THE UNIVERSITY
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The interface between jurisdiction instruments and arbitration

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ACKNOWLEDGEMENTS

First, the fun bit.

Writing this PhD has felt like some kind of epic quest: the stuff of (probably not a particularly well-selling) fantasy novel. Four years ago, like Frodo Baggins, I fairly lightly took on an enormous burden, not appreciating how difficult it would become to carry towards the end. As I cast my thesis off into the fiery clutches of the markers (and hope the Lord of the Rings metaphor ends before they destroy it), I cannot help but reflect that, like Frodo, I could not have reached this point without the staunch support of my own Fellowship and wider cast of characters.

Where to begin in thanking all of them?

At the beginning, I suppose. This project came into existence under the supervision of Professor John J Barceló III at Cornell University during my LLM studies. He deserves my warmest thanks for his support, encouragement, and belief in me, as well as for opening the worlds of international commercial arbitration and the law of jurisdiction to me in his excellent classes.

To return to Tolkien, my supervisors Professor Gerry Maher and Dr Simone Lamont-Black have been like Gandalf to my Frodo. Their wisdom and direction have helped me turn this project from a decent master's essay into a PhD thesis. Each deserves my gratitude for their own particular contributions. Gerry, for the theoretical richness of his thought that has hopefully, to some extent, trickled down into this thesis, as well as for his linguistic attention to detail that has helped tidy up my often sloppy slang (how's that for 'feedback', Gerry?). Simone has taught me academic rigour, to consider the legal world from new perspectives, and has been the consummate role model in terms of her work ethic, thoroughness, and attitude to academia and the world beyond. Thank you both.

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to raise my game and has spurred me onwards. Special mention must be made of David Holloway, now of the UEA, for all he has done and continues to do to help me.

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perceived speck on the horizon of my possibilities. Like Bilbo to Frodo, without them, none of this could have happened.*

My grandfather, William Cunningham, was one of my greatest supporters and most unfailingly positive influences in life. He told me when I accepted a place at Edinburgh, with a tear in his eye, that his father had worked for the University as joiner in the McEwan Hall. He explained that my great grandfather would be watching, swelling with pride, if I ever managed to graduate in the same hall he spent his professional life repairing. Now that my grandfather has joined him, that memory has added poignancy. This one's for both of you.

* My father, a GP, surely deserves a law degree for all the assistance he has given me over the years, proof-reading essays and asking revision questions. I am pleased to say that, with this thesis, I have finally written something technical and complicated enough to defeat his patience. I thought if Company Law hadn't, nothing would.

DECLARATION

In accordance with Regulation 22 of the Postgraduate Assessment Regulations for Research Degrees I acknowledge that portions of this thesis have appeared in published form in Neil Dowers, 'The anti-suit injunction and the EU: legal tradition and Europeanisation in international private law' (2013) 2(4) *CJICL* 960; Neil Dowers and David Holloway, 'Brussels I Recast Passed' (2013) 16(2) *Int ALR* N18; and Neil Dowers and Zheng Sophia Tang, 'Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal' (2015) 3(1) *Groningen Journal of International Law* 125.

In accordance with Regulation 24 of the Postgraduate Assessment Regulations for Research Degrees I acknowledge that Chapters 3 and 8 build on work undertaken for a seminar paper as part of my LLM degree at Cornell University. There are therefore limited portions of text which are identical to that earlier work.

In accordance with Regulation 25 of the Postgraduate Assessment Regulations for Research Degrees I confirm that this thesis was composed by me; that it is my own work; and that it has not been submitted for any other degree or professional qualification (subject to the declaration above).

Signed:

Date: **06/10/2015**

ABSTRACT

This thesis addresses the question of how conventions and other instruments regulating court jurisdiction should deal with court proceedings relating to arbitration. It argues that the conventional approach of excluding court proceedings related to arbitration entirely from the scope of the jurisdiction instrument cannot be justified with reference to any international arbitration convention. It continues to argue that the exclusion of arbitration causes or exacerbates significant problems at the interface between the courts and arbitration, taking the European Union's recent experience as an example. It then argues that the European legislature has recently directly considered the exclusion of arbitration from its jurisdictional instruments and failed to act effectively.

Any amendments to this system will necessarily be offered within the relevant legal context, so an assessment of the prevailing principles in European international private law and international commercial arbitration will follow. Furthermore, the ongoing debate surrounding the delocalisation of arbitration and its relevance to the debate about the interface between court jurisdiction and arbitration shall be addressed.

Finally, this thesis proposes a model for inclusion of arbitration in the European jurisdiction instrument (the Brussels I Regulation) that would, it is argued, solve or ameliorate the problems at the interface between the Regulation and arbitration, whilst broadly aligning with the prevailing principles in the relevant legal context. The thesis then considers whether this approach could be extended beyond Europe to the world at large, concluding that it could not.

This work therefore takes an original approach to a topic of much contemporary controversy, by taking a holistic, rounded, and reasoned view of the problems at the interface between court jurisdiction and arbitration. It also contains original insights into several other areas, including the historical justification for the exclusion of arbitration from jurisdiction conventions, the importance of mutual trust as a founding principle of the common market, the relevance of the delocalisation debate to the topic, and the proposal for reform advanced at the end of this thesis.

LAY SUMMARY

In international legal disputes, controversy often arises over which country's courts should take practical authority (jurisdiction) to hear and decide cases. Because of this, many international laws have been created to regulate which country's courts can take jurisdiction over what kinds of dispute. This process has developed furthest within the European Union, because clear rules as to how a dispute can be resolved are important to encourage trade in the single market.

Arbitration is a method of resolving legal disputes privately, without going to court. It can be thought of as effectively an agreement to submit the dispute to a private judge or judges, and to abide by their decision. Arbitration relies on the support of national courts, especially to provide compulsive force to the decisions (awards) of arbitrators, but also to ensure that the process remains fair and that unwilling parties participate in arbitration.

Arbitration is a very popular method of resolving international legal disputes, especially because most countries in the world have agreed by treaty to enforce agreements to arbitrate and arbitration awards.

Disputes can arise as to which courts should have practical authority to provide support to or supervise any given arbitration. The jurisdiction laws referred to above however do not address the appropriate approach to these questions, having excluded court proceedings related to arbitration from their scope of application.

This thesis asks whether this is an appropriate approach for jurisdiction laws to take. It concludes that it is not; that the exclusion of arbitration from jurisdiction laws was never justified, and has caused or exacerbated significant problems; and that court proceedings related to arbitration could and should be included in jurisdiction laws at least within the European Union in a way that resolves practical problems and aligns with the principles and goals of both the law of jurisdiction and the law of international arbitration. There is less pressing need for reform beyond the European Union because the law of jurisdiction is less developed, and it is at any rate less likely that satisfactory

solutions could be reached because the lack of a trust-based single market could undermine the operation of some of the rules proposed in this thesis.

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TABLE OF ABBREVIATIONS

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Art/Arts	Article/Articles
Brussels I 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 (recast) [2012] OJ L 351/1
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 [2000] OJ L 12/1
Brussels Convention	Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 1262 UNTS 153
cf	*confer* (compare)
ch	chapter
CMR	Geneva Convention on the Contract for the International Carriage of Goods by Road, May 19 1956, 399 UNTS 189
Commission Green Paper	European Commission, *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
Commission Proposal	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
Commission Report	European Parliament, *Report on the implementation and review of Council Regulation (EC) 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters*, Session Document A7-0219/2010 (2009/2140(INI))

Court of Justice	European Court of Justice (pre-2009) / Court of Justice of the European Union (post-2009)
Draft Hague Convention 2000	*Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference Enforcement of Judgments Prel Doc No 11 of August 2000
EC	European Communities
EEC	European Economic Community
et al	*et alia* (and others)
EU	European Union
European Convention	European Convention on International Commercial Arbitration, 21 April 1961, 484 UNTS 349
European Convention on Human Rights	Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221
European Uniform Law Convention	European Convention providing a Uniform Law on Commercial Arbitration, 20 January 1966, 1966 COETS 2
Evrigenis/Kerameus Report	DI Evrigenis and KD Kerameus, *Report on the accession of the Hellenic Republic to the Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* [1986] OJ C 298/01
Heidelberg Report	B Hess, T Pfeiffer and PF Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03
Ibid	*Ibidem* (the same place)
ICC	International Chamber of Commerce
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159
Jenard Report	P Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968* [1979] OJ C 59/1
LCIA	London Court of International Arbitration

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2009] OJ L 177/6
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40
TFEU	Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01
Treaty of Amsterdam	Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997, 2700 UNTS 163
Treaty of Lisbon	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, [2007] OJ C 306/1
Treaty of Rome	Treaty establishing the European Economic Community, 25 March 1957, 294 UNTS 3
UK	United Kingdom
UN	United Nations
US	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985, as amended in 2006

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van den Berg 2010	AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2010) 27(2) *J Intl Arb* 179
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1. INTRODUCTION

This thesis is concerned with the interface between jurisdiction instruments and arbitration. Several points must be made in introduction, including defining the scope of the inquiry into the topic and some of the key terms and concepts that will be referred to throughout.

A. The scope of inquiry into the topic

The title of this thesis prefers jurisdiction 'instruments' to jurisdiction 'conventions' because the European law of jurisdiction, which finds its origins in conventions, is now in large part regulated by EU legislation in the form of the Brussels Regulations. The title therefore encompasses both the legislative jurisdiction rules of the modern EU and the jurisdiction rules of the old EEC and Hague Conference, contained in conventions.

'Jurisdiction' in the title means not only jurisdiction in the classical sense – a court's authority to hear and decide a dispute – but also in the sense of one court's decision to recognise and/or enforce the judgments of a foreign court, sometimes referred to as 'indirect jurisdiction', because it concerns the enforcing court's decision whether or not to recognise the jurisdiction of the issuing court. These concepts will be considered in more detail below.

'Arbitration' in the sense of this thesis is limited to genuine international commercial (i.e. business to business) arbitration. Domestic arbitrations are excluded, as are arbitrations concerning any subject matter over which arbitration law or the European law of jurisdiction tends to recognise the need for a protective jurisdiction, such as consumer or employment contracts. Insurance contracts will also be excluded, except insofar as the Brussels Regime allows parties to enter into a valid pre-dispute choice-of-court agreement, it being argued that such insurance contracts are in fact true commercial contracts and thus not in need of rules of protective jurisdiction. It equally does not concern non-commercial international arbitration, such as state-state or investor-state arbitration, which are subject to their own regimes.

Finally, as the title suggests, the investigation and findings of the work are not intended to be limited to the European law of jurisdiction. As, however, the Brussels Regime has provided over a period of more than fifty years the best example of a successful, multinational set of jurisdictional rules, analysis of the European experience – the successes, failings, and future of its relationship with arbitration – will form the backbone of this thesis. This is not intended to take away from the implications of the work for the allocation of jurisdiction amongst non-European states, but to add to them by way of empirical example.

B. Terminology and definitions

(1) The Brussels Regime

As mentioned above, this thesis will rely heavily on an analysis of the European example provided by the Brussels Regime. The Brussels Regime itself requires a short introduction and explanation.

'The Brussels Regime' is used as a collective term for the European jurisdictional instruments. These instruments are the Brussels Convention,[1] the Brussels I Regulation,[2] Brussels I Recast,[3] Brussels II bis Regulation,[4] and the Lugano Conventions.[5] This thesis will concentrate on the former three. This is because the Brussels II bis Regulation concerns family law and is not relevant to the scope of inquiry of this thesis, whilst the Lugano Conventions have a similar scope to the Brussels Convention and Regulations, are virtually identical in substance,[6] but are also open to accession by European Free Trade Association ('EFTA') Member States.

[1] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 1262 UNTS 153 ('Brussels Convention').
[2] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L 12/1 ('Brussels I Regulation').
[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1 ('Brussels I Recast').
[4] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L 388/1 ('Brussels II bis Regulation').
[5] Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1659 UNTS 202; and its successor: Convention of 21 December 2007 on jurisdiction and the enforcement of judgments in civil and commercial matters 2007 OJ L 339/3 ('Lugano Convention 2007').
[6] A Briggs, *Private International Law in English Courts* (2014) ('Briggs (2014)'), 100.

Cases concerning the Brussels Convention and Regulations seem to come before the Court of Justice far more frequently than Lugano cases.[7]

(2) Jurisdiction

As stated above, 'jurisdiction' can refer to both jurisdiction in the classical sense – the practical authority of a court to resolve a given dispute – and recognition and/or enforcement of judgments. This entails the obvious possibility of confusion, so this thesis will from time to time use a set of terms summarised and explained by Ralf Michaels in a 2006 article to enhance ease and clarity of expression.[8] The phrase 'direct jurisdiction' refers to jurisdiction in the classical sense, also sometimes referred to as 'judicial jurisdiction' or 'adjudicatory jurisdiction'.[9] 'Indirect jurisdiction' in turn refers to a court's decision whether or not to recognise the jurisdiction of the foreign court that rendered a judgment by granting recognition and/or enforcement.[10] For the most part this thesis will refer simply to 'jurisdiction' for direct jurisdiction and 'recognition and/or enforcement' for indirect jurisdiction. It will occasionally, however, be convenient or necessary to use these terms for ease or clarity, hence their introduction here.

Some other conceptions are relevant and useful to the discussion in this thesis. He distinguishes between 'single' and 'double' conventions. The former kind of convention regulates one of direct or indirect jurisdiction; the latter, both. As such, the Hague 1971 Convention is an example of a single convention;[11] the Brussels Regime provides examples of double conventions.[12]

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[7] This is perhaps because the original Lugano Convention did not allow for reference to the Court of Justice. The Lugano Convention 2007 does, but only by the courts of an EU member state. See Protocol 2, Arts 1 and 2 Lugano Convention 2007; G Maher and BJ Rodger, *Civil Jurisdiction in the Scottish Courts* (2010) ('Maher and Rodger'), para 2-16.

[8] R Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions' in E Gottschalk, R Michaels et al (Eds), *Conflict of Laws in a Globalizing World* (2006) ("Michaels, 'Jurisdictional Conceptions'").

[9] Ibid, II (2). See also AT von Mehren, 'Adjudicatory Jurisdiction: Some General Theories Compared and Evaluated' (1983) 63(2) *BUL Rev* 279, 282-285.

[10] Michaels, 'Jurisdictional Conceptions', II (2).

[11] Convention on the recognition and enforcement of foreign judgements in civil and commercial matters, 1 February 1971, 1144 UNTS 249 ('Hague Convention 1971').

[12] Michaels, 'Jurisdictional Conceptions', II (2).

The final relevant conception distinguishes between 'required', 'permitted', and 'excluded' bases of jurisdiction. Both direct and indirect jurisdiction can be allocated on any of these bases. Required direct jurisdiction means the court addressed *must* take jurisdiction over a dispute; permitted direct jurisdiction means the court *may* do so; and excluded direct jurisdiction means the court *must decline* jurisdiction. Similarly, required indirect jurisdiction means the court asked for recognition and enforcement of a foreign judgment *must* recognise and enforce that judgment; permitted indirect jurisdiction means that the court *may* recognise and enforce the judgment; and excluded indirect jurisdiction means that the court *must refuse* recognition and enforcement.[13] Together, these conceptions and terms explained by Michaels are a significant aid to accurate, concise discussion of jurisdiction conventions.

(3) Arbitration

Arbitration is a non-judicial dispute resolution process whereby parties to a dispute agree to submit their dispute to an independent tribunal for final and binding resolution.[14] This thesis is concerned with international commercial arbitration as opposed to domestic, investor-state,[15] or inter-state arbitration,[16] though examples from these fields may be used illustratively.

There is no international consensus as to the distinction between international and domestic arbitration, with some laws making reference only to the nationality or residence of the parties, others considering the subject matter in dispute, still others considering the choice of the parties, and others some combination of the above standards.[17] The precise distinction is not particularly important for this thesis, because

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[13] Ibid, II (1).

[14] See generally SM Kröll, JDM Lew and LA Mistelis, *Comparative International Commercial Arbitration* (2003), ch 1; N Blackaby et al, *Redfern and Hunter on International Arbitration*, (5th edn, 2009) ('*Redfern and Hunter*'), ch 1.

[15] Disputes between states and nationals of another state, where both states are contracting states to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 ('ICSID Convention').

[16] Disputes to which both parties are states, such as those regularly settled at the Permanent Court of Arbitration ('PCA') in The Hague amongst other places. See *Redfern and Hunter*, above, 64-67.

[17] See, for example; Art 1 (3) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006 ('UNCITRAL Model Law 2006'):

'An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

any provisions of jurisdiction conventions concerning arbitration will apply only in those cases where an arbitration is subject to court proceedings or enforcement proceedings in a member state other than that in which it takes place, which will automatically provide the requisite international element for the rules of the jurisdiction convention to become applicable.

Arbitration as an area of law has its own sizeable vocabulary, some of which will now be introduced. This will include the concepts of the seat of an arbitration, the place of an arbitration, the *lex arbitri*, the *lex loci arbitri*, and set aside. Each of these ideas will play a role throughout this thesis (and especially in chapter 7), and an understanding of their meanings is therefore essential.

In any given arbitration there may be several different laws applicable to different elements of the process. These include: the law applicable to the capacity of the parties to enter into an arbitration agreement; the law applicable to the arbitration agreement; the law applicable to the arbitration or arbitral process itself; the law applicable to the substance of the dispute; and the law applicable to the recognition and enforcement of

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(b) one of the following places is situated outside the State in which the parties have their places of business:
  (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which this subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country';

US law, 9 US Code § 202: '
An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.';
s 85 Arbitration Act 1996 (yet to be brought into force):
'(2) For this purpose a 'domestic arbitration agreement' means an arbitration agreement to which none of the parties is—(a)an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or (b)a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,
and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.';
Art 1504 Code de procédure civile, 'An arbitration is international when international trade interests are at stake';
Art 176 (I) (1) Private International Law Act 1987 (Switzerland): 'The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland';
Redfern and Hunter, 7-12.

the award.[18] Of these, the most relevant to this thesis is the law applicable to the arbitration itself, though there remains controversy over other applicable laws to the extent that they have not been effectively harmonised by the New York Convention[19] or are not understood to be subject to the agreement of the parties.[20]

The law applicable to the arbitration itself, often referred to as the *lex arbitri*, plays various supporting and supervisory roles in the arbitral process. This law is the arbitration law (not domestic court procedural or substantive law) of the 'seat' of the arbitration[21] and often functions like a specialised *lex fori*.[22] The seat can be thought of as the domicile or juridical centre of the arbitration,[23] and is most often (but not always) the place where the arbitration actually takes place (*lex loci arbitri*).[24]

The losing party in an arbitration will often not comply voluntarily with the award, which will thus need to be taken to a national court in an action for recognition and enforcement to gain compulsive force. The losing party may resist enforcement on a

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[18] See: *Redfern and Hunter*, above, para 3.07; A Belohlavek, 'Importance of the Seat of Arbitration in International Commercial Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth' (2013) 31(2) *ASA Bull* 262, 264.

[19] For harmonised minimum standards for recognition and enforcement of the award, see generally Art V. For the law applicable to the capacity of the parties, and for the law applicable to the arbitration agreement, see Art V (1) (a), all of which will be discussed in detail in Chapter 6 of this thesis.

[20] It is well understood that the parties to an arbitration are entitled to select the law applicable to the substance of their dispute. Without wishing to labour the point, see for example: Art 28 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006; s 46 Arbitration Act 1996 (England and Wales); Art 187 Private International Law Act 1987 (Switzerland); Art 21 International Chamber of Commerce Rules of Arbitration (2012) ('ICC Rules'); Art 22.3 London Court of International Arbitration Rules (2014) ('LCIA Rules').

[21] G Born, *International Commercial Arbitration* (2nd edn, 2014) ('Born'), 1246.

[22] See Born, above, 1247.

[23] Born, above, 1246.

[24] The New York Convention effectively provides at Art V (1) (a), (d), and (e) that the parties are free to agree on a seat of arbitration, but that failing such agreement the seat will be the place where the hearings take place (see Born, above, 1247). It is therefore possible that the parties will choose a place for the arbitration that is mutually convenient, but subject that arbitration to a different supervisory law. So for example, German and French parties may choose to hold arbitral hearings in Luxembourg, but provide in their agreement that the law of England should govern the arbitration. In this case, England would be the seat of the arbitration and the Arbitration Act 1996 the *lex arbitri*. Equally, it is quite foreseeable in the modern world that parties will agree to arbitration without specifying a seat and that hearings will be conducted in multiple countries or even entirely by videoconferencing. In such a case there is no clear seat and the parties are unlikely to agree to a seat after a dispute has arisen between them. Such cases are generally provided for by allowing an arbitral institution or the arbitral tribunal itself to determine the seat, or providing that the court seised in respect of the arbitration will determine the seat (*cf* Art 176 (3) Private International Law Act 1987 (Switzerland); s 3 Arbitration Act 1996 (England and Wales); Art 20 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006).

number of grounds under the New York Convention. Where the losing party feels an award is tainted, for example by a breach of due process in the arbitration, he may proactively seek to have the award 'set aside' ('vacated', 'nullified', or 'annulled') by the courts at the seat of the arbitration, in preference to resisting recognition and enforcement wherever the successful party seeks it. This is a process whereby the competent court declares the award to be of no legal force, and forms a discretionary basis for refusal of recognition and enforcement under the New York Convention.[25]

There is much controversy surrounding the proper role of the seat and the effect that can and should be given to set-aside judgments handed down at the seat of arbitration. This controversy, and its relevance to this thesis, shall be discussed in detail in Chapter 7.

C. Introduction to the topic and research questions

This thesis is concerned with the interface between jurisdiction conventions and arbitration. As stated above, the thesis will largely focus on the European example provided by the Brussels Regime.

The Brussels I instruments regulate both direct and indirect jurisdiction as between European Union member states. Their scope extends to civil and commercial matters, subject to a list of exceptions.[26] Arbitration is, and always has been, one of those exceptions.[27] This represents a conscious legislative decision not to regulate court jurisdiction over matters relating to arbitration in the Brussels I instruments. Equally, jurisdiction over matters relating to arbitration has not been allocated under another, specialised agreement or piece of European legislation.

This thesis proposes to investigate the topic with the following structure and answering the following research questions.

Chapter 2 of this thesis will investigate the history of the arbitration exclusion from both the Brussels Regime and similar global jurisdiction conventions. The following

[25] Art V (1) (e).
[26] See Art 1 of each instrument of the Brussels Regime.
[27] Art 1 (4) Brussels Convention; Art 1 (2) (d) Brussels I Regulation; Art 1 (2) (d) Brussels I Recast.

research questions will be addressed. Why was arbitration excluded from the Brussels Convention in the first place? How does arbitration compare to other excluded subject matters? Why has arbitration continued to be excluded? Was the justification for the exclusion of arbitration ever strong? If so, does it remain strong today? And is there some conceptual difference between arbitration and other civil and commercial matters that means arbitration simply does not fit within jurisdiction conventions such as these? This section will conclude that there never was a convincing justification for the exclusion of arbitration from jurisdiction conventions and that that absence of justification persists in the present day.

The logical next step is for chapter 3 to investigate the effects of the arbitration exclusion within Europe. This is because, even absent rational justification, if the exclusion has had no, or only *de minimis*, negative effects, there would be no compelling reason to question it or call for change. This section will seek to answer the research questions: what problems has the exclusion of arbitration caused or exacerbated, and could these problems be rectified by the inclusion of arbitration? It shall conclude that the exclusion of arbitration has caused or exacerbated significant problems that could have been avoided by some form of European jurisdictional rules on court proceedings related to arbitration.

Chapter 4 will consider the process of recasting the Brussels I Regulation, which was completed in late 2012. The relevant research questions to be addressed will be: what arbitration-related proposals were made during the recasting process, both officially and in the literature? What approach was ultimately taken and why? What are the likely consequences of this approach? Does the Recast address the problems outlined in the previous chapter? It shall be concluded that the Recast makes little-to-no substantive change, and that it fails to address the problems at the interface between the Brussels Regime and arbitration. This chapter, together with chapter 3, will indirectly serve the function of a literature review of the Brussels Regime's relationship with arbitration.

After concluding that the exclusion of arbitration could productively and should be at least partially deleted, this thesis will turn its attention to the question of how to go about that deletion effectively. Before proposing a model for deletion, the thesis will consider the legal context in which the proposal must be made. This is an important

exercise as a proposal for reform will be more likely to meet with acceptance if it not only addresses extant problems, but also accords well with contemporary thinking in the relevant fields. The first of those fields, to be considered in chapter 5, is European international private law, as a subset of European Union law more generally. This chapter will ask what principles currently underlie the European law of jurisdiction and how these principles can be ranked against one another, if at all. This section will conclude that mutual trust has become perhaps the single most important guiding principle in European international private law, and perhaps European Union law itself, whilst also emphasising the importance of legal certainty and party autonomy in international private law.

The thesis will then set out the legal context in international commercial arbitration. Chapter 6 will consider the aims of and principles underlying the quasi-constitutional New York Convention, again seeking to rank these principles against one another.[28] Chapter 7 will investigate where a proposal to include arbitration in the Brussels Regime sits with the longstanding and ongoing debate on the delocalisation of international commercial arbitration. These sections shall conclude that arbitration can be included in the Brussels Regime in a fashion by and large consistent with the New York Convention and with delocalisation as it exists in the contemporary world.

With this theoretical groundwork laid, this thesis will then move on in chapter 8 to propose a system of partial integration of arbitration in the Brussels Regime that addresses existing problems in a fashion consistent with the ideals and principles of the contemporary legal framework. The research questions addressed in chapter 8 will include: what a scheme for the partial inclusion of arbitration in the Brussels Regulation would look like; how this scheme would apply compared to the current regime in various scenarios in practice; how the proposal is placed within its legal context; and whether any fatal objection can be raised to the proposal advanced. This chapter will then ask whether the European example holds any lessons for the rest of the world when it comes time once again to consider civil and commercial court jurisdiction on a global scale. It shall ultimately be concluded that Europe is more

[28] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3 ('New York Convention').

fertile ground for the creation of jurisdictional rules concerning court proceedings related to arbitration, especially because of the principle of mutual trust and the ongoing push for European integration. Without mutual trust, many of the proposals advanced in this thesis would be impaired or entirely obstructed in their operation. The proposal of this thesis must therefore be limited to Europe for the time being.

D. Original contribution to knowledge

This thesis read as a whole is intended to make a contribution to knowledge, thereby satisfying the requirements for the award of a doctoral degree. The contribution is the holistic approach to the question of the appropriate relationship between jurisdiction conventions and arbitration, bringing together the strands of modern thought in European international private law, international commercial arbitration, and the practical experience of the European Union with the arbitration exclusion. Other literature in this field tends to be article-length and concentrate one of these threads, or several in scant detail, rather than taking a truly broad approach.

It is also intended that this thesis will be peppered with original insights into several of the areas it covers. These original insights are intended to lie in: the detailed analysis of the history of the arbitration exclusion from the Brussels Regime and Hague instruments; the identification of mutual trust as a fundamentally important tenet of European international private law and European Union law more generally; a unique and extensive engagement with the ongoing delocalisation debate in the context of this topic; the proposal and justification of a novel scheme of inclusion of court proceedings related to arbitration in jurisdiction conventions; and the thesis's outward-looking approach to lessons for global jurisdiction conventions arising from the European example.

2. THE HISTORY OF THE ARBITRATION EXCLUSION

Article 220 of the Treaty of Rome is in the following terms:

'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals…

…the simplification of formalities governing the reciprocal recognition and enforcement of *judgements* [sic] *of courts or tribunals and of arbitration awards*.'[29]

Thus, in setting out its goals for the original six European Economic Community ('EEC') members, the Treaty of Rome mentioned recognition and enforcement of state court and tribunal judgments and of arbitral awards in the same sentence. This points to a certain proximity between the two in the drafters' minds, as if the recognition and enforcement of commercial judgments and arbitral awards are somehow interrelated. Indeed, there were a number of bilateral and trilateral conventions between EEC member states that covered both the recognition and enforcement of civil and commercial judgments and arbitral awards, concluded both before and after the Treaty of Rome.[30] If this was indeed the thinking of the legislators, however, the linkage did not survive for long; only the recognition and enforcement of judgments has ever been regulated at a European level.

In the European Union, the recognition and enforcement of civil and commercial judgments is governed by the Brussels Regime, which also governs court jurisdiction. The recognition and enforcement of arbitral awards is governed by external treaties, including most notably the global New York Convention, but also the European Convention on International Commercial Arbitration.[31] The former tends to be the

[29] Treaty establishing the European Economic Community, 25 March 1957, 294 UNTS 3 ('Treaty of Rome'). Emphasis added.

[30] Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, Paris, 8 July 1899; Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, Brussels, 28 March 1925; Convention between the Federal Republic of Germany and the Kingdom of Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, Bonn, 30 June 1958; Treaty between Belgium, the Netherlands and Luxembourg on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, Brussels, 24 November 1961.

[31] European Convention on International Commercial Arbitration, 21 April 1961, 484 UNTS 349 ('European Convention').

more commonly used and discussed, especially because of its virtually universal level of subscription, though the latter remains relevant in some contexts.[32]

The deliberately separate treatment of civil and commercial judgments and arbitration awards is demonstrated by the fact that every instrument of the Brussels Regime expressly excludes arbitration from its scope. Indeed, the Brussels Convention even repeals several bilateral and multilateral agreements on the recognition and enforcement of both judgments and arbitral awards.[33] When attempts have been made to create jurisdiction conventions on a global scale at the Hague Conference, these too have either largely ignored or completely excluded arbitration.

This chapter explores why the drafters of these jurisdiction conventions and instruments would choose to exclude arbitration as a subject. It will first look into the drafting history of the relevant instruments to discover that the principal justification for the exclusion of arbitration is the existence of other conventions, most notably the New York Convention, which deal with the same subject matter. After examining the reasoning of this justification, this thesis will ask whether it remains, or ever was, convincing. It shall be argued that there is only a very limited substantive overlap between a court jurisdiction convention and the conventions on the recognition and enforcement of arbitral awards, meaning that the justification as traditionally and repeatedly presented does not hold. Furthermore, in the European context, the lack of overlap in membership between the Brussels Convention and relevant arbitration conventions at the time of drafting undermines the justification still further. The chapter will then examine the subsequent treatment of other excluded subjects from the scope of the Brussels Regime. This evaluation will conclude that bespoke jurisdictional rules have been created for all other expressly excluded matters, suggesting the reason for their exclusion was not simply that the subjects were

[32] The New York Convention has, at time of writing, 154 parties from all over the world. See the UN Treaties website, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last accessed: 21 April 2015). The European Convention has 31 parties, mostly States wholly or partly in the continent of Europe, though with some other curious additions such as Burkina Faso and Cuba. 18 of the 28 EU member states are also signatories of the European convention. See the UN Treaties website, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en (last accessed: 21 April 2015).

[33] Art 55 Brussels Convention.

incompatible with the creation of jurisdictional rules. Nevertheless, it is possible to create bespoke jurisdictional rules within jurisdiction conventions: not every included matter has to fit neatly within general rules. This chapter will conclude that there is no good reason for the exclusion of arbitration from jurisdictional instruments.

A. The treatment of arbitration and the reasons given

This section shall investigate the treatment of arbitration by each of the Brussels Convention and Hague Conventions and the reasons given for that treatment in the official reports and commentary. The exclusion from the Brussels Regime will be examined first, followed by the relationship between judgments and arbitration in the Hague Convention 1971, and then in which way arbitration was intended to be handled in the Draft Hague Convention 2000.[34]

(1) The Brussels Regime

Arbitration has been excluded from the Brussels Regime since its inception in the 1960s. The wording of the exclusion has remained consistent: 'The Regulation shall not apply to… arbitration.'[35] This wording is obviously very general. The exact intention behind it is unclear from the wording and, as will be discussed in the next chapter, judicial interpretation has therefore been required to define its precise meaning.

So why was the exclusion drafted in the first place? In order to understand the exclusion completely, it is relevant first to consider the legal context in which the Brussels Convention was concluded in 1968.

More than a decade previously, the Treaty of Rome was concluded in March 1957 and entered into force on 1 January 1958. As mentioned above, the Treaty of Rome called

[34] *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference Enforcement of Judgments Prel Doc No 11 of August 2000 ('2000 Draft Hague Convention'). The negotiations towards the conclusion of this convention broke down, and eventually gave rise to the much more limited Convention on Choice of Court Agreements, 30 June 2005 ('Hague Choice of Court Convention').

[35] This wording is included in Art 1 (4) of the Brussels Convention, Art 1 (2) (d) of the Brussels I Regulation, and Art 1 (2) (d) of the Brussels I Recast.

on its signatories to simplify the process for the recognition and enforcement of both judgments and arbitral awards.

Also in 1958, the New York Convention was concluded, coming into force in 1959. The Convention was subscribed by five of the six then EEC Member States.[36] The Convention's full title, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards', gives a misleading impression of the Convention's scope. Although principally concerned with the recognition and enforcement of awards, the Convention also contains provisions on the validity of arbitration agreements and states that a court seised of a matter in respect of which the parties have concluded an arbitration agreement should refer the parties to arbitration.[37] This is effectively a jurisdictional rule requiring the court to decline jurisdiction. So although the New York Convention is principally concerned with the indirect jurisdiction of arbitral tribunals (that is, the recognition of their jurisdiction by courts in the form of the enforcement of their awards), it also contains some provision on the direct jurisdiction of both arbitral tribunals and courts.[38] Furthermore, Art V (1) (e) contains the rule that an arbitral award may be refused recognition and enforcement when it has been set aside where rendered, effectively permitting, and some would argue requiring, the recognition of foreign set-aside judgments. These are important factors to bear in mind when considering the context in which arbitration was excluded from the Brussels Convention a decade later, and will be discussed in more detail below.

In 1961, 16 European states concluded the European Convention on International Commercial Arbitration, which came into force in stages between 1964 and 1965. Obviously not all of the 16 signatories were then EEC member states, and only four of the six then EEC members subscribed to the Convention.[39] As will be discussed in more detail below, Art VI of the European Convention addresses court jurisdiction in

[36] Belgium, France, Germany, Luxembourg, and the Netherlands were all signatories to the New York Convention, though not all would ratify it before the 1980s. Italy would accede only in 1969. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last accessed 21 April 2015).
[37] Art II (3) New York Convention.
[38] See above, Chapter 1.B.2.
[39] Belgium, France, Germany, and Italy subscribed; Luxembourg did not but later would; and the Netherlands never has. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en (last accessed: 21 April 2015).

slightly more detailed terms than Art II of the New York Convention, while Art IX provides more detail on which set-aside judgments may be accorded recognition by contracting states.[40] Again, the fact that this treaty was available for accession at the time of the conclusion of the Brussels Convention should be borne in mind in assessing the justification for the exclusion of arbitration.

In 1966, the Council of Europe concluded the European Uniform Law Convention, with the aim of harmonising arbitration law within Europe.[41] The Convention was signed only by Austria and Belgium and only ratified by the latter, therefore failing to achieve the required three ratifications to enter into force.[42] It would however have been impossible to know in the late 1960s how successful or unsuccessful this endeavour would ultimately prove, so the European Uniform Law Convention would have been taken into consideration by the drafters of the Brussels Convention. This is stated expressly in the Jenard Report, which is the official report on the Brussels Convention.[43] It makes sense that the potential success of this Convention would influence the thinking of the negotiators of the Brussels Convention, given it contained rules on the definition and validity of arbitration agreements, which if unified could have a significant effect in improving international consistency in the referral of disputes to arbitration.[44] This would in turn significantly reduce the perceived need to harmonise rules on the jurisdiction of courts over the question of the validity of an arbitration agreement, because all courts would be more likely to reach the same conclusion.

It was in this context that the 1968 Brussels Convention was negotiated. The Treaty of Rome at Art 220 had set the EEC member states the goal of simplifying the process of the recognition and enforcement of judgments and arbitral awards. Since then, two major conventions – one European, one worldwide – had been negotiated to simplify

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[40] See below, Ch 2.B.1.
[41] European Convention providing a Uniform Law on Commercial Arbitration, 20 January 1966, 1966 COETS 2 ('European Uniform Law Convention').
[42] Art 11 (2) European Uniform Law Convention; http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=056&CM=4&DF=&CL=ENG (last accessed: 21 April 2015).
[43] P Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968* [1979] OJ C 59/1 ('Jenard Report'), 13.
[44] Annex 1, Arts 1-4 European Uniform Law Convention.

the process of recognition and enforcement of arbitral awards. Each of these conventions also contained some provisions affecting both the direct and indirect jurisdiction of national courts, as did a further European convention, through its efforts to harmonise arbitration law on the domestic level. The Brussels Convention was to address direct and indirect jurisdiction of national courts over civil and commercial matters. It may therefore have seemed completely logical to exclude court proceedings concerning arbitration from the scope of the Brussels Convention.[45]

This is certainly the most often repeated justification for the exclusion of arbitration from the Brussels Convention. It is mentioned by the drafters, in official reports, literature, and case law.

Perhaps the most authoritative explanation for the exclusion can be found in the writings of Georges Droz. Droz was the General Secretary at the Hague Conference on Private International Law, and therefore heavily involved in the drafting of a multitude of international private law conventions. He contributed to the drafting of both the Brussels Convention and the Hague Convention 1971. Droz wrote both a commentary and a longer treatise on the Brussels Convention, and was described by Pierre Bellet as follows: 'he oversaw the preliminary efforts that led to the creation of the [Brussels] Convention. He knows its origins, and its implications and nobody could be considered more qualified to comment on its provisions.'[46] His information therefore comes from the inside of the drafting process and should be given weight.

That said, Droz's commentary on the Brussels Convention contains only one short and slightly informative paragraph on the arbitration exclusion at Art 1 (4):

'The Convention expressly excludes *arbitration, which is the subject of several special conventions*. The rules of the treaty do not apply to the jurisdiction of courts in disputes

[45] It is assumed that the jurisdiction of arbitral tribunals and indirect jurisdiction over arbitral awards is excluded from a judgments convention by definition: an arbitral tribunal is not a court and an arbitral award is not a judgment.

[46] '*...il a, depuis le premier jour, assisté aux travaux qui ont mené à la conclusion de la Convention du 27 septembre 1968. Il en sait les origines et les implications et peu de personnes étaient aussi qualifiées que lui pour en commenter les dispositions*'. P Bellet, 'Préface', in G Droz, *Pratique de la Convention de Bruxelles du 27 Septembre 1968* (1973) ('Droz, *Pratique*'), v. Translation of this and any quote from this work is by the author, with the able and necessary assistance of Mlle Évodie Fleury, for which she deserves sincere thanks.

relating to arbitration, nor to the recognition or enforcement of court decisions relating to arbitration'.[47]

This language hints that the reason for the arbitration exclusion is the existence of other 'special conventions' concerning arbitration. Droz does not go in to any detail as to which conventions he means, but the New York, European, and European Uniform Law Conventions are the most obvious and likely.[48]

Droz's lengthier treatise on the Brussels Convention treats the arbitration exclusion in slightly more detail, but again fails to provide a full explanation of the reason or reasons for the exclusion. He begins by pointing out the obvious: that the jurisdiction of arbitral tribunals and the recognition and enforcement of arbitral awards are by definition excluded from judgment conventions.[49] This is self-evident, but is worth repeating because it helps to define the scope of the exclusion more accurately: if not meant to exclude the jurisdiction of arbitral tribunals and the recognition and enforcement of arbitral awards, it must be intended to exclude court proceedings relating to arbitration. This clearer understanding of the scope of the exclusion is in turn helpful in determining and analysing the reasons for that exclusion.

Droz goes on to explain that the negotiators of the Brussels Convention 'wished once and for all to remove any notion of enforcing court decisions relating to arbitration, such as for example a set-aside action,' even though arbitration is expressly mentioned in Art 220 Treaty of Rome.[50] He continues: '[t]he reason for the exclusion of

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[47] '*La Convention exclut expressément la matière de l'arbitrage qui fait l'objet de plusieurs conventions spéciales. Les règles du Traité ne s'appliquent donc pas à la compétence des tribunaux judicaires pour les contestations relatives à l'arbitrage ni à la reconnaissance ou l'exécution des décisions relative à un arbitrage'*. Droz, *Pratique*¸ 12 (emphasis added).

[48] There had also been, in the early 1900s, bilateral arbitration conventions concluded between the United States and France on the one hand, and the United States and the United Kingdom on the other. See: JE Noyes, 'William Howard Taft and the Taft Arbitration Treaties' (2011) 56 *Vill L Rev* 535. These treaties are little remembered nowadays and likely were not part of the collective legal consciousness in the 1960s, but it is possible that Droz had in mind the possibility of similar, smaller arbitration conventions when he referred to 'several special conventions'. At any rate, as will be discussed below, this is not how the references have come to be popularly interpreted. See also the conventions listed at Art 55 Brussels Convention.

[49] G Droz, *Compétence Judicaire et Effets des Jugements Dans le Marché Commun* (1972) ("Droz, *Compétence*"), 37. Translations from this work are by the author, with the assistance of Mlle Évodie Fleury.

[50] '*…ils ont voulu, par une disposition formelle, éliminer toute tentative de reconnaissance ou d'exécution de décisions judicaiires statuant sur des contestations relatives à l'arbitrage, comme par exemple une action en nullité'*. Ibid.

arbitration… has to do with the large number of international agreements that now deal with the issue'.[51]

Again, the existence of other arbitration Conventions – including the New York and European Conventions – is given as the express justification for the exclusion of arbitration from the Brussels Convention.[52] Once again, however, the reasoning underlying this justification is left unexplained. Droz's writing does not explain what substantive overlap or conflict was envisaged, what problems this might cause, or why complete exclusion was thought more appropriate than bespoke rules.

Droz does, however, add an afterthought to the 'other conventions' justification in the form of an additional paragraph 49 bis. He writes that 'determining the scope of a treaty is a very delicate question,' and that 'too wide a scope, whether geographical or material, could harm the chances of solutions [to difficult issues in negotiations]'.[53] Presumably he means that at the negotiation stage, the broader the scope of the treaty, the more problems will need to be solved to create a satisfactory draft and the more scope for disagreement there will be. There may be something telling in Droz's decision to include this addendum in the section of his treatise dealing with arbitration. If so, it suggests that Droz did not necessarily believe that it was essential to exclude arbitration from the scope of the Brussels Convention. It suggests, rather, that he believed a convention on jurisdiction and recognition and enforcement of judgments could conceivably have included court proceedings relating to arbitration, but that it would have been too difficult to negotiate a satisfactory regime, whether because of the complexity of the subject or difficulty in securing the agreement of all negotiating parties. Arbitration may simply have been excluded as a matter of expediency. The

[51] '*La raison pour l'exclusion de l'arbitrage… tient aux nombreux accords internationaux qui règlant aujourd'hui la matière*'. Ibid, 38.
[52] Droz also lists the predecessors to the New York Convention, the Geneva Convention and Protocol of 1927 and 1923, which, although repealed by the New York Convention, remained in force between France and Italy at the time of conclusion of the Brussels Convention. Ibid.
[53] '*La détermination du champ d'application d'un traité est une question fort délicate... Nul doute qu'un champ d'application trop vaste, qu'il soit géographique ou materiél, ne nuise à l'adoption de solutions hardies*'. Ibid.

plausibility of this conclusion is reinforced by the Jenard Report, which gives very similar reasons for the exclusion of other matters from the convention.[54]

It may also be emphasised here that the EEC lacked power to legislate in this area, it being part of what would come to be known as the 'third pillar of the EU' of co-operation in justice and home affairs, so progress was reliant on the conclusion of conventions between the member states with only policy input from the EEC institutions.[55] Agreement is not always easily reached, and the exclusion of arbitration may therefore arguably be explained by practical considerations and difficulty reaching consensus amongst the EEC founding members. If this is true, however, it could have been freely stated in the official reports, as it is in respect of other exclusions. That would have allowed a far more open consideration of reform in future instruments. But the justification offered for the exclusion of arbitration was always that other conventions covered the matter, so it is this justification that is being questioned here.

The lack of detailed explanation from inside the drafting process of the rationale underlying the decision to exclude arbitration and this expression of reservation by Droz become particularly important when it is considered that the Brussels Convention's arbitration exclusion has set a precedent that has been followed without being significantly questioned in future conventions. Furthermore, the proffered justification that arbitration should be excluded from jurisdiction conventions because of overlap with special conventions has survived and prevailed in legal memory.

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[54] Jenard Report, above, 10. 'Apart from the desirability of bringing the Convention into force as soon as possible, the Committee was influenced by the following considerations. Even assuming that the Committee managed to unify the rules of jurisdiction in this field, and whatever the nature of the rules selected, there was such disparity on these matters between the various systems of law […] that it would have been difficult not to re-examine the rules of jurisdiction at the enforcement stage. This would have meant changing the nature of the Convention, making it less effective.' The report goes on to state that the drafters were concerned about encouraging abuse of the public policy exception by overreaching in harmonising the rules of jurisdiction. 'The members of the Committee chose the lesser of the two evils, retaining the unity and effectiveness of the draft while restricting its scope.'

[55] The third pillar would be partly merged with the first pillar by the Treaty of Amsterdam in 1999, giving the EU legislative power over some matters relating to justice and home affairs, hence the Brussels I Regulation in 2001. See J Fairhurst, *Law of the European Union* (8th edn, 2010), 6-20.

Tracking the development of the justification offered for the exclusion through time, it is worth remembering its shaky foundations.

The Jenard Report explains the exclusion in the following terms:

'There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration.'[56]

This explanation is illuminating in that it adds specific examples of the international agreements referred to: the New York Convention and the European Uniform Law Convention. That these Conventions were considered is hardly surprising, though the emphasis placed on the latter is informative. As will be shown below, this emphasis shifts over time after the failure of the European Uniform Law Convention.

Future official reports on the Brussels Regime would offer the same explanation for the exclusion of arbitration. The Evrigenis-Kerameus Report in 1986 cited the 'existence of numerous multilateral international agreements in this area' as the explanation for the arbitration exclusion.[57]

The 2007 Heidelberg Report goes into more detail, and gives a slightly different explanation to its predecessors:

'Article 1 (2) (d) [Brussels I Regulation] comprehensively excludes arbitration from the scope of European procedural law. Historically, this exclusion is explained by the relationship between the 'Brussels regime' and the [New York Convention]. When the [Brussels Convention] was negotiated in the 1960s, there was a large consensus that the recognition of arbitral agreements and awards worked efficiently under the 1958 New York Convention and, accordingly, arbitration should not be addressed by the European instrument. In addition to this, the European Council [sic] was elaborating a parallel instrument on arbitration at that time which finally proved to be unsuccessful.'[58]

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[56] Jenard Report, above, 13.

[57] DI Evrigenis and KD Kerameus, *Report on the accession of the Hellenic Republic to the Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* [1986] OJ C 298/01 ('Evrigenis-Kerameus Report'), 10.

[58] B Hess, T Pfeiffer and PF Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03 ('*Heidelberg Report*'), para 106. The reference to the European Council

This explanation shifts the emphasis to the New York Convention, when it had been placed more firmly on the Council of Europe's European Uniform Law Convention in the earlier Jenard Report. This is likely explained by the failure of the latter and the success of the former, which by then was widely in force and had taken on quasi-constitutional significance in the world of international commercial arbitration. It makes sense that modern authors would look to the more significant convention in the modern world to underpin the justification, but it should be remembered that this is a slight distortion of the original reasoning, which always cited various international agreements.

The focus on the New York Convention however is central in most other modern references to the reason for the arbitration exclusion. The Court of Justice[59] in its 1991 *Marc Rich* judgment cites the passage of the Jenard Report quoted above, before discussing the relationship between the Brussels and New York Conventions.[60] The court was in that case ruling on the scope of the exclusion, and looked to the reason for the exclusion to help define that scope. Paragraph 18 of the judgment reads, in relevant part:

'The international agreements, and in particular the abovementioned New York Convention […] lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards.'

The court uses this analysis of overlap to justify the reading of the exclusion to cover all court proceedings relating to arbitration. Again, the focus has shifted from several international agreements to the New York Convention. This makes sense in a world

– the European Union institution composed of the heads of government of each member state – is erroneous. The Convention was prepared by the Council of Europe, an institution separate to and with wider membership than the EU, which is best known as the protector of European human rights through the European Convention on Human Rights.

[59] The 'European Court of Justice', often abbreviated to 'ECJ', was renamed the 'Court of Justice of the European Union', often abbreviated to 'CJEU' with the coming into force of the Treaty of Lisbon in 2009. See Art 2 (A) (2) (m), Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, [2007] OJ C 306/1 ('Treaty of Lisbon'). This thesis will refer to the 'Court of Justice' as a catch all term.

[60] Case C-190/89 *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR I-3855, paras 17-18.

where the New York Convention is the principal arbitration convention, because it extends the relevance of the justification to the present day.

The justification has survived in this form in literature, which routinely cites the Jenard Report and often emphasises the New York Convention as the primary justification for the exclusion of arbitration.[61] Sources frequently erroneously conflate the European Uniform Law Convention and the European Convention in doing so.[62] The European Convention cannot possibly, however, be the convention referred to in the Jenard Report.[63] The frequency of references to the New York Convention, combined with the complete misunderstanding of the European instrument referred to in the Jenard Report, demonstrates the extent to which the New York Convention is treated as the primary justification for the exclusion of arbitration from the Brussels Convention.

There can be seen, therefore, a development in the generally proffered justification for the exclusion of arbitration from the Brussels Regime over time. At all times, the existence of other, special arbitration conventions is put forward as justification for the exclusion. The early references to these other conventions are usually not specific, and when they are, mention the New York Convention and especially emphasise the Council of Europe's ultimately unsuccessful attempts to harmonise arbitration law across Europe. Moving forward in time, the 'other conventions' justification has

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[61] P Rogerson, 'Art 1', in U Magnus and P Mankowski (Eds), *Brussels I Regulation* (2nd edn, 2012) ('Magnus and Mankowski'), 68-69; M Illmer, 'Scope and Definitions', in A Dickinson and E Lein (Eds), *The Brussels I Regulation Recast* (2015), 74; G Carducci, 'Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention' (2011) 27(2) *Arb Intl* 171 ("Carducci, 'Arbitration, Anti-suit Injunctions…"), 172-173; M Adler-Nissen and AE Ippolito, 'West Tankers revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?' (2013) 79(2) *Arbitration* 158, 158; A Mourre and A Vagenheim, 'The arbitration exclusion in Regulation 44/2001 after West Tankers' (2009) 12(5) *Int ALR* 75, 80; K Jolly, 'Anti-suit injunction and the arbitration exception in the Brussels Regulation: New India Assurance v Through Transport Mutual Insurance' (2005) 75(1) *Arbitration* 276, 276.

[62] See, *inter alia*, Carducci, 'Arbitration, Anti-suit Injunctions…', above, 172: "As the Jenard Report confirmed, the 'many international agreements' referred to in the 'justification' boil down to essentially two multilateral treaties: the 1958 New York Convention and the 1961 European Convention on International Commercial Arbitration"; *Heidelberg Report*, above, para 106.

[63] The Jenard Report is clear on two things about the European Convention to which it refers: that it is a project of the Council of Europe, and that it is intended to provide a uniform law on international commercial arbitration. See Jenard Report, above, 13. The European Convention on International Commercial Arbitration was negotiated by plenipotentiaries in a special meeting of the United Nations in Geneva and does not contemplate harmonising domestic arbitration law, so cannot possibly be the convention referred to in the Jenard Report.

remained the most commonly repeated, but the emphasis has shifted firmly to the New York Convention. The Council of Europe's European Uniform Law Convention has been forgotten to the extent that it has routinely been confused with the European Convention on International Commercial Arbitration. It will be important to remember this shift in the emphasis of the justification when it comes to analysing the validity of that justification.

(2) The Hague Convention 1971

Though a contemporary of the Brussels Convention, the Hague Convention 1971 deals with arbitration somewhat differently. It does not list arbitration amongst its excluded subject matters, which include, like the Brussels Convention, matters of status and capacity, family law, bankruptcy, succession, and social security,[64] as well as questions of damage or injury in nuclear matters.[65]

In fact, the Hague Convention 1971 mentions arbitration expressly in its provisions. Before considering this provision, it is worth noting that this Convention applies only to indirect jurisdiction, i.e. the recognition and enforcement of foreign judgments. This may have played into the drafting, and would certainly change the considerations about overlaps with arbitration conventions. The provision on arbitration, found in Art 12, reads:

'the jurisdiction of the court of the State of origin need not be recognised…

(3) if the authority addressed considers itself bound to recognise an agreement by which exclusive jurisdiction is conferred upon arbitrators.'

Thus the Hague Convention 1971 considers arbitration only insofar as to provide that a valid arbitration agreement, and presumably by extension an arbitral award made thereunder, shall be a defence to recognition and enforcement of a judgment. It does not exclude judgments relating to arbitration, such as set-aside judgments. These would on the face of it be covered, as they are 'decisions rendered in commercial matters by the courts of Contracting States'.[66] This is backed up by Droz, who implies

[64] Art 1 (1) - (6) Hague Convention 1971.
[65] Art 1 (7) Hague Convention 1971.
[66] This is the description of the scope of the Convention given in Art 1.

that but for the exclusion of arbitration in the Brussels Convention, judgments such as set-aside would fall within its scope.[67]

Droz, however, also suggests that this was an oversight rather than a conscious decision by the negotiators at The Hague Conference. In *Compétence*, he states when writing about the exclusion of arbitration from the Brussels Convention that the question of judgments concerning arbitration 'had not influenced negotiations at The Hague'.[68] This suggests that it simply did not occur to the negotiators to exclude arbitration or judgments relating to arbitration.

This is odd for a number of reasons. Firstly the Hague Convention 1971 was concluded three years after the Brussels Convention, and both would have been negotiated by experts in the field. Furthermore, Georges Droz at least was present for the negotiations of each. It is possible that the negotiations were conducted concurrently and therefore blindly to one another, but this seems unlikely, especially as several of the same negotiators were involved in the drafting of each convention.[69] On top of that, arbitration was obviously to some extent discussed, resulting in Art 12 (3). In this context, it seems highly unlikely that judgments concerning arbitration were not discussed at all or were forgotten.

Because the Hague Convention 1971 was poorly subscribed and never technically entered into force, its effects have never been tested.[70] One can only speculate as to how courts would react to a set-aside judgment brought for recognition under the terms of the Convention. All that can be said with confidence is that, whether by accident or design, with or without appreciation of the potential consequences, the negotiators of the Hague Convention did not exclude arbitration from its scope. A source from inside

[67] The negotiators of the Brussels Convention 'wished once and for all to remove any notion of enforcing court decisions relating to arbitration, such as for example a set-aside action'. Droz, *Compétence*, 37.
[68] Droz, *Compétence*, 38.
[69] AT von Mehren, 'Recognition and enforcement of foreign judgments: a new approach for the Hague Conference?' (1994) 57(3) *LCP* 271, 275. Von Mehren writes: 'In 1971, the Hague Conference on Private International Law completed work on a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,' implying that work continued until that point, well after the conclusion of the Brussels Convention.
[70] Ibid. The convention was negotiated multilaterally and received the required number of signatories to enter into force in the broader sense, but was to come into effect bilaterally upon the negotiation of bilateral agreements between contracting states. No such agreements have ever been completed.

the drafting process suggests that this was simply because drafters did not consider the relevant question. At any rate, the negotiators of the Draft Hague Convention 2000 would not follow suit.

(3) Draft Hague Convention 2000

The Draft Hague Convention 2000 took a decidedly different approach from its predecessor to the arbitration question. The Hague Convention negotiators this time chose to follow the European lead, excluding arbitration entirely from the scope of the Convention, and in clearer language than the Brussels Convention. Art 1 (2) (g) of the draft states that:

'(2) The Convention does not apply to-

… (g) arbitration and proceedings related thereto'.

The draft is therefore more express about the intention to exclude not only the jurisdiction of arbitral tribunals and the enforcement of their awards but also all court proceedings related to arbitration.

The commentary annexed to the draft explains the exclusion in very similar terms to the exclusion of arbitration from the Brussels Convention. The report explains: '[t]here was general agreement in the Special Commission that the Convention should not interfere with the operation of international Conventions on the subject, the most important of which is the [New York Convention]'.[71] Again, there is a return to the justification that arbitration is covered by special conventions – especially the New York Convention – and that these regimes should be left undisturbed. Indeed, the word choice of 'interfere' demonstrates a genuine worry, not present during the negotiations of the Hague Convention 1971, that the inclusion of arbitration in the Convention could cause problems with the operation of the New York Convention regime. According to the report, there was discussion as to how to treat court proceedings ancillary to arbitration, and it was ultimately decided that complete exclusion would be the most appropriate solution.[72] This is borne out by earlier *travaux préparatoires*,

[71] P Nygh and F Pocar, *Report of the Special Commission*, Hague Conference Enforcement of Judgments Prel Doc No 11 of August 2000, 36.
[72] Ibid.

which show that some of the many possible permutations and potential complications of including judgments relating to arbitration were discussed.[73] Ultimately, the decision was taken to exclude everything. This in turn suggests that at least part of the reason for the exclusion was the complexity of the issues raised.

Once again, arbitration has been excluded from a jurisdiction convention during the drafting process, and once again the main reason given for the exclusion is the existence of other conventions, most notably the New York Convention. There is some suggestion that the complexity of the issues raised by potential inclusion was also a deterring factor.

(4) Summary

Of the three jurisdiction conventions examined, two excluded arbitration completely from their scope. In both cases, the reason given was the existence of other, special arbitration conventions. In both cases, there was also the suggestion of some hesitancy on the part of negotiators because of the intricate complexity of the potential inclusion of arbitration, as well as the potential for such inclusion to cause disagreement. In the case of the convention that did not exclude arbitration, the best sources suggest that this was an oversight and that the question simply was not considered by negotiators. It seems, therefore, that the general consensus is that arbitration should be excluded from jurisdiction conventions and that the existence of the New York Convention justifies this. This thesis now considers the question whether it does.

B. The justification examined

This section of this thesis will critically examine the 'other conventions' justification offered for the exclusion of arbitration from the Brussels Convention and the Draft Hague Convention 2000. The justification will be criticised for two reasons. The first is the differing scope between the arbitration conventions mentioned as justification on the one hand and jurisdiction conventions on the other. The second is, especially in the European context, the membership of the relevant regimes. This section will then

[73] C Kessedjian, *Synthesis of the Work of the Special Commission of March 1988 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conference Enforcement of Judgments Prel Doc No. 9 of March 1998, 11-12.

investigate the academically interesting, but no longer practically relevant, question of whether the creation of a uniform arbitration law would justify the exclusion of arbitration in a given region.

(1) The overlap in scope between arbitration and jurisdiction conventions

When it comes to justifying the exclusion of arbitration from jurisdiction conventions, much is made of the potential overlap such conventions and special arbitration conventions. The tenor of the rhetoric of justification varies from leaving the New York Convention and other special conventions' operation undisturbed, to preventing active interference with the New York Convention regime. But to what extent do the scopes of arbitration and jurisdiction conventions actually overlap? This section will seek to answer this question, leaving aside the European Uniform Law Convention, which is of a different nature and will be considered separately under section (3), below.

In fact, as has been pointed out in scholarship, the actual overlap between arbitration and jurisdiction conventions is slight.[74] The former concerns the jurisdiction of arbitral tribunals and the enforcement of their awards; the latter concerns the jurisdiction of courts and the enforcement of their judgments.

Jurisdiction conventions delineate whether a national court or tribunal must, may, or may not take jurisdiction over a given dispute, and whether a foreign court must, may, or may not recognise and enforce that judgment once rendered.[75] These instruments tend to limit their scope to civil and commercial matters, with certain broad exclusions.[76] It is not controversial to assume that international commercial arbitration is a commercial matter to which such a convention would apply in the absence of express exclusion.

The first thing that may be pointed out is that these conventions do not and cannot regulate the recognition and enforcement of arbitral awards, nor positively give jurisdiction to an arbitral tribunal. This is because the scope is limited to the

[74] See Carducci, 'Arbitration, Anti-Suit Injunctions…', above, 172-176, especially 173.
[75] Michaels, 'Jurisdictional Conceptions', above. See Chapter 1.B.2.
[76] Art 1 Brussels Convention; Art 1 Hague Convention 1971; Art 1 Draft Hague Convention 2000.

jurisdiction of national courts rather than arbitral tribunals and the recognition and enforcement of judgments of these courts rather than the awards of arbitral tribunals.[77] Jurisdiction conventions could, of course, operate negatively to exclude the direct or indirect jurisdiction of courts over disputes in respect of which an arbitration agreement has been concluded.

The jurisdiction of arbitral tribunals and the recognition and enforcement of their awards are regulated by arbitration conventions, especially the New York Convention and the European Convention. These special arbitration conventions contain detailed provisions on when an award must be enforced and under what conditions enforcement may be refused.[78] Indeed, this is the first aim of the New York Convention, as evinced by its full title, 'Convention on the *Recognition and Enforcement* of Foreign Arbitral Awards'.[79] In this respect, there is no possibility of overlap with jurisdiction conventions, which cover the recognition and enforcement of court judgments rather than arbitral awards.

Both the New York Convention and the European Convention also contain provisions on the jurisdiction of arbitral tribunals. Art III (3) New York Convention states:

'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have 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.'

Here, the New York Convention protects the jurisdiction of arbitral tribunals over disputes in respect of which arbitration agreements have been reached by way of a negative jurisdictional provision excluding the jurisdiction of national courts over such disputes. This is therefore an example of a potential overlap in scope between an arbitration and a jurisdiction convention, as the arbitration convention includes a rule governing court jurisdiction.

The European Convention is more specific in establishing the jurisdiction of arbitral tribunals, and a little more specific in regulating the jurisdiction of courts. Art V (1)

[77] Ibid; Droz, *Compétence*, above, 37.
[78] Arts III-VII New York Convention; Art IX European Convention, which slightly modifies Art V New York Convention.
[79] Emphasis added.

and (2) establish an estoppel/waiver rule to protect the jurisdiction of the arbitrator from tactical challenge by requiring pleas as to jurisdiction to be raised before the arbitrator at the earliest possible moment in the arbitral process. Art V (3) enshrines the kompetenz-kompetenz principle, that an arbitral tribunal has the power to rule on its own jurisdiction, subject to the judicial control of the arbitral seat. These rules protecting and establishing arbitral jurisdiction clearly fall outwith the scope of a jurisdiction convention.

Art VI European Convention concerns the jurisdiction of courts over disputes in respect of which an arbitration agreement has been made. Art VI (1) requires objections to the jurisdiction of the court based on the existence of an arbitral agreement to be made at the earliest possible moment in the proceedings, on penalty of estoppel. Art VI (3) establishes a *lis pendens* rule, providing that where arbitration is commenced before court proceedings on the same matter, the court shall stay its proceedings until such time as the arbitral award has been made, unless the court has 'good and substantial reasons' not to do so. Art VI (4) gives courts jurisdiction over requests for interim measures. Like Art III NY Convention, this is an example of a potential overlap between an arbitration and jurisdiction convention. Indeed, a *lis pendens* rule similar to Art VI (3) European Convention is one of the most often suggested amendments to the Brussels Regime.[80]

Arbitration conventions do not clearly state what should happen when a court is asked to recognise and enforce a judgment that has been rendered by a foreign court in spite of an arbitration agreement that the former court considers valid. There is an argument that Art II New York Convention covers this situation by providing that a court 'seized of an action in a matter in respect of which the parties have made an [arbitration agreement], shall, at the request of one of the parties, refer the parties to arbitration'. It is hard, however, to argue that a court asked to enforce a judgment is 'seised of' the matter that judgment concerns. The matter before the court is whether or not to enforce the judgment, which forms a head of jurisdiction separate from the merits of the

[80] This will be discussed in more detail below, but see for example: *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 ('*Commission Proposal*'), 4.

underlying dispute,[81] and which is clearly a subject matter incapable of settlement by arbitration. This confusion is compounded by the exclusion of arbitration from jurisdiction conventions, which means that such conventions do not include rules on the enforceability of judgments rendered in spite of arbitration agreements, unlike the Hague Convention 1971. Here again we see an area in which jurisdiction conventions could usefully fill gaps left by arbitration conventions.

All of this demonstrates that there is very limited potential for overlap between the primary functions of arbitration conventions and jurisdiction conventions. There will be no overlap as regards the recognition and enforcement of arbitral awards and the establishment of the jurisdiction of arbitral tribunals, except insofar as the latter excludes court jurisdiction. To this extent, it cannot be said that the exclusion of arbitration from jurisdiction conventions is necessary to protect the function of arbitration conventions, especially given the very limited provisions that could overlap and the ease with which these could be replicated or respected in a jurisdiction convention. Where else, then, could overlap arise?

It is often said that arbitration does not and cannot exist in a legal vacuum. What is meant by this is that, although the arbitral process itself is private and extrajudicial, arbitration relies on court support in order to function. The most obvious example of this is for enforcement of arbitral awards, as arbitral tribunals and institutions lack the power of courts to compel parties to comply with their decisions. But court support comes in many guises. This support may take the form of enforcing the arbitration agreement by ordering an uncooperative party who has started court proceedings to arbitrate its dispute, as envisaged in Art II New York Convention. It may be by providing interim relief or protective measures, or giving assistance in the taking of evidence. It may be by providing the first port of call to challenge a defective award by setting it aside rather than merely refusing recognition and enforcement. Arbitration conventions provide direct or indirect jurisdiction rules for practically none of these things.

[81] See, for example, Art 24 (5) Brussels I Recast.

On enforcement of the arbitration agreement, Art II New York Convention provides that *any* court seised of a matter in respect of which the parties have reached an arbitration agreement must decline jurisdiction in favour of the arbitral tribunal, and provides some minimum standards for formal validity of arbitral agreements. Art II says nothing about *which* court should have jurisdiction to assess the validity of the arbitral agreement and whether the result it reaches should be respected by other courts. This is a gap a jurisdiction convention would be perfectly placed to fill.

On interim measures, the European Convention provides at Art VI (4) that courts in general shall have jurisdiction to grant such measures. It does not provide which court should have jurisdiction to order interim measures in any given case, nor whether that court's order should be recognised and enforced by other courts. Again, this is an obvious gap that could be filled by a jurisdiction convention, and indeed has been filled by the Brussels Regime despite its exclusion of arbitration.[82]

On set-aside, Art V (1) (e) New York Convention provides that a court asked to recognise and enforce an arbitral award may refuse to do so if the award has been set-aside in the country in which or under the law of which it was rendered. This does not expressly provide for direct jurisdiction over set-aside proceedings, though it does strongly imply that such jurisdiction should lie with the courts at the seat of the arbitration. It effectively provides a rule of indirect jurisdiction, permitting the court asked to enforce an award to recognise the set-aside judgment of the courts at the seat of the arbitration. Art IX (2) European Convention limits the circumstances in which such judgments may be recognised. Again, the gap in provision for direct jurisdiction could easily be filled by a jurisdiction convention. As regards recognition of set-aside judgments, there is the potential for some overlap here. However, the New York Convention rule is so permissive that a jurisdiction convention could easily operate alongside and in harmony with it.

[82] Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-3855, especially paras 33-34, in which it was held that an application to a court for interim measures where the parties have concluded an arbitration agreement could fall within the scope of the Brussels Convention when the rights those proceedings sought to protect fall within the scope of the Convention.

It has been demonstrated that there is in fact very little scope for overlap between jurisdiction and arbitration conventions, and that even where there is, the two could work harmoniously quite easily. It is therefore submitted that the original justification for the exclusion of arbitration from judgment conventions – that the subject is covered by many special arbitration conventions, and that inclusion could impede the operation of these conventions – does not stand up to scrutiny.

(2) The overlap in membership between arbitration conventions and the Brussels Convention

A further issue can be raised with the exclusion of arbitration from the Brussels Regime specifically. It is the issue of the stated aims of the Treaty of Rome and how these were hoped to be achieved.

As has been stated above, Art 220 Treaty of Rome requires the member states of the EEC to simplify the intra-Community enforcement of judgments and arbitral awards. As has also been stated above, the Brussels Convention was the principal instrument intended to achieve this with respect to judgments. No such Community instrument was created to do so for arbitral awards. The best explanation for this is the creation of the New York, European, and European Uniform Law Conventions, which performed or would have performed the same function. As discussed above, the same reason is given for the exclusion of arbitration from the Brussels Convention. This justification is questionable because of the lack of potential for overlap between the Brussels Convention and arbitration conventions. But overlap is pertinent for another reason: the differing membership of the then EEC and these arbitration conventions.

It is submitted that, it being a stated goal of the EEC to enhance the enforceability of arbitral awards between its member states, it should be seen as the responsibility of the member states of the EEC to conclude the relevant conventions amongst themselves. Whether an external convention could ever be seen to satisfactorily achieve that goal is questionable, but it is altogether impossible for external conventions to achieve that goal when their membership is different from the EEC. Yet this was true of all three of the arbitration conventions commonly referred to as justification for the arbitration exclusion at the time the Brussels Convention was concluded.

The EEC had six member states when the Brussels Convention was concluded in 1968: Belgium, France, Germany, Italy, Luxembourg, and The Netherlands. For any external convention to satisfy the aims expressed in the Treaty of Rome and justify the exclusion of arbitration from the EEC jurisdiction regime, it would at a minimum need to have these six member states as signatories.

Yet when the Brussels Convention was concluded, only five of the six EEC member states had signed the New York Convention. Although Belgium, France, Germany, Luxembourg and The Netherlands were signatories of the New York Convention, and France, Germany and The Netherlands had ratified it by 1968, Italy would only accede in 1969. Belgium would ratify the New York Convention in 1975, and Luxembourg only in 1983.[83] There is no suggestion that the Brussels Convention required its members to accede to or ratify the New York Convention. It cannot therefore be said that the New York Convention achieved the goal of simplifying the recognition and enforcement of arbitral awards *between EEC Member States* at the time the Brussels Convention was concluded, given it was in force in only three of those member states.

Likewise, the European Convention was not subscribed by every then EEC member state. Belgium, France, Germany, and Italy were signatories when the Convention was concluded in 1961. However, Belgium and Italy would only ratify the Convention well after the conclusion of the Brussels Convention, in 1975 and 1970 respectively. Luxembourg would only accede to the Convention in 1982, and the Netherlands never has.[84] Again, because this Convention was not in force in all member states, and never has come into force in all member states, it can in no way be said to achieve the goals of Art 220 Treaty of Rome.

The stillborn European Uniform Law Convention was concluded in 1966, signed by just Austria and Belgium, and ratified only by the latter, therefore failing to achieve the three ratifications required for its coming into force.[85] Again, this Convention could

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[83] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last accessed: 21 April 2015).

[84] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en (last accessed: 21 April 2015).

[85] See http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=056&CM=4&DF=&CL=ENG (last accessed: 21 April 2015)

not be said to achieve the aims of Art 220 Treaty of Rome with respect to arbitral awards as of 1968, nor to look at the time as if it were ever likely to do so.

It is therefore submitted that the exclusion of arbitration from the Brussels Convention could not possibly have been justified by reference to any of these three special conventions in 1968, given none of them applied to all the then EEC member states. Like the lack of overlap in scope, this points to the conclusion that the justification for exclusion was weak.

(3) Would a uniform arbitration law justify exclusion?

It has been argued above that arbitration conventions such as the New York and European Conventions could not justify the exclusion of arbitration from jurisdiction conventions. It has also been submitted that neither of these two, nor the European Uniform Law Convention could justify the exclusion of arbitration from the Brussels Convention due to their differing membership. But what if the European Uniform Law Convention had been successful in harmonising arbitration law across the EEC and beyond, or at least genuinely looked like it could do so when the Brussels Convention was concluded in 1968? Would a uniform arbitration law justify the exclusion of arbitration from a jurisdiction convention?

The answer is a frustrating 'yes and no'. To explain this, it is necessary to examine the gaps left by recognition and enforcement arbitration conventions and to what extent a uniform law convention would fill them.

Recognition and enforcement arbitration conventions leave gaps as to which court should have jurisdiction over the question of the validity of an arbitration agreement, the provision of interim measures, and the set-aside of an arbitral award. A uniform law would not directly solve these problems. This is because a uniform law consists of a set of provisions for importation into domestic law, which will then be harmonised across contracting states. This does not provide a direct solution as to which contracting state should have jurisdiction over the issues set out above.

A uniform law could, however, significantly reduce the practical need for such jurisdictional rules, as has been pointed out by commentators in the debate surrounding

the Brussels Regime's relationship with arbitration.[86] This is because a uniform law could significantly reduce the potential for jurisdictional issues to arise.

For example, it has already been stated that the New York Convention operates to deprive courts of jurisdiction over a dispute when an arbitration agreement has been entered into. The New York Convention does not provide when an arbitration agreement will be considered valid, save for delineating the most stringent permitted formal requirements at Art II (2). This aside, contracting states have wide freedom to determine when an arbitral agreement will be considered valid. Different states will therefore have different conditions for validity of arbitral agreements.[87]

This creates the obvious problem that one state might perfectly possibly view an arbitration agreement as valid, whilst a second state views it as invalid and therefore subject to court jurisdiction. This is one of the reasons that it might be desirable to provide in a jurisdiction convention which court should have jurisdiction over the question of validity of the arbitration agreement, with that court's decision receiving recognition in other convention countries.[88] The same can be argued to be necessary to achieve consistency in provision of interim measures and approach to set-aside judgments.

With this argument in mind, it is obvious why a uniform law would reduce the need to include arbitration in a jurisdiction convention. If standards for the validity of arbitration agreements, the provision of interim measures, and the availability of set aside are harmonised, the courts in member states should theoretically reach the same conclusion on the same set of facts. An arbitration agreement valid in one state should

[86] LG Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?' (2011) 7(3) *J Priv Int L* 423 ("Radicati, 'Seeds of Home Country Control'"), 434; H van Houtte, 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' (2005) 21(4) *Arb Intl* 509 ('van Houtte').

[87] See for example Art 7 UNCITRAL Model Law 2006, which contains two different options for provisions on the validity of an arbitration agreement: one which restricts valid arbitration agreements to certain written agreements, the other which allows any agreement considered a valid contract under the law of that country to constitute an arbitration agreement. Cf s 4 Arbitration (Scotland) Act 2010; s 5 Arbitration Act 1996.

[88] See more detailed discussion of the desirability of such jurisdictional rules throughout this thesis, and especially in Chapter 4.B for discussions of the various proposals for reform of the Brussels Regulation and their merits.

be considered valid in another. An award set aside in one state for any reason other than public policy should be considered invalid in any other state.

This argument, however, only goes so far. Courts called upon to apply the same rule to the same or very similar sets of facts can often reach different conclusions. Regarding the validity of arbitration agreements, informative examples can be found in the application by different courts of the uniform UNCITRAL Model Law.

For instance, in interpreting the requirement in Art 7 (2) of the UNCITRAL Model Law 1985 that arbitration agreements be concluded in writing, different courts have taken very different approaches. According to Art 7 (2), 'An agreement is in writing if it is contained in a document signed by the parties[…] The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing…'.

In a Hong Kong Court of First Instance case, the writing requirement was interpreted narrowly.[89] An arbitration clause was contained in standard terms allied to a purchase order. The plaintiff had signed the purchase order, but could not produce a copy signed by the defendant. The two parties had clearly concluded a contract based on the purchase order and had performed the contract. The court held that the agreement was not in writing because it, or the contract incorporating it, was not signed by both the parties.[90]

In very similar circumstances two years later, where a signed offer containing an arbitration clause was communicated to a defendant who did not countersign but subsequently performed, the Court of Queen's Bench of Saskatchewan was happy to find the arbitration clause to have been accepted by conduct.[91] This is despite applying the same UNCITRAL Model Law 1985 provision as the Hong Kong Court of First Instance, a plain reading of which would seem to point to the opposite conclusion. The court even expressly states that it is giving a 'liberal interpretation' to Art 7 (2).[92]

[89] CLOUT Case No 64 *H Small Limited v Goldroyce Garment Limited* [1994] HKCFI 203.
[90] Ibid, paras 8, 12.
[91] CLOUT Case No 365 *Schiff Food Products Inc v Naber Seed & Grain Co Ltd* [1996] CanLII 7144 (SK QB).
[92] Ibid, para 25.

It can be seen, therefore, that the same provisions can be interpreted very differently by different courts. Similarly, courts have also taken widely divergent approaches to the validity of arbitration agreements under Art II New York Convention.[93]

It is therefore submitted that the harmonisation of arbitration law would not justify the exclusion of arbitration from jurisdiction conventions unless there were a supranational authority to ensure uniform interpretation of the provisions: the function served by the Court of Justice in the European Union. Failing this – and this supervisory authority would have been lacking under the European Uniform Law Convention – divergent interpretation is inevitable, and the same jurisdictional issues will arise as if each member state applied an arbitration statute of its own drafting. So although a uniform arbitration law may improve the situation that calls for the inclusion of arbitration in jurisdiction conventions by reducing the incidence of divergent interpretation, it does not justify the exclusion of arbitration as a whole. In turn, the argument that the European Uniform Law Convention, had it been successful, would have justified the exclusion of arbitration from the Brussels Convention must be rejected.

C. Other excluded matters

Arbitration is not the only matter excluded from the Brussels Convention. The scope of the convention is defined at Art 1 as 'civil and commercial matters, whatever the nature of the court or tribunal'. The stated exclusions from this scope fall into two categories. The first is those matters that naturally fall outside the scope of the convention, being inherently public law matters, but are listed presumably for the avoidance of doubt.[94] These include 'revenue, customs, and administrative matters'. The second set of exclusions concerns matters that could be seen as 'civil and commercial matters', but are nonetheless excluded. Arbitration is one of these. The others include: matters of family law; succession; bankruptcy; and social security.[95]

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[93] *Report of the Secretary General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL DOC A/CN.9/168.
[94] P Rogerson, 'Art 1', in Magnus and Mankowski, above, 54-55.
[95] Art 1 (1)-(3) Brussels Convention.

The other excluded matters can to an extent contribute to the debate surrounding the arbitration exclusion. The first set of exclusions – those inherently public in nature – adds little to the discussion because their nature is so different from arbitration. It is, however, useful to compare arbitration with the other matters in the second category of exclusion: those civil or commercial in nature, but nonetheless excluded. Evaluating why these other matters were excluded and how they have subsequently been treated may reveal that these matters have something in common.

Indeed, the other excluded matters do have one striking feature in common: all have been subject to at least proposals for special, bespoke regulation since their exclusion from the Brussels Convention. This in turn suggests that these are not matters that by their nature fall outside the scope of jurisdiction conventions, but simply special, complex cases that require bespoke regulation.

Bankruptcy and similar proceedings are excluded by Art 1 (2) Brussels Convention. The Jenard Report explains this exclusion with reference to a special EEC convention that was being drafted at the time.[96] Two draft Conventions were created before a Convention was finally concluded, though this never entered into force.[97] Each of these Conventions contained detailed provisions on jurisdiction.[98] Following the Treaty of Amsterdam, which laid down new powers for the European Council over judicial co-operation,[99] the Insolvency Regulation was adopted.[100] This regulation also contains bespoke jurisdiction rules.[101] In contrast to arbitration, it can be seen that there was a sustained effort to create a bespoke system of regulation at an EEC level for insolvency proceedings, filling the gap left by the exclusion from the Brussels Regime.

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[96] Jenard Report, above, 11-12.
[97] *Preliminary Draft of a Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings*, Comm Doc 3.327/1/XIV/70 ('Draft Bankruptcy Convention 1970'); *Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings*, EC Bull Supp 2/82 ('Draft Bankruptcy Convention 1982'); Convention on Insolvency Proceedings, 23 November 1995, Council Doc Conv/Insol/en 1.
[98] Title II Draft Bankruptcy Convention 1970; Title II Draft Bankruptcy Convention 1982; Art 3 Convention on Insolvency Proceedings 1995.
[99] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997, 2700 UNTS 163 ('Treaty of Amsterdam'), Art 73o.
[100] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 ('Insolvency Regulation').
[101] Art 3 Insolvency Regulation.

According to the Jenard Report, mutual recognition of succession judgments was considered essential, but impossible until such time as the conflict of laws rules of the EEC member states could be harmonised, owing to the vastly different conceptions of and approaches to succession in the different member states.[102] Following the Treaty of Amsterdam, this has become possible, and succession has also become subject to special regulation, following over a decade of preparatory work.[103] Because of the complexity of the issues raised by cross-border succession, the Succession Regulation contains many lengthy and detailed provisions on jurisdiction.[104] Here, the original exclusion of succession from the Brussels Convention makes sense owing to the complicated nature of the rules required to regulate jurisdiction over such questions. Still, these rules have ultimately been concluded at the EU level, filling the gap left by the Brussels Regime.

The Jenard Report states that 'rights in property arising out of a matrimonial relationship' was expressly excluded from the scope of the Brussels Convention due to the wildly divergent rules and conflict rules applied to this question in the member states.[105] Although to date there has been no convention concluded or legislation passed to govern the question, and the matter is specifically excluded from the scope of the Brussels II Bis Regulation which governs family law matters,[106] there has recently been a proposal for a regulation in this area.[107] It is clear, therefore, that there is an ongoing commitment to filling this gap left in the Brussels Regime.

A related exclusion is 'the status or legal capacity of natural persons'.[108] This refers to family law matters such as marriage and divorce, and was excluded because of the wide divergence on the subject of divorce between member states, whose approaches

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[102] Jenard Report, above, 11.
[103] Regulation (EU) No 650/2012 of the European Parliament and Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107 ('Succession Regulation'); House of Lords European Union Committee, 6th Report of 2010, *The EU's Regulation on Succession* [2010] HL Paper 75, para 4.
[104] Arts 4-19 Succession Regulation.
[105] Jenard Report, above, 11.
[106] Recital 8 Brussels II Bis Regulation.
[107] European Commission, *Commission Proposal for a Council Regulation on jurisdiction, applicable law and enforcement of decisions in matters of matrimonial property regimes* COM(2011) 126 final.
[108] Art 1 (1) Brussels Convention.

varied from allowing divorce by consent (Belgium) to an absolute prohibition under any circumstances (Italy).[109] It was feared that forcing courts to recognise decisions relating to family law and especially to divorce would encourage abuse of the public policy exception to enforcement.[110] These matters have since been brought within the wider Brussels Regime by the Brussels II and Brussels II Bis Regulations.[111]

The only remaining express exclusion other than arbitration, social security, was excluded from the scope of the Brussels Convention largely because of differing conception of social security in the member states.[112] Some view it as a matter of public law, others as quasi-public; in some member states, social security litigation falls within the jurisdiction of the ordinary courts, in others, administrative tribunals.[113] Furthermore, the EEC legislature was empowered by Art 51 Treaty of Rome to enact legislation in the field of social security with a view to securing free movement of workers, which it duly did.[114] These regulations provided which member state's social security legislation would apply to a given worker, and court jurisdiction over social security claims was treated as falling to the court of the country whose legislation applies to a worker.[115] This left the gap in the Brussels Regulation half-filled, with recognition and enforcement of social security decisions still unregulated.[116] This gap has since been filled by the modernised Social Security Regulation, passed in 2004.[117] Once again, a gap left by exclusion from the Brussels Regime has been filled over the past 40 years.

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[109] Jenard Report, above, 10.
[110] Ibid.
[111] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses [2000] OJ L 160/19; Brussels II bis Regulation, above.
[112] Jenard Report, above, 12.
[113] Ibid.
[114] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2 ('Social Security Regulation'); Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1972] OJ L 74/1.
[115] Arts 13-17 Social Security Regulation; Jenard Report, above, 12.
[116] Jenard Report, above, 12.
[117] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1, Art 84.

It can therefore be seen that, arbitration aside, every specific exclusion from the Brussels Convention, other than those included for the purpose of clearly defining 'civil and commercial', has been dealt with by bespoke European Community/Union conventions or legislation.

What can be read into this? At the very least, this demonstrates that these matters are not excluded because there is no place for the creation of jurisdictional rules at a European level. Many were excluded because of the difficulty of creating rules acceptable to the six member states back in 1968. Indeed, some of the matters were excluded with the express intention of the creation of bespoke rules. When looking at the complexity of some of the jurisdictional rules that have been created, it makes sense that separate instruments were required. What is certain is that exclusion from the Brussels Convention was in no way intended to exempt matters from becoming subject to European jurisdictional rules. Indeed, arbitration is entirely the odd man out in this respect. Whilst it would be rash to draw too wide-reaching conclusions from this fact, it is submitted that it is certainly pertinent to the debate on the creation of jurisdictional rules on arbitration at a European Union level. But does that mean the exclusion of arbitration was justified by the need for separate, bespoke arbitration legislation?

D. Is exclusion necessary for the creation of bespoke jurisdictional rules?

The foregoing may suggest that excluded subjects have been left out because of their complexity and can only be satisfactorily dealt with in bespoke legislation, rather than by inclusion in a dedicated jurisdiction convention like the Brussels or Draft Hague Conventions. This is not true for two main reasons. First, the Brussels and Draft Hague Conventions contain bespoke rules for several subject matters which do not fall neatly into the general jurisdictional rules. Second, only a limited number of jurisdictional rules are required concerning arbitration to fill the gap between a jurisdiction convention and arbitration conventions.

The Brussels and Hague Conventions contain bespoke rules covering several subject matters. The Brussels Convention is structured with a rule of general jurisdiction, that

a defendant may be sued where domiciled, and fallback rules of special jurisdiction, which allow plaintiffs to bring actions in courts other than those at the defendant's domicile based on the subject matter of the dispute or the existence of a choice of court agreement.[118] There are then bespoke rules for those subject matters for which jurisdiction would not be appropriately allocated by the general rule. These include special sections on insurance,[119] consumer contracts,[120] and prorogation,[121] as well as conferring exclusive jurisdiction over certain matters.[122] The bespoke rules vary in complexity, from the seven articles regulating jurisdiction in matters relating to insurance to the individual provisions giving exclusive jurisdiction to the courts of certain countries over certain matters. Like the Brussels Convention, the Draft Hague Convention 2000 contained bespoke rules concerning, for example, prorogation,[123] consumer contracts,[124] employment contracts,[125] trusts,[126] and other items of exclusive jurisdiction.[127] All of this makes perfectly clear that jurisdiction conventions are capable of including bespoke jurisdictional rules of varying complexity for certain subject matters.

The jurisdictional rules required for arbitration are not so complex as to demand their own separate instrument. Compared with the other excluded matters from the Brussels Convention that have become subject to bespoke rules, the rules required for arbitration would be relatively few and uncomplicated. Social security, for example, is intrinsically linked to the free movement of workers, one of the fundamental freedoms of the EEC. It would obviously require separate and thorough consideration, and was likely to require detailed and comprehensive regulation to ensure the systems of social security amongst the member states work harmoniously. Considering this, it makes sense that social security would be excluded from the Brussels Regime and jurisdictional rules contained in the relevant specialised legislation. By contrast,

[118] For the rule of general jurisdiction, see Art 2 Brussels Convention. For the rules of special jurisdiction, see Art 5 Brussels Convention.
[119] Section 3 Brussels Convention.
[120] Section 4 Brussels Convention.
[121] Section 6 Brussels Convention.
[122] Art 16 Brussels Convention.
[123] Art 4 Draft Hague Convention 2000.
[124] Art 7 Draft Hague Convention 2000.
[125] Art 8 Draft Hague Convention 2000.
[126] Art 11 Draft Hague Convention 2000.
[127] Art 12 Draft Hague Convention 2000.

arbitration needs only a few special rules: likely no more in number or complexity than the seven articles dedicated to jurisdiction in matters relating to insurance.[128]

It is therefore submitted that bespoke jurisdictional rules relating to arbitration could feasibly be included in jurisdiction conventions; specialised instruments are not the only way to fill the gaps left by exclusion.

E. Preliminary conclusion

It is therefore concluded that the traditionally accepted justification for the exclusion of arbitration from jurisdiction conventions – that arbitration is satisfactorily dealt with by other, bespoke conventions – does not stand up to examination. As has been demonstrated, the bespoke arbitration conventions have very little potential for substantive overlap with the jurisdiction conventions. Furthermore, in the case of the Brussels Regime, the membership of the bespoke conventions did not align with the membership of the EEC at the time, suggesting that the justification was never particularly well thought through. Exclusion was not justified by the prospect that arbitration law might have been harmonised across the member states, because this would not eliminate the problems that would typically be seen as requiring inclusion of arbitration. If the exclusion was not justified at the time it was written, it could not possibly justify the continued exclusion of arbitration since. Furthermore, exclusion in 1968 was clearly not intended to mean a subject would never be subject to EEC or EU jurisdictional rules, as demonstrated by comparison with the other specifically excluded matters, all of which are now covered, whether as part of the wider Brussels Regime or another bespoke statute. Nonetheless, exclusion is not necessary for the creation of bespoke jurisdictional rules. All of this means it is entirely appropriate to reject the traditional justification for exclusion and reconsider arbitration's relationship with jurisdictional rules.

[128] See Chapter 8, below.

3. THE EXCLUSION WITHIN EUROPE PART 1 – THE PROBLEMS WITH EXCLUSION

The previous chapter argued that the standard justification for the arbitration exclusion does not stand up to scrutiny. The next step is to ask: what effects has the exclusion had? This is because it is one thing to demonstrate that the exclusion was never properly justified, but if it has had no significant practical effects, there would be no pressing reason to make any change. It is therefore vital for this thesis to establish not only that the arbitration exclusion cannot be justified, but also that it has caused significant problems.

This thesis will therefore now take the European example as a case study to examine the practical effects of the arbitration exclusion. Europe has been chosen because it is the only example of a multi-state set of jurisdictional rules that is actually in effect and has had time to be tested. This chapter will focus on Europe's struggle with the arbitration exclusion up to the creation of the Brussels I Recast in late 2012 and entry into force in early 2015. The next chapter shall focus on the recasting process, and analyse the Recast as passed. In the limited number of situations where the analysis presented in this chapter would or could be affected by the changes in the Brussels I Recast, this will be noted in passing and subject to deeper analysis in the following chapter.

This chapter shall be split into three main parts. First it will examine the case law that was required to define properly the scope of the arbitration exclusion and the effects of this exclusion. Next it will focus on the problems arising from or exacerbated by the arbitration exclusion as defined. Finally, it will briefly consider why these problems are particularly significant within Europe, albeit many of the problems are present to some degree in the world at large. The chapter shall conclude that there are significant problems at the interface between the Regulation and arbitration, many of which could be addressed by redrafting or partially deleting the exclusion of arbitration.

A. The scope of the arbitration exclusion

As mentioned in the previous chapter, the exclusion of arbitration from each instrument of the Brussels Regime is written in very general language, stating that the instrument 'shall not apply to arbitration'.[129] This generality also gives rise to uncertainty as to the exact parameters of the exclusion. Was it meant simply to exclude the jurisdiction of arbitral tribunals and the recognition and enforcement of arbitral awards, even though these would seem by default to be excluded from instruments concerning the jurisdiction of national courts and the enforcement of court judgments? If so, it would seem unnecessary to include an exclusion at all, so surely court proceedings and judgments concerning arbitration must also be excluded. But which proceedings and judgments? There is not always a clear dividing line as to when court proceedings concern arbitration. What about a preliminary decision on the validity of an alleged arbitration agreement as a challenge to the jurisdiction of the court in an action in tort? Or an application for interim or protective measures in respect of a contractual dispute that is subject to an arbitration agreement? Are remedies proscribed under the Brussels Regime, such as the anti-suit injunction, available in actions not falling within the scope of the Brussels Regime, such as an action for the appointment of arbitrators under an arbitration agreement? These questions and more would have to be resolved by the Court of Justice to assist in lending certainty and predictability to the scope of the arbitration exclusion.

This part of this thesis focusses on four of these cases that were decided in order to clarify the scope of the arbitration exclusion. The cases are: the *Marc Rich* case,[130] which concerns *lis pendens* and decisions on the validity of an arbitration agreement as a preliminary matter; the *van Uden* case,[131] which concerns interim and protective measures; the infamous *West Tankers* case,[132] which concerns the availability of the anti-suit injunction to courts in cases falling outwith the scope of the Brussels Regime;

[129] Art 1 (4) Brussels Convention; Art 1 (2) (d) Brussels I Regulation; Art 1 (2) (d) Brussels I Recast.
[130] *Marc Rich*, above, paras 17-18.
[131] *van Uden*, above.
[132] Case C-185/07, *Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR I-663 ('*West Tankers*').

and the *Gazprom* case,[133] in which the relationship between the Brussels I Regulation and anti-suit injunctions issued by arbitrators was considered.

(1) The *Marc Rich* case

The *Marc Rich* case came before the Court of Justice in 1989, with judgment being handed down in 1991. The case was therefore decided under the Brussels Convention, though Brussels Convention decisions remain valid insofar as they remain relevant under the Brussels Regulation.[134]

The facts of the case are worth recounting in some detail to aid in the understanding of the issues before the court, why they were important, and how the court resolved them.

In January 1988, Marc Rich and Società Italiana Impianti ('SII') concluded a contract under which the former would purchase from the latter a quantity of Iranian crude oil on FOB terms.[135] The terms of the contract included a clause for *ad hoc* arbitration[136] providing that '[s]hould any dispute arise between buyer and seller the matter in dispute shall be referred to three persons in London. One to be appointed by each of the parties hereto and the third by the two so-chosen, their decision or that of any two of them shall be final and binding on both parties.'

The oil was loaded onto the nominated ship in early February. That same day, Marc Rich complained that the cargo was badly contaminated, causing it significant losses.

In mid-February, SII requested the Regional Court of Genoa, Italy, to declare that SII was not liable to Marc Rich for the alleged contamination. Summons were served on Marc Rich on 29 February, and that same day Marc Rich began arbitration proceedings

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[133] Case C-536/13 *'Gazprom' OAO*, not yet reported ('*Gazprom*').
[134] There is continuity between the Brussels Convention and the Brussels I Regulation, per Recital 19 of the Regulation, and jurisprudence of the former is applicable to the latter where relevant. See e.g. the Court of Justice's references in the *West Tankers* judgment to several Brussels Convention cases. *West Tankers*, above, para 28.
[135] FOB = Free on Board. These terms define how goods are to be transported, which party pays for what part of the carriage process, when risk transfers, etc.
[136] *Ad hoc* arbitration is arbitration conducted without a supervising arbitral institution. As institutions often provide a first port of call for assistance in the arbitral process, such as appointing arbitrators, ancillary court proceedings are far more commonly required in *ad hoc* arbitration.

in London. SII refused to take part in the arbitration proceedings, which entailed refusal to take its part in the arbitrator appointment procedure under the arbitration agreement.

In May 1988, Marc Rich requested the High Court to appoint arbitrators under s 10 (3) of the Arbitration Act 1950, SII still having failed to do so. The High Court granted leave to serve originating summons on SII in Italy.

In July 1988, SII requested that the order granting leave should be set aside. It argued that the question before the English court was one of the existence of an arbitration agreement, which should fall within the scope of the Brussels Convention and therefore be adjudicated in the Regional Court of Genoa: the court first seised.

In October 1988, Marc Rich contested the jurisdiction of the Regional Court of Genoa under the New York Convention or implementing Italian statute on the basis of the arbitration agreement.

In November 1988, the High Court held that the Brussels Convention did not apply to the action before it, by virtue of the arbitration exclusion in Art 1 (4).[137] The court applied English law, therefore refusing to set aside the order granting leave to serve summons.[138] SII appealed this decision to the Court of Appeal, which made a preliminary reference to the Court of Justice.[139]

Three questions were referred to the Court of Justice, of which the relevant one was:

'Does the exception in Article 1(4) of the Convention extend:

(a) to any litigation or judgments and, if so,

(b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?'

The Court of Justice was therefore called upon to define the scope of the arbitration exclusion. The case had the potential to have very serious consequences. Both the Italian and English courts had to rule on the question of the validity of the arbitration

[137] *Marc Rich & Co AG v SpA Italiana Impianti* [1989] ECC 198, para 25.
[138] Ibid, para 35.
[139] *Marc Rich & Co AG v Società Italiana Impianti PA* [1989] 1 Lloyd's Rep 548.

agreement between Marc Rich and SII before potentially proceeding to hear the merits of the relevant proceedings, on contractual liability or the appointment of arbitrators respectively. If the question of the validity of the arbitration agreement fell within the scope of the Convention, the *lis pendens* rule at Arts 22 and 23 of the Convention would apply and the English court would have to stay proceedings pending the resolution of the earlier-filed Italian claim. This could prove problematic because Italian courts are notoriously slow-moving, so SII would effectively 'torpedo' the contractually agreed arbitration by beginning proceedings in Italy and refusing to participate in the arbitrator appointment procedure.[140]

The Court concluded that the contracting parties to the Brussels Convention intended to exclude arbitration in its entirety, including proceedings brought before national courts.[141] The Court also reasoned:

'In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.'[142]

The Court of Justice also justified this holding by re-emphasising the importance of legal certainty and the need for a rule producing a clear and definite result.[143] To allow the application of the Convention to vary according to the existence and nature of a preliminary matter would undermine this legal certainty.

The *Marc Rich* case therefore lays down a subject-matter test for the applicability of the Brussels Regime, with focus on the main issue at stake in the proceedings. The focus is put on the main issue before the court to avoid creating uncertainty when a

[140] These so-called 'torpedo' actions have been much discussed for a number of years, both in and out of the arbitration context. See TC Hartley, 'How to Abuse the Law and (Maybe) Come Out on Top: Bad-Faith Proceedings under the Brussels Jurisdiction and Judgments Convention', in JAR Nafziger and SC Symeonides (Eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (2002) 73-75 and 77-78.
[141] *Marc Rich*, para 18.
[142] *Marc Rich*, para 26.
[143] *Marc Rich*, para 27, citing Case 38/81 *Effer SpA v Kantner* [1982] ECR 825, para 6.

preliminary issue must be decided, even if the Brussels Regime would in theory apply differently to this preliminary issue than to the main issue.

Thus in the *Marc Rich* case the proceedings before the Regional Court of Genoa fell within the scope of the Brussels Convention, as would that court's decision on the validity of the arbitration agreement. In theory, this meant that the court's decision on the validity of the arbitration agreement would be enforceable in other Convention states, and that the *lis pendens* rule of the convention would operate to prevent the litigation of that dispute or that preliminary question before other Brussels Convention state courts. However, where proceedings in the other Convention state are ancillary to arbitration, such as where there are proceedings to appoint an arbitrator, the Convention cannot apply by virtue of the arbitration exclusion. The *lis pendens* rule in the Convention does not apply to and cannot interfere with these proceedings, notwithstanding that the courts must answer an identical preliminary question in each case.

This ruling can be seen as a positive, pro-arbitration decision. It protects arbitration agreements from torpedo actions and allows national arbitration laws to function free from interference from European private international law. As will be discussed below, it may not provide a perfect system, but the *Marc Rich* was an absolutely necessary development for a Brussels Regime that excludes arbitration yet still envisages that arbitration will take place within its contracting states.

(2) The *van Uden* case

In the late 1990s, the Court of Justice would again be asked to consider the arbitration exclusion, this time in the context of provisional and protective measures. It would reach a decision arguably inconsistent with that in *Marc Rich*.[144]

In *van Uden*, van Uden entered into a charter agreement with Deco-Linecargo. Van Uden was to provide space on board a liner service and Deco-Linecargo in turn to pay

[144] E Brengesjö, 'The pursuit of solutions to lis alibi pendens in international commercial arbitration' (2014) 17(2) *Int ALR* 43 ('Brengesjö') 50-51, especially n 68.

charter hire. The agreement contained an arbitration clause for arbitration in the Netherlands.

Van Uden commenced arbitration under the agreement for payment of unpaid invoices – a simple contractual claim – and also requested the District Court of Amsterdam to order interim payment of the invoices to maintain its cash flow. To do so was compatible with the then Dutch arbitration law. Deco-Linecargo was however based in Germany, so even had there been no arbitration clause, the Dutch court could not have taken jurisdiction over the substance of the dispute under the Brussels Convention, because both the domicile of the defendant and place of performance of the obligation in question – payment – were in Germany.[145]

The District Court ordered interim payment to be made, though its decision was overturned on appeal. Upon further appeal to the Supreme Court of the Netherlands, a preliminary reference was made to the Court of Justice. The questions referred included whether the existence of an arbitration clause in a contract affects the ability of a court to order interim measures by way of a provisionally enforceable Brussels Convention judgment in respect of a claim for payment under that contract.

Courts having jurisdiction over the substance of a dispute under the Brussels Convention are generally accepted to have jurisdiction to issue interim measures without relying on the provisions on provisional and protective measures in *ex* Art 24.[146] In this case, however, because the arbitration clause excludes the jurisdiction of all courts for the purposes of the Brussels Convention, the only way that a court could found jurisdiction to issue an enforceable judgment for interim measures was on Art 24, which provides:

> 'Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'[147]

[145] Arts 2 and 5 (1) Brussels Convention.
[146] *Van Uden*, above, para 19; M Partegas Sender, 'Art 31' in Magnus and Mankowski, above, 611.
[147] *Van Uden*, above, paras 24 and 25.

It was argued by Deco-Linecargo and the UK government that interim proceedings were 'intrinsically bound up with' the arbitration proceedings, and therefore must fall within the exclusion of arbitration at Art 1 (4). Van Uden and the Commission argued that an arbitration agreement does not exclude an application to a court for interim measures enforceable under the Convention.

The decision in *Marc Rich* would seem to support the former view: all proceedings ancillary to arbitration should be excluded from the scope of the convention in their entirety, and the exclusion is to be given a wide reading.[148] The court had, however, previously developed a line of case law that provisional measures were not incorporated in the Convention by virtue of their own nature as provisional measures, but by virtue of the nature of the rights they served in any given instance to protect.[149] It had also held that Art 24 could not be relied upon to bring within the scope of the Brussels Convention provisional and protective measures relating to matters otherwise excluded from its scope, such as matters concerning matrimonial property or family law.[150]

The court therefore faced the task of deciding whether a request for interim measures in a dispute subject to arbitration should be characterised as ancillary to that arbitration, and therefore excluded from the Convention, or as protecting the substantive rights asserted in the arbitration, and therefore capable of inclusion if those substantive rights fell within the scope of the Convention. It ultimately took the latter route, holding that: 'provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights.'[151]

In this case, the right to be protected was, according to the Court of Justice, a contractual claim for payment, which falls within the scope of the Convention.[152] This is where the Court of Justice's decision is ultimately made: as one of characterisation.

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[148] *Marc Rich*, above, para 18.
[149] Case C-261/90 *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* [1992] ECR I-2149 ('*Reichert*'), para 32; Case 143/78 *Jaques de Cavel v Louise de Cavel* [1979] ECR 1055 ('*De Cavel*'), para 8.
[150] *Reichert*, above, para 32; *De Cavel*, above, para 9.
[151] *Van Uden*, above, para 33.
[152] *Van Uden*, above, para 37.

Had the court decided to characterise the right being protected as 'a claim in arbitration', which it could conceivably have done, then the judgment on interim measures would have been excluded from the scope of the Brussels Convention, even if the application for interim measures in itself was not considered inherently ancillary to arbitration. In this way, the court could have excluded the application of the Convention in a fashion consistent with its previous case law. As soon, however, as the right being protected is characterised as contractual, it must fall within the scope of the Convention to remain consistent with previous jurisprudence.

It has also been argued that interim and protective measures in support of arbitration proceedings fall not only outwith the scope of the Brussels Convention, but also outside the scope of the language of Art 24 itself. This is because Art 24 of the Brussels Convention could be read as only applicable when the *courts* of one contracting state have jurisdiction over the substance of the dispute.[153] In this case, no court, but rather an arbitral tribunal, has jurisdiction over the substance of the dispute.

The language of Art 24 is not clear and does not necessarily lead to this conclusion. However, the rationale behind Art 24 appears to be to prevent the jurisdictional rules of the Convention being used to deny access to provisional measures when the court able to issue effective preliminary measures would not have jurisdiction over the substance of the dispute. In light of this, the requirement of a 'real connecting link' between the territorial jurisdiction of the court seised under Art 24 and the provisional relief sought[154] makes sense. Furthermore, it is open to question whether Art 24 was ever meant to allow internationally enforceable provisional measures, or simply to allow courts with territorial jurisdiction to issue interim measures notwithstanding that they did not have jurisdiction over the substance of the dispute.[155] Finally, it should be noted that the granting of provisional measures in support of arbitration proceedings

[153] G Maher and BJ Rodger, 'Provisional and Protective Remedies: The British Experience of the Brussels Convention' (1999) 48 *ICLQ* 302 ('Maher and Rodger (1999)'), 316; BJ Rodger, 'Interim relief in support of foreign litigation?' (1999) 18 *CJQ* 199, 200.
[154] *Van Uden*, above, paras 40-47.
[155] Partegas Sender, above, in Magnus and Mankowski, above, 611; Maher and Rodger (1999), above, 309.

tends to be treated as a matter of domestic arbitration, rather than general procedural, law.[156]

If the rationale of Art 24 is indeed to prevent the ordinary jurisdictional rules of the Convention from interfering with the granting of provisional measures, then the application of Art 24 in cases in which the ordinary jurisdictional rules of the Convention do not apply makes little sense. Further, if most countries view provisional measures in support of arbitration to be a matter of arbitration law, it would seem far easier to say that provisional measures in support of arbitration should be excluded from the Convention, and therefore available from any court in any country that would ordinarily issue such measures in support of arbitration proceedings according to its own arbitration law, rather than under the Brussels Convention.

At any rate, the importance for this thesis of the *van Uden* decision is the scope it gives to the arbitration exclusion. The case demonstrates the difficulty in defining the precise meaning of the exclusion, especially when compared with *Marc Rich*. As stated above, the two decisions have been argued to be inconsistent,[157] though scholars have equally argued that the two are reconcilable.[158] Whether the cases are consistent is as debateable as the characterisation of the rights being protected by the interim proceedings in *van Uden*, and both questions serve only to show the difficulty with which the arbitration exclusion has come to be defined.

(3) The *West Tankers* case

Perhaps the most famous, or infamous, arbitration case to come before the Court of Justice is *West Tankers*.[159] As in *Marc Rich*, the facts are somewhat complicated and require a relatively detailed retelling.

In August 2000 a ship owned by West Tankers and chartered by an Italian party collided with and damaged a dock owned by the latter in Syracuse, Italy. The charterparty contained a clause for arbitration of disputes in London. The Italian party

[156] See, for example, Art 17J UNCITRAL Model Law (2006).
[157] Brengesjö, above, 50-51.
[158] I Yoshida, 'Lessons from The Atlantic Emperor: Some Influence from the Van Uden Case' (1999) 15(4) *Arb Intl* 359, 364-366.
[159] *West Tankers*, above.

was indemnified by its Italian insurers up to the limit of its policy, and recovered the balance of damages from West Tankers in London arbitration without incident.

The insurers then began a subrogated action before the Italian courts in Syracuse to recover from West Tankers the sum paid out under the insurance policy. The action before the court was in tort and, but for the potentially effective arbitration clause, the Italian courts would have had jurisdiction under the Brussels I Regulation, which had by then largely superseded the Brussels Convention, as Italy was the place where the harmful event occurred.[160] West Tankers objected to the jurisdiction of the Syracuse court on the basis of the arbitration agreement contained in the original charterparty.

While that action was pending, West Tankers applied to the English courts for a declaration that the dispute was subject to arbitration and an anti-suit injunction restraining any proceedings by the insurer other than London arbitration. This was granted because under English law a party pursuing a subrogated right is also subrogated into an arbitration clause binding on the original parties to the dispute.[161] The same is not necessarily true in Italian law, and though the New York Convention points to the law of the seat of the arbitration (in this case English law) as the appropriate law to resolve this question, it is unclear what result the Italian court might have reached as to its own jurisdiction. [162] The insurer appealed the anti-suit injunction to the House of Lords, which made a preliminary reference to the Court of Justice on the question:

'Is it consistent with [the Brussels I Regulation] for a court of a Member state to make an order to restrain a person from commencing or continuing proceedings in another Member state on the ground that such proceedings are in breach of an arbitration agreement?'[163]

Several previous Court of Justice decisions provide relevant context to the decision in *West Tankers*. The first is *Turner*, in which the Court held that the English courts were not entitled to issue an anti-suit injunction to restrain vexatious proceedings before a

[160] Art 5 (3) Brussels I Regulation.
[161] *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm), [2005] 2 Lloyd's Rep 257.
[162] Art V (1) (a) New York Convention.
[163] *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA and Others* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391 ('*West Tankers* (HL)'), para 23.

Spanish court.[164] This decision is rooted in the mutual trust that is supposed to exist between the European member states and the fact that anti-suit injunctions represent an interference with the jurisdiction of a foreign court.[165] The *Turner* decision also took place against the background of a continental European tradition that rejects the anti-suit injunction as a common-law remedy that is offensive to sovereignty and the principles of comity.[166]

Further relevant cases are those in which the Court of Justice has held that a member state court must be allowed to determine its own jurisdiction under the Brussels Regime without interference from the courts of other member states.[167] These cases are obviously of some relevance to the question of whether a court can enjoin Brussels I Regulation proceedings in another member state in defence of an arbitration agreement.

Several factors, however, could have set the *West Tankers* judgment apart from these previous cases. The main factor was the arbitration exclusion, and the scope already given to the exclusion in the *Marc Rich* case, which held that the existence of an action on the merits in another member state should not interfere with court proceedings in support of arbitration.[168] Ancillary proceedings should therefore theoretically be

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[164] Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit and others* [2004] ECR I-03565 ('*Turner*').
[165] Ibid, paras 24-27.
[166] *Re the Enforcement of An English Anti-Suit Injunction* Case 3VA 11/95 Oberlandesgericht (Regional Court of Appeal) Düsseldorf 10 January 1996, [1997] ILPr 320, paras 5, 12; CMV Clarkson and J Hill, *The Conflict of Laws* (3rd edn, 2006), 152-153; J Harris, 'Restraint of Foreign Proceedings--The View from the Other Side of the Fence' (1997) *CJQ* 283; JJ Barceló III, 'Anti-Foreign-Suit Injunctions to Enforce Arbitration Agreements' in A Rovine (Ed), *Contemporary Issues in International Arbitration and Mediation* (2007) 107 ("Barceló, 'Anti-Foreign-Suit Injunctions'"), 111; R Fentiman, 'Anti-Suit Injunctions--Comity Redux?' (2012) 71 *CLJ* 273; T Kruger, 'The Anti-Suit Injunction in the European Judicial Space: Turner v Grovit' (2004) 53 *ICLQ* 1030 ('Kruger'), 1033; C Ambrose, 'Can Anti-Suit Injunctions Survive European Community Law?' (2003) 52 *ICLQ* 401, 404-410. The anti-suit injunction is used in England, and a similar tool – the anti-suit interdict – has been used in Scotland. See *Pan American World Airways v Andrews* 1992 SLT 268 OH; *Shell UK Exploration and Productions Ltd v Innes* 1995 SLT 807 OH; Maher and Rodger, above, 118-120.
[167] *Turner*, above; Case C-351/89 *Overseas Union Insurance and Others v New Hampshire Insurance Company* [1991] ECR I-3317 ('*Overseas Union*'), in which it was held that, absent exclusive jurisdiction, the *lis pendens* rule in Art 21 Brussels Convention required a later-seised court to stay proceedings until conclusion of proceedings in the first-seised court without conducting its own review of the first-seised court's jurisdiction; Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693 ('*Gasser*'), in which it was held that a later-seised court that may have had jurisdiction under Art 17 Brussels Convention due to a prorogation agreement had to stay proceedings under Art 21 until the first-seised court had ruled on its own jurisdiction.
[168] *Marc Rich*, above, paras 26-29.

allowed to proceed free from interference by the Brussels I Regulation. Furthermore, since *The Angelic Grace*,[169] the English courts had readily issued anti-suit injunctions in support of arbitration, and commentators, including even some eminent civilian scholars in the Heidelberg Report, have argued that the protection of an arbitration agreement is a situation in which issuing an anti-suit injunction could be considered justifiable.[170] Finally, it should be noted that London is one of the few truly thriving international arbitration hubs in Europe, and it was feared that any interference with England's arbitration procedure might harm London's arbitration practice.[171] In the totality of the circumstances, and especially because of the arbitration exclusion, it was entirely conceivable that the Court of Justice might deviate from its previous line of reasoning, described above.

The Court, however, remained consistent in its approach to the anti-suit injunction. It ruled that the Italian action, as a claim in tort, fell within the scope of the Regulation, holding: 'because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of [the Brussels I Regulation], a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application'.[172]

Combined with the previous jurisprudence of the court, this means that a court seised with a merits action must be allowed to determine its own jurisdiction, including the validity of the alleged arbitration agreement.[173] This is true even where another Member State court has referred the parties to arbitration in ancillary proceedings, because that judgment is excluded from the Regulation and has no automatic effect under the Regulation outwith the territory of the state in which it was issued. In *West Tankers*, the English courts had to allow the Italian proceedings to run their course,

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[169] *Aggeliki Charis Compania Maritima SA v Pagnan SpA ('The Angelic Grace')* [1995] 1 Lloyd's Rep 87 (CA) ('*The Angelic Grace*').
[170] *Heidelberg Report*, above, para 123; Barceló, 'Anti-Foreign-Suit Injunctions', above, 108.
[171] A Trukhtanov, 'Anti-suit injunctions in support of arbitration – is the ECJ about to take away the English court's powers?' (2007) 10 *Int ALR* 136; B Steinbruck, 'The impact of EU law on anti-suit injunctions in aid of English arbitration proceedings' (2007) 26 *CJQ* 358. See also *West Tankers* (HL), above, paras 17-21.
[172] *West Tankers*, above, para 26.
[173] *Ibid*, para 29.

and the Italian court to determine whether it would accept jurisdiction under the Regulation or refuse it under New York Convention Art II (3) or its own implementing legislation.[174] The mutual trust between the courts of the member states required this result.[175]

The outcome was that, although the English proceedings for a declaration that the dispute is subject to arbitration and for an anti-suit injunction fell outwith the scope of the Brussels Regime, the English court was not competent to issue an injunction to restrain proceedings falling within the Regime's scope. This arguably demonstrates less about the scope of the exclusion of arbitration and more about the interaction of excluded proceedings with Brussels Regime proceedings, on which view *West Tankers* and *Marc Rich* are in fact consistent.

Criticism of the *West Tankers* decision has been heated, but has largely focussed on its implications for English practice and for the future of London as an arbitration venue.[176] It has also been criticised for removing the anti-suit injunction from the English procedural armoury without fashioning an acceptable replacement under the Regulation, such as the *lis pendens* rule covering court proceedings.[177] These criticisms aside, the decision is consistent with the Court of Justice's previous rulings on the arbitration exclusion in *Marc Rich*, on anti-suit injunctions in *Turner*, and on the right of a court to assess its own jurisdiction under the Brussels Regime in *Overseas Union*, *Turner*, and *Gasser*. It is difficult to see what other conclusion the court could have reached without departing from at least some of its earlier decisions.

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[174] Ibid, paras 28, 33.
[175] Ibid, para 30.
[176] See S Dutson & M Howarth, 'After West Tankers – the rise of the 'foreign torpedo'?' (2009) 75 *Arbitration* 334; SP Camilleri, 'The Front Comor – the end of arbitration as we know it?' (2010) 6 *CSLR* 214; J Tumbridge, 'European anti-suit injunctions in favour of arbitration agreements – a sea change?' (2010) 21 *ICCLR* 177; H Seriki, 'Anti-suit injunctions, arbitration and the ECJ: an approach too far?' (2010) 1 *JBL* 24; Y Baatz & A Sandiforth, 'A setback for arbitration' (2009) *STL* 1; J Chuah, 'Serious blow to international commercial arbitration: The Front Comor' (2009) 57 *SLR* 53. See also: A Dickinson, 'Dickinson on West Tankers: Another One Bites the Dust', *Conflict of Laws Blog,* 11 February 2009, (http://conflictoflaws.net/2009/dickinson-on-west-tankers-another-one-bites-the-dust) (last accessed: 21 April 2015); J Harris, 'Harris on West Tankers', *Conflict of Laws Blog,* 12 February 2009, (http://conflictoflaws.net/2009/harris-on-west-tankers/) (last accessed: 21 April 2015).
[177] NA Dowers, 'The anti-suit injunction and the EU: legal tradition and Europeanisation in international private law' (2013) 2(4) *CJICL* 960 ("Dowers, 'The anti-suit injunction and the EU'"), 970-973.

(4) The *Gazprom* case

The *Gazprom* case concerned a dispute between shareholders in a Lithuanian natural gas company. The principal shareholders at the relevant time were Gazprom (Russia), EON (Germany), and the Lithuanian Ministry of Energy. The three were party to a shareholders' agreement concluded in 2004 that contained an arbitration clause.

In 2011, the Ministry of Energy began proceedings in the Vilnius District Court requesting an investigation into the activities of a legal person. The proposed subject of the investigation was the natural gas company, its general manager, and two of its board members, who were Russian nationals appointed by Gazprom.

Gazprom believed that these court proceedings violated the arbitration clause in the shareholders' agreement and commenced arbitration against the Ministry of Energy at the Stockholm Chamber of Commerce. The arbitral tribunal issued an award ordering the Ministry to withdraw or amend some of its claims before the Vilnius District Court. The award did not include penalties for non-compliance.

The Vilnius District Court ignored the arbitral award, holding that an investigation of the activities of a legal person fell within its jurisdiction and was not capable of settlement by arbitration. On appeal, the Supreme Court of Lithuania, considering the arbitral awards to amount to an anti-suit injunction, referred some questions relating to the dispute to the Court of Justice.[178] The questions referred included, *inter alia*:

'Whether, if an arbitral tribunal issues an antisuit injunction by which it restricts a party from bringing a case with certain claims before a court of a Member State, which, under the rules of jurisdiction in the Brussels I Regulation, has jurisdiction to rule on the merits of the civil case, the court of a Member State has the right to refuse to recognize such arbitral award, because the award restricts the court's right to determine itself whether it has jurisdiction in the case under the rules of jurisdiction in the Brussels I Regulation.'

And:

[178] *Lithuania No 2 – OAO Gazprom v The Republic of Lithuania, represented by the Ministry of Energy of the Republic of Lithuania*, Court of Appeal of Lithuania, 17 December 2012; *Civil Case No 3K-7-326/2013*, Supreme Court of Lithuania, 10 October 2013, (2013) XXXVIII YBCA 417 ('*Lithuania No 2*').

'Can a national court, seeking to safeguard the primacy of EU law and the full effectiveness of the Brussels I Regulation, refuse to recognise an award of an arbitral tribunal if such an award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the scope of the Brussels I Regulation?' [179]

This case was decided under the Brussels I Regulation, not the Brussels I Recast, the proceedings having been started before January 2015. The two quoted questions appear to ask roughly the same thing: whether or not a member state court can refuse to recognise and enforce an arbitral award that constitutes an anti-suit injunction because of the provisions of the Brussels Regulation. The right to refuse enforcement of an arbitral award can only be exercised under the New York Convention, and, as far as protecting the jurisdiction regime of the Brussels I Regulation is concerned, only under the public policy exception at Art V (2) (b). In other words, even if the provisions of the Brussels I Regulation obligate the enforcing state to refuse to recognise and enforce an arbitral award, the actual refusal of enforcement will take place under the New York Convention's public policy exception. The questions can therefore be treated as asking whether the Brussels Regulation scheme of jurisdiction gives rise to a public policy defence to the recognition and enforcement of an arbitral award under Art V (2) (b) New York Convention. The difference between the two is that the former question effectively asks whether the provisions of the Regulation *obligate* the enforcing country to refuse recognition and enforcement of the award, and the second asks, if the first question is answered negatively, whether the provisions nonetheless *permit* non-enforcement.

The Court of Justice took a narrow approach to the questions asked, only answering those questions actually put to it in the precise scenario put to it. This meant answering only whether the jurisdiction provisions of the Brussels Regulation (not the Recast) can oblige or allow a member state court to find public policy grounds to refuse recognition and enforcement of this specific kind of arbitral anti-suit injunction under the New York Convention. The Court held that it is permissible to enforce such an arbitral anti-suit injunctions because an arbitral tribunal is not subject to the same requirement to act in a spirit of mutual trust as a national court, and because the

[179] *Lithuania No 2*, above, para 81.

question of recognition and enforcement of the award was to be decided under the New York Convention or implementing national legislation.[180] This holding may however be limited on its facts to the situation where the arbitral anti-suit injunction does not carry a penalty and therefore its recognition cannot prevent the court of a second member state from ruling on its own jurisdiction under the Brussels I Regulation.[181] In that situation, the court addressed by the anti-suit injunction can decide freely whether or not to enforce the award, thereby deciding on its own jurisdiction.

Under the Brussels I Regulation, there remains an argument that a member state court should not enforce an arbitral award that constitutes a true anti-suit injunction – i.e. one that provides for penalties for non-compliance – against the jurisdiction of another member state court. This is because, in *West Tankers*, the English courts were prohibited from issuing an anti-suit injunction in ancillary proceedings falling entirely outwith the scope of the Brussels I Regulation, because to do so would interfere with the Regulation jurisdiction of another member state court, thereby undermining the spirit and purpose of the Regulation. There is no obvious reason why the approach to enforcing an arbitral award that does the same thing should be any different. Even if the New York Convention takes precedence over the Brussels I Regulation, it may only to do so insofar as it is consistent with the aims and purposes of the Regulation.[182] The Court of Justice certainly emphasised the lack of penalties for non-compliance as distinguishing the arbitral anti-suit injunction in *Gazprom* from the state-court-issued anti-suit injunction in *West Tankers*.[183] It may therefore be argued that, as a matter of European Union policy, the correct approach to a true arbitral anti-suit injunction

[180] *Gazprom*, above, para 37, '…so far as concerns the principle of mutual trust […] it must be pointed out that, in the circumstances of the main proceedings, as the order has been made by an arbitral tribunal there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State', paras 42-44.
[181] Ibid, para 40, '…unlike the injunction at issue in the case which gave rise to the judgment in [*West Tankers*], failure […] to comply with the arbitral award […] is not capable of resulting in penalties being imposed […] by a court of another Member State. It follows that the legal effects of an arbitral award such as that at issue in the main proceedings can be distinguished from those of the injunction at issue in the case which gave rise to that judgment.'
[182] See *TNT*, above. Although the Court of Justice distinguished *TNT* in the *Gazprom* decision because it governs an area that is not included in the scope of the Regulation (arbitration), it may be that if the exercise of New York Convention obligations interferes with the Brussels I Regulation jurisdiction scheme by preventing the court of another member state from assessing its own jurisdiction, the enforcing court would still be obliged to uphold those principles.
[183] *Gazprom*, above, para 40.

would be to refuse enforcement, and that the *Gazprom* decision can be limited to the situation where an arbitral 'anti-suit injunction' does not provide for penalities for non-compliance.

The second question was ignored by the Court of Justice, but if it were to have been answered, the Court would have been very unlikely to state what should or should not be considered part of a member state's public policy under New York Convention Art V (2) (b). The Court has refused to determine what forms part of a member state's public policy even under the Brussels Regime, though it has been willing to give general guidance on how to determine what rises to the level of European public policy.[184] If determining the content of member state public policy under the Brussels Regulation is *ultra vires* the Court of Justice, then so must be determining the content of public policy under the New York Convention. Indeed, even suggesting what might be considered public policy under the New York Convention is clearly far beyond the remit of the Court.

The *Gazprom* decision addresses a very narrow set of facts and adds little to the understanding of the arbitration exclusion under the Brussels I Regulation. It is consistent with *West Tankers*, unless it can be understood to mean that a genuine anti-suit injunction against the jurisdiction of a member state court issued by an arbitral tribunal and providing for penalties for non-compliance could be freely enforced in any other EU member state. It is submitted that *Gazprom* is actually limited on its facts to arbitral anti-suit injunctions that do not provide for penalties for non-compliance, and therefore cannot prevent a member state court from ruling on its own jurisdiction. In this sense, it is submitted, the decision is entirely consistent with *West Tankers*.

(5) The scope of the exclusion summarised

What emerges from these cases is a subject-matter test: the substantive issue of the case before a national court determines the applicability of the Brussels Regime. The fact that a preliminary matter of the validity of the arbitration clause would logically seem to be excluded from the scope of the Brussels Regime is irrelevant – that

[184] See *Krombach* and *Maxicar*, above.

preliminary matter is secondary to the substantive question before the court. Proceedings ancillary to arbitration are excluded from the scope of the Brussels Regime, are not subject to interference from Brussels Regime proceedings, but equally cannot prevent the continuation of proceedings that do fall within the Regime's scope. The exception to this rule is the provision of interim measures, where one must look beyond the arbitration agreement to the substantive rights to be protected in determining the applicability of the Brussels Regime.

B. Consequences of exclusion

The scope of the exclusion from the Brussels Regime being established, it is now necessary to identify the problems that the given scope creates or exacerbates. This section of this chapter will examine the problems caused by the exclusion of arbitration with reference to relevant cases. The problems identified will include: the problem of scope itself; the parallel proceedings problem; the declaratory judgment problem; the treatment of various judgments relating to arbitration; and the problem of conflict between awards and judgments. This section will conclude with the argument that these issues – many of them commonplace in the rest of the world – are particularly problematic within Europe under the Brussels Regime. Where any of the analysis presented here has potentially been changed under the Brussels I Recast, this will be noted in passing and will be subject to further discussion in the next chapter.

(1) The scope of the exclusion

As has been identified above, defining the scope of the blanket exclusion of arbitration has caused difficulty. Litigation directly concerning the scope of the arbitration exclusion has come before the Court of Justice four times, producing arguably inconsistent results. *Van Uden* is arguably inconsistent with *Marc Rich*, as it undermines the notion of a broad and all-encompassing arbitration exclusion.[185] *West Tankers* again has been argued to be inconsistent with *Marc Rich* and *van Uden* as the Brussels Regime appears to interfere with proceedings excluded from its scope, thereby indirectly expanding that scope.[186] *Gazprom* may in turn be inconsistent with

[185] Brengesjö, above, 50-51.
[186] *West Tankers (HL)*, above, paras 13-15.

West Tankers as it may reintroduce the indirect restraint of foreign proceedings by the back door. Whilst these arguments on inconsistency really depend on the focus placed on different parts of the judgments, they serve to underline the complexity of defining the scope of the exclusion in a consistent and predictable fashion.

The scope of the exclusion has now been defined more fully by way of a recital to the Brussels I Recast. As will be discussed below, the recital far from resolves all the issues about the scope of the arbitration exclusion. There may yet be the need for further litigation to address new scope-based concerns.[187]

The recurring need for litigation and legislative reform to define the scope of the exclusion signifies the confusion and the difficulty that it has caused. The may link back to the discussion in the previous chapter of how the arbitration exclusion may have been included less as a thoroughly thought out rule and more to simplify the process of the conclusion of the Brussels Convention. A poorly justified, poorly thought out, and vague rule will inevitably necessitate more judicial intervention than would a clear and well-thought out rule. It is at any rate submitted that the difficulties in defining and redefining the scope of the arbitration exclusion are themselves a problem with the exclusion as originally drafted. It is furthermore highly unlikely that these problems have been resolved by the detail included in the recitals to the Brussels I Recast.

(2) Parallel proceedings

In September 2007, the Heidelberg Report on the Brussels I Regulation was published ahead of the recasting process which would culminate in the Brussels I Recast. The

[187] See J Beraudo, 'The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgments' (2001) 18(1) *J Int'l Arb* 13, 25, for a discussion of how any rules laid down with respect to the exclusion are unlikely to signal the end of future litigation; NA Dowers and D Holloway, 'Brussels I Recast passed' (2013) 16(2) *Int ALR* N18 ('Dowers and Holloway'), for a brief discussion, in part by this author, of the changes made by the Brussels I Recast and the gaps that still remain. See also Chapter 4 of this thesis.

report was the result of a two-year consultation[188] with officials from the then 28 member state jurisdictions in which the Regulation applies.[189]

Question 1.5 of questionnaire 3 reads: 'Should the scope of application be extended, especially to incorporate arbitration and mediation proceedings?' The vast majority of the officials that responded to the questionnaire answered in the negative in respect of arbitration, believing that the New York Convention created a sufficient international structure for the enforcement of arbitral agreements and awards, thereby repeating the standard justification for the arbitration exclusion.[190] The few positive responses generally came from countries with relatively little involvement in international arbitration and were either sparsely reasoned or unreasoned.[191] Many of the negative responses to the questionnaire did, however, raise concerns about the interface between the Regulation and arbitration. These concerns will be given central importance in this and the following subsections of this thesis.

The problem that has been described as the most serious at the interface between the Brussels Regime and arbitration is that of parallel proceedings.[192] 'Parallel proceedings', as the name may suggest, occur when the same issue is simultaneously litigated in more than one different forum. This is obviously undesirable as it is inefficient, creates uncertainty, and can result in a race to judgment or the existence of conflicting decisions in the same case, contrary to the aims and purposes of the Brussels Regime.[193]

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[188] *Compilation of All National Reports (Questionnaire No 3)* Study JLS/C4/2005/03 ('Heidelberg Study').
[189] The 27 then member states and Scotland, whose legal system is separate from the rest of the UK.
[190] The sole respondents from Austria, Belgium, Cyprus, England, Finland, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands and Scotland responded this way, along with two out of three respondents from the Czech Republic and one of two respondents from Spain.
[191] The positive Czech and Spanish responses, the Lithuanian and Slovenian responses were unreasoned. The positive Greek response was reasoned solely on the basis that the inclusion of arbitration in the Art 34 (3) and (4) grounds for refusal to enforce a judgment would correspond with current Greek practice. The Portuguese response was based mainly on the argument that the inclusion of arbitration in the Brussels I Regulation would create a better system for enforcement of arbitration agreements than the New York Convention.
[192] Radicati, 'Seeds of Home Country Control', above, 424.
[193] This will be discussed in more detail below, but see Recital 12 Brussels I Regulation; the *lis pendens* rule at Art 21 Brussels Convention; Art 27 Brussels I Regulation.

The arbitration exclusion as defined by the Court of Justice contributes to the parallel proceedings problem in the following way. Because of the arbitration exclusion, when a dispute is subject to an arbitration agreement, proceedings in one member state to begin arbitration under that agreement do not preclude court proceedings in another member state seeking a determination on the merits, despite the fact that both courts will have to decide on the validity of the arbitration agreement as a preliminary matter. Similarly, the commencement of proceedings before an arbitral tribunal will have no effect on the availability of proceedings on the merits before another member state court.

It may be that the court at the seat of arbitration or the arbitral tribunal on the one hand and the court in a second member state hearing a merits action on the other will reach the same conclusion as to jurisdiction. In a case where the arbitration agreement is valid at the seat of the arbitration, that would mean the court hearing the merits action should refer the parties to arbitration under Art II (3) New York Convention or its own implementing legislation. In this case the party pursuing a claim in arbitration will have had to expend resources contesting the jurisdiction of the court hearing the merits action in the second member state on the basis of the arbitration agreement. This may even prove impossible in cases where there is a financial imbalance between the parties, or the party pursuing a claim in arbitration could find itself so frustrated or financially exhausted by the whole saga that it agrees to settle the case when it otherwise may not have.[194] This leaves real scope for 'guerrilla warfare' or tactical litigation by the respondent in the arbitration.

Although such parallel litigation of the validity of the arbitration agreement is objectionable, this situation may also foreseeably develop into the dual litigation of the dispute as a whole. Different courts seised of the same problem may apply different

[194] See the survey by Robert Force, summarised in R Force, 'Chapter 1' in M Davies (Ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force* (2005). The survey reveals that parties to maritime disputes are far more disposed to settle a claim after the court first seised declines jurisdiction because of an arbitration agreement or choice of court agreement in favour of another court. Parallels are drawn tentatively as the survey dealt exclusively with maritime claims rather than commercial claims in general, but it is submitted that this is a better indication of parties' reactions to litigation in the 'wrong' forum, tactical or otherwise, than anecdotal evidence or assertions.

law, or simply reach different conclusions on the facts.[195] It is possible, then, that an arbitration agreement is valid at the seat, but is found to be somehow invalid by a court otherwise having jurisdiction under the Brussels Regime. The result would be the parallel arbitration and litigation of the entire dispute. Followed to its logical conclusion, this could also mean the existence of conflicting awards and judgments in the same dispute.

The German response to the Heidelberg Study identified this problem.[196] The authors of the Heidelberg Report itself even highlighted the need for a device 'as effective as an English anti-suit injunction or the French doctrine of the negative effect of the competence-competence,'[197] to discourage the bad-faith 'obstruction' of arbitration agreements.[198] As stated above, parallel proceedings have also been described in scholarship as 'the most serious of the many debated issues' surrounding the arbitration exclusion,[199] while the English unrest at the prohibition of the anti-suit injunction in *West Tankers*, summarised above, is clearly based on concern that the Commercial Court has been deprived of its power to restrain parallel proceedings in order to protect arbitration agreements.

The desire to address the difficulties caused by parallel proceedings is plainly evident as the *West Tankers* saga rumbles on into a new decade, with English lawyers and courts seeking new ways to defend agreements to arbitrate. The *West Tankers* case began with a maritime collision in the year 2000. It was referred to the Court of Justice in 2007, and judgment on the preliminary reference was handed down in early 2009. It would have been optimistic to assume the protracted litigation would end there.

In 2008 the arbitral tribunal seised of the dispute issued an award stating that West Tankers was not liable to Allianz in respect of the collision. Allianz had taken no part in the arbitration. After the Court of Justice ruling was handed down in 2009, the insurer continued its action before the Italian courts in the hope of obtaining judgment

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[195] Barceló 'Anti-Foreign-Suit Injunctions', above, 111-112.
[196] The current state of the law 'may impair the judicial predictability in the European Judicial Area. This current situation is not satisfactory.' Heidelberg Study, above, 64.
[197] Note that the report was published before the Court of Justice handed down judgment in *West Tankers*.
[198] *Heidelberg Report*, above, para 123.
[199] Radicati, 'Seeds of Home Country Control', above, 424.

against West Tankers. In 2010 Simon J granted leave to enforce the arbitral award as a judgment in England under s 66 (1) and (2) Arbitration Act 1996. West Tankers hoped thereby to pre-empt any attempt to enforce an Italian judgment against it in England, because such enforcement would thereafter be contrary to a judgment already rendered between the parties in England.[200]

Allianz then sought to have the order that the award be entered as a judgment set aside on the basis that the court lacked jurisdiction to make such an order.[201] The order was upheld, Field J ruling that West Tankers had demonstrated that it 'has a real prospect of establishing the primacy of the award over an inconsistent judgment.'[202] This decision was upheld on appeal.[203]

It may well be that this enforcement of a declaratory award serves as protection against the enforcement of a subsequent judgment in the English courts, and commentators have welcomed the decisions.[204] It cannot, of course, serve to protect against enforcement of a judgment under the Brussels Regime in any other member state. This is because 'judgments on judgments' – that is, decisions to recognise and enforce a judgment or to refuse the same – do not fall within the scope of the Brussels Regime.[205] An enforcement action in a third member state would therefore most likely fall to be decided as a question of competing public policies.[206]

Since then, the *West Tankers* litigation has been back before the English courts. This time it appeared in the form of an appeal on a point of law under s 69 Arbitration Act 1996 against the decision of the arbitrators that they could not issue damages against

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[200] Art 34 (3) Brussels I Regulation. Although this approach may at first seem unlikely to succeed, see the judgment in Case C-145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR I-00645, in which a decree of divorce granted in the Netherlands, which fell outside the scope of the Brussels Convention, was irreconcilable with and could justify the refusal of enforcement of a German maintenance order, which fell within the Convention's scope.

[201] *West Tankers Inc v Allianz Spa* [2011] EWHC 829 (Comm), [2011] 2 Lloyd's Rep 117.

[202] Ibid, para 30.

[203] *West Tankers Inc v Allianz Spa, Generali Assicurazione Generali SpA* [2012] EWCA Civ 27.

[204] See HR Dundas, 'The West Tankers saga continues: a new twist - negative declaratory awards' (2012) 78(2) *Arbitration* 212; N Roberts and J Zadkovich, 'Case Comment – West Tankers 2012: pro-arbitration through enforcement of declaratory awards' (2012) 15(2) *Int ALR* 51.

[205] See *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485; P Wautelet, 'Art 32' in *Magnus and Mankowski*, above, 632-634.

[206] See below, Chapter 3.B.6.

legal fees and expenses incurred by West Tankers in Italy, nor could it indemnify West Tankers against any pecuniary judgment rendered against it in Italy. This claim was founded on the breach of duty to arbitrate. The High Court allowed the appeal, holding that the tribunal was free from the constraints placed on national courts by European Law, and that indemnity is a logical consequence of a declaratory award of non-liability,[207] and considered that the tribunal also had jurisdiction to award equitable damages for breach of the duty to arbitrate.[208]

This would effectively amount to the granting of an anti-suit injunction by arbitrators, an action whose legitimacy was at issue in the *Gazprom* case.[209] As has been argued above, the *Gazprom* decision does not address an arbitral anti-suit injunction that provides for a penalty for non-enforcement, so the legitimacy of the above anti-suit injunction in *West Tankers* is still dubious.

At any rate, as *West Tankers* rumbles on towards its 15th year and further similar cases come before the Court of Justice, it serves to show the lengths parties will go to in the hope of avoiding conflicting awards and judgments. The exclusion of arbitration from the Brussels Regime combined with the prohibition of anti-suit injunctions has forced parties to arbitration agreements down new and inventive roads to protect those agreements. Where next is anybody's guess.

Indeed, the arbitration exclusion and the *West Tankers* decision can be criticised on the basis that they leave no effective mechanism to resolve conflicts of jurisdiction and parallel proceedings when they do arise. This author has argued in a separate paper that the prohibition of the anti-suit injunction was inevitable, and indeed wholly desirable, in cases falling within the scope of the Brussels Regime.[210] This is because the Brussels Regime resolves conflicts of jurisdiction through its *lis pendens* rules in a fashion more consistent with the aims and principles of European Union than does the unilateral injunction of proceedings before courts in one member state by the courts

[207] *West Tankers Inc v Allianz SpA (formerly known as Riunione Adriatica Sicurta) & Anor* [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103, para 72.
[208] Ibid, para 68.
[209] *Gazprom*, above.
[210] Dowers, 'The anti-suit injunction and the EU', above, 970-973.

of another.[211] Furthermore, because the English courts had been relatively hesitant to issue anti-suit injunctions for any reason other than to protect a contractual right to sue or be sued in a particular forum, it is in fact only in a tiny minority of non-arbitration cases in which a litigant will find itself relying on the judgement of a foreign court applying the *lis pendens* rule rather than the unilateral action of an English court issuing an anti-suit injunction.[212]

This is not the case where arbitration is concerned. In *West Tankers* the Court of Justice removed the anti-suit injunction from the procedural armoury of the English courts. That it did so was understandable in the context of the ongoing project of ever-deeper European unification. What is regrettable is that it did so without providing any workable alternative to reduce or eliminate parallel proceedings to arbitration. The only hope for the prevention of parallel proceedings is now the uniform interpretation and application of the New York Convention, which, as argued in the previous chapter, is unlikely, given the variety in implementing legislation and approaches of courts, together with the lack of a supranational authority to ensure uniform application.[213] The arbitration exclusion as currently interpreted therefore not only allows parallel proceedings, but takes away the only widely acknowledged as successful, non-Regime method of preventing such parallel proceedings, albeit one that the courts of only some member states had at their disposal.[214]

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[211] Ibid, 970-971.

[212] For general hesitancy to issue anti-suit injunctions, see: *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provincien' NV* [1987] AC 24 (HL), 40; *British Airways Board and others v Laker Airways Ltd* [1985] AC 58 (HL), 81; *EI Du Pont de Nemours & Company and Endo Laboratories Inc v Agnew* [1988] 2 Lloyd's Rep 240 (CA), para 23. For willingness to issue anti-suit injunctions to protect a contractual right to sue or be sued in a particular forum, see: *Donohue v Armco Inc and others* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425, para 19 (general comments on readiness to issue such injunctions); *National Westminster Bank plc v Utrecht-America Finance Co* [2001] EWCA 658, [2001] CLC 1372, 1384 (choice of court agreements); *The Angelic Grace*, above, 94-97 (arbitration agreements).

[213] Dowers, 'The anti-suit injunction and the EU', above, 972.

[214] The effectiveness of the anti-suit injunction in preventing parallel proceedings is acknowledged by the *Heidelberg Report*, above, para 123. Although the *Heidelberg Report* also identifies the French doctrine of the negative effect of competence-competence – which entails the court declining jurisdiction in favour of an arbitral tribunal whenever the existence of an arbitration agreement not manifestly null is alleged – as another effective device in preventing tactical, it is only internationally effective insofar as it is uniformly applied in different countries. The French doctrine cannot defend arbitration in France from parallel litigation in another country.

It should be noted that these concerns are not raised as an argument in favour of taking the regressive step of reinstating of the anti-suit injunction.[215] The arguments for a more co-operative, trust-based approach to conflicts of jurisdiction are well-founded and will be expanded upon in much greater detail in later chapters.[216] This section should serve merely to highlight another difficulty of the arbitration exclusion as currently understood: that it encourages parallel proceedings and removes the member states' ability to deal with them unilaterally, while not providing an alternative solution within the Brussels Regime. As has been argued in scholarship, 'greater uniformity of European procedural laws [has] been bought at the expense of the loss of yet another sophisticated tool developed by English courts, which will take away from Europe's competitiveness in the international arbitration arena'.[217] Whilst the above author clearly writes in defence of the anti-suit injunction, it is submitted that the provision of a European alternative would significantly soften the blow of the anti-suit injunction's loss.

It can thus be seen that the possibility of parallel proceedings in arbitration is one of the most widely agreed upon and most serious issues with the exclusion of arbitration from the Brussels Regime. The importance of preventing parallel proceedings will be discussed in more detail in the following chapter, as part of an analysis of the Brussels I Recast's failure to deal with the problem. At this stage of this thesis, it is sufficient to note that problem exists and is widely acknowledged.

(3) Declaratory judgments

Another concern raised in the Heidelberg Study is that the current blanket exclusion of arbitration effectively renders declaratory judgments as to the validity or invalidity of an arbitration agreement ineffective internationally.[218] The authors of the Heidelberg Report note that, though they believe this will rarely adversely affect parties in practice, it is nevertheless an unsatisfactory situation.[219] Why the authors

[215] Dowers, 'The anti-suit injunction and the EU', above, 973.
[216] See Chapters 5.B.2 and 8.D.1 below.
[217] Trukhtanov, above, 138.
[218] See Italian, German and Portuguese responses, Heidelberg Study, above, 62-67, 69.
[219] *Heidelberg Report*, above, para 121.

consider that this problem would be of little practical significance is never explained and is not immediately obvious.

Courts will often be asked for a declaratory judgment on the validity of an arbitration agreement.[220] This action can be raised as a preliminary matter before both proceedings ancillary to arbitration or actions on the merits of a case.[221] It may be raised before the courts of the place where arbitration is intended to take place, or the courts of another country.[222]

There are therefore effectively four fact patterns in which a court may be asked for a declaratory judgment on the validity of an arbitration agreement. This section will now evaluate the effectiveness of the declaratory judgments rendered in each of these fact patterns.

(a) Ancillary action at the seat of arbitration (a member state)
(b) Ancillary action in the courts of another member state
(c) Merits action at the seat of arbitration (a member state)
(d) Merits action in the courts of another member state

Any of these actions could require a court to make a declaratory judgment as to the effect of an arbitration agreement. Only the judgment in scenario (c), a merits action at the seat of the arbitration, would ever have been capable of meaningful international effect. However, following the recast process, the declaratory judgment in none of the above scenarios is capable of any international effect. The analysis presented here will focus first on the situation pre-Recast, then the changes made by the Recast will be presented in brief, before being analysed in greater detail in the following chapter.[223] In all of the following examples it should be assumed that all the claims discussed would fall within the substantive scope of the Brussels Regime but for the existence of an arbitration agreement, such as a contractual claim or a claim in tort.

[220] P Sanders (Ed), *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011) ('*ICCA Guide*'), 36.
[221] Ibid; see also the fact pattern in *Marc Rich*, above.
[222] Again see the fact pattern in *Marc Rich*, above.
[223] See Chapter 4.C below.

(a) Ancillary action at the seat of arbitration

This is the situation in the English action in *West Tankers* with the anti-suit injunction stripped away. The English court was asked for a declaratory judgment that the dispute was subject to arbitration in the hope that the insurer would commence London arbitration instead of Italian court proceedings. Under the combined case law of *Marc Rich* and *West Tankers* ancillary proceedings fall outwith the scope of the Brussels Regime, as does any preliminary assessment of the validity of the arbitration agreement. As these proceedings fall outwith the scope of the Brussels Regime, the judgment handed down will not be enforceable under the Regime in any other form of case in any other member state, whether ancillary to arbitration or on the merits. Furthermore, according to the *West Tankers* judgment, a decision in proceedings outside the scope of the Brussels Regime cannot interfere with the determination of jurisdiction in proceedings falling within its scope. A declaratory judgment in ancillary proceedings is therefore not capable of any international effect under the Brussels I Regulation. This analysis remains unchanged under the Brussels I Recast.

(b) Ancillary action in another member state

Ancillary action is occasionally required in a country other than the seat of the arbitration, for example to have a court with personal jurisdiction refer an uncooperative party to arbitration or assist in the taking of evidence. These courts would presumably make their own preliminary review of the validity of the arbitration agreement, which may not match the assessment made by the court at the seat of arbitration or by the arbitrators. The judgment in these ancillary proceedings would also be excluded from the scope of the Brussels Regime and not enforceable thereunder. This is unlikely to prove problematic, as such ancillary support would most likely be sought in relation to an arbitration already commenced at the seat. This analysis also remains unchanged under the Brussels I Recast.

(c) Merits action at the seat of arbitration

This is the only scenario in which a declaratory judgment would have had meaningful international effect before the Recast process. If the court at the designated seat of the

arbitration was seised with an action on the merits of the dispute, the proceedings would have fallen within the scope of the Brussels Regime. According to *Marc Rich* and *West Tankers*, a preliminary determination of the validity of the arbitration agreement would also have fallen within the scope of the Regime because reference is made solely to the principal subject matter of the dispute in determining the Regime's applicability.[224] In that case, the principal subject matter would have been an action on the merits, falling within the scope of the Brussels Regime. The courts of any other member state later seised of the same merits action would have had to order a stay, pending the resolution of the case at the seat. If the court at the seat determined that it had no jurisdiction under Art II (3) New York Convention or that state's own implementing legislation, the determination would have fallen within the Brussels Regime and would, it is submitted, have been binding in respect of merits actions in other Member States. It would, however, have had no automatic effect under the Regulation in ancillary proceedings in another member state, which would themselves fall outside the scope of the Brussels Regime, and therefore would be unaffected by proceedings falling within the Regime's scope, as per *Marc Rich*. It is submitted, therefore, that this is one situation in which a declaratory judgment would have had meaningful automatic international effect pre-Recast.

Now that the Brussels I Recast is in force, it appears this will no longer be the case. As will be discussed in greater detail in the following chapter, the Brussels I Recast contains a recital stating, in relevant part, that a judgment of the court of a member state on the validity of an arbitration agreement should not be capable of recognition and enforcement under the Recast, regardless of whether or not it is decided as a preliminary matter.[225] Assuming operative effect is given to the recital over the case law of the Court of Justice, declaratory judgments on the validity of the arbitration agreement will have no international effect.

[224] See Chapter 3.A.1 and 3.A.3 above.
[225] Recital 12 Brussels I Recast, above. See Chapter 4.C.3 below.

(d) Merits action in another member state

When a court in a member state other than the seat is seised of an action on the merits of a dispute potentially subject to a valid arbitration agreement, it will have to determine the preliminary matter of the validity of that arbitration agreement. According to *Marc Rich*, this judgment will not affect the ability of courts at the seat of arbitration to make their own determination of the validity of the arbitration agreement in ancillary proceedings, nor will it prevent the commencement of proceedings before a tribunal, as both of these actions fall outwith the scope of the Brussels Regime. If the court seised of the merits action decides that there is a valid arbitration agreement, this will not automatically bind the court at the seat to find likewise in ancillary proceedings. Furthermore, if that court finds that there is no valid arbitration agreement and accepts jurisdiction, this does not preclude courts at the seat finding that the agreement is valid and referring the parties to parallel arbitral proceedings. Of course following the analysis described above the judgment of the court seised on the merits as to the validity of the arbitration agreement would bind another member state court later seised of the same merits action. This is not likely to be of any practical significance, as difficulties are more likely to arise when one party believes the dispute to be subject to court jurisdiction and the other believes it to be subject to arbitration. In the scenario where both believe the dispute to be subject to the jurisdiction of different courts, it may be argued that they have constructively agreed to terminate their arbitration agreement.

When the Recast enters into force, the declaratory judgment in these cases will have no automatic international effect under the Recast, as mentioned above.

(e) Summary

In summary, before the Brussels I Recast was passed, the fears expressed by respondents in the Heidelberg Study that declaratory judgments concerning the validity of arbitration agreements were an internationally ineffective remedy were well founded. Almost any kind of conceivable declaratory judgment was incapable of meaningful international effect. Now that the Brussels I Recast has entered into force, declaratory judgments have still less effect. The disharmony created by this situation

obviously troubled the authors of the Heidelberg Report, yet it remains an issue several years on.

(4) Treatment of judgments rendered in spite of an arbitration agreement

The Heidelberg report highlights an inconsistency in the approach of member state courts to the recognition and enforcement of judgments rendered in spite of a potentially valid arbitration agreement.[226] The Brussels Regime does not provide for the refusal of recognition and enforcement of a Regime judgment on the basis that it violates an arbitration agreement.[227] It does, however, provide that a judgment shall not be recognised if it is manifestly contrary to the public policy of the state in which recognition is sought.[228]

Courts in England have suggested that they may rely on this public policy exception to justify refusing to enforce foreign judgments that they consider to violate an arbitration agreement.[229] A German court, on the other hand, has used similar reasoning to the Court of Justice in *West Tankers*, enforcing judgments on the validity of an arbitration agreement as a matter incidental to a merits dispute without raising a question of public policy.[230]

In the *Fincantieri* cases, the Paris Court of Appeal refused to recognise the judgment of a Genoan court seised on the merits taking jurisdiction under the Brussels Regime, because the Parisian court considered the dispute to be subject to a *prima facie* valid arbitration agreement.[231] In *Bamberger* the English courts suggested they may refuse to enforce a judgment considered to violate an arbitration agreement.[232] This position

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[226] *Heidelberg Report*, para 119
[227] Art 33-37 Brussels I Regulation. *Cf* Art 12 (3) Hague Convention 1971.
[228] Art 34 (1) Brussels I Regulation.
[229] *Philip Alexander Securities & Futures Ltd v Bamberger & Ors and related action* [1996] CLC 1757 ('*Bamberger*'), 1778. 'Accordingly, my suggestion would be that, albeit a judgment on the substance of the dispute is a Convention judgment it may well not be recognisable under Art 27 of the Convention if it has been obtained in breach of an arbitration provision'.
[230] *Parties not indicated*, Higher Regional Court of Düsseldorf, I-3 W 13/07, 21 May 2007.
[231] *France No 37 – Legal Department of the Ministry of Justice of the Republic of Iraq v Fincantieri - Cantieri Navali Italiani (Italy), Finmeccanica (Italy) and others,* Court of Appeal of Paris, 15 June 2006, (2006) XXXI YBCA 635 ('*Fincantieri II'*); *Italy No 138 – Fincantieri - Cantieri Navali Italiani SpA and, Oto Melara SpA v Ministry of Defence, Armament and Supply Directorate of Iraq and others*, Genoa Court of Appeal, 7 May 1994, (1996) XXI YBCA 594 ('*Fincaniteri I*').
[232] *Bamberger*, above, 1778.

is also enshrined in UK legislation in the Civil Jurisdiction and Judgments Act 1982, although this provision is not supposed to interfere with the enforcement of otherwise enforceable Brussels Regime judgments.[233] The reasoning in *Bamberger* was followed in *obiter* comments at first instance in *National Navigation I*,[234] but overturned as part of the *ratio decidendi* on appeal in *National Navigation II*, which will be discussed in more detail below.[235] The public policy implications of enforcing a judgment rendered in violation of an arbitration agreement has been subject of much legal debate in England, and the matter may yet be considered not fully settled.[236]

Indeed, the degree of difference in the approaches of even arbitration-friendly member states to the validity of an arbitration agreement at the enforcement stage is highlighted in the '*Dallah* saga',[237] in which French and English courts took opposite views on the applicability of an arbitration agreement to a non-signatory of that agreement. An award against the non-signatory was refused recognition and enforcement in England on the basis of a lack of jurisdiction,[238] which it was subsequently granted by the Paris Court of Appeal.[239] Although this case concerns the validity of an arbitration agreement at the recognition and enforcement stage, it nonetheless demonstrates the potential for conflicting interpretations.

The decisions in *National Navigation* in particular are valuable in illustrating the complexity of the issues raised by the question of enforcing a judgment rendered in spite of an arbitration agreement, especially the interplay between the black letter law

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[233] s 32 Civil Jurisdiction and Judgments Act 1982.
[234] *National Navigation v Endesa Generacion SA* [2009] EWHC 196 (Comm), [2009] 1 Lloyd's Rep.
[235] *National Navigation v Endesa Generacion SA* [2009] EWCA Civ 1397, [2009] 2 CLC 1004.
[236] See L Collins *et al* (Eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, 2012) ('*Dicey, Morris & Collins*'), paras 14-208 – 14-211; A Briggs, *The Conflict of Laws* (3rd edn, 2013) ('Briggs'), 151, both of which pieces argue quite strongly that a judgment given in breach of an arbitral award would infringe English public policy. See also JM Carruthers and JJ Fawcett, *Cheshire, North & Fawcett on Private International Law* (14th edn, 2008) ('*Cheshire, North & Fawcett*'), 629-630; A Layton and H Mercer, *European Civil Practice* (2nd edn, 2004) ('Layton and Mercer'), 26.023.
[237] Radicati, 'Seeds of Home Country Control', above, 428; D Holloway, 'Avoiding duplicative litigation about arbitration awards within the EU' (2011) 2(2) *JIDS* 435 ("Holloway, 'Avoiding duplicative litigation'").
[238] *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 ('*Dallah*').
[239] *Government of Pakistan, Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company*, Court of Appeal of Paris, 17 February 2011, (2011) XXXVI YBCA 590.

and overarching public policy considerations. It is therefore useful to discuss these decisions in more depth.

The principal parties in the *National Navigation* cases were NNC, the Egyptian owner of the ship named The Wadi Sudr, and Endesa, a Spanish power company. Endesa was named as consignee on a bill of lading for a shipment of coal aboard The Wadi Sudr.

The bill of lading in the case was designed to be used with charterparties and provided that the relevant charterparties would be incorporated. There were two potentially relevant charterparties, both of which contained a clause for London Maritime Arbitrator's Association ('LMAA') arbitration. One of the charterparties also contained a choice of English law.

The ship was damaged *en route* and the cargo had to be discharged at a port not contractually named. The coal was transported overland to the named port at Endesa's expense. It became evident that Endesa intended to sue NNC for damages in respect of the expense of overland transport.

Endesa applied to the Court of First Instance of Almeira, Spain, for the arrest of the vessel, which was granted *ex parte*. Its substantive claim was to follow within 30 days, which it duly did. Later on the same day the Almeira court was seised, unaware both of the Spanish action and the arbitration clause, NNC's lawyers applied to the English courts for a declaration that it was not liable on the merits. The substantive claims on liability would fall within the scope of the Brussels I Regulation.

When its lawyers became aware of the arbitration clause, NNC challenged the jurisdiction of the Spanish court on that basis, claiming the clause was validly incorporated under English law. NNC also sought to begin LMAA arbitration.

The Almeira court handed down a judgment dismissing NNC's jurisdictional objection, holding that it had jurisdiction over the merits of the dispute. The English courts were then faced with the question of what to do with the action of which they were seised, in which the claims had been modified several times over to reflect the changing nature of the dispute.

In *National Navigation I*, the operative part of the judgment relevant to this thesis was that the court was not required under the Brussels I Regulation to recognise the Spanish judgment on the validity of the arbitration clause.[240] The judge also added *obiter* that, even if this conclusion was wrong, it would be 'manifestly contrary to the public policy of the United Kingdom' to recognise the judgment, because, *inter alia*, 'there is a clear statutory and conventional obligation under English law for an English court to give effect to an arbitration agreement that is valid in accordance with its proper law'.[241]

This judgment was overturned on appeal in *National Navigation II*. The Court of Appeal ruled that the holding that there was no obligation under the Brussels I Regulation to recognise the Spanish court's judgment as to the validity of the arbitration agreement was plainly wrong in light of the *West Tankers* decision.[242] The court therefore had to consider in earnest the question of public policy raised in the *obiter* comments in *National Navigation I*. One of the two leading judgments relied on the case law of the Court of Justice to read the public policy exception narrowly,[243] holding that the potentially valid arbitration agreement did not give rise to any arguments on the grounds of public policy as envisaged by the Regulation.[244] The other leading judgment stated: '[i]mportant though arbitration agreements undoubtedly are, I think [the judgment in *National Navigation I*] puts the matter rather too high. It is not, I think, contrary to public policy to recognise a judgment of a foreign court of competent jurisdiction simply on the grounds that an English court would have come to a different decision.'[245]

It can therefore be seen that there is significant scope for confusion and difficulty at the interface between arbitration and the Brussels Regime. These cases also demonstrate the difficulty of defining public policy, which one English judge was ready to invoke to defend arbitration agreements, while others disagreed.

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[240] *National Navigation I*, above, para 97.
[241] Ibid, paras 98-102.
[242] *National Navigation II*, above, paras 39-41. It is however arguable that the Court of Appeal decision in this respect is inconsistent with *Marc Rich*, above, para 26.
[243] Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935 ('*Krombach*').
[244] *National Navigation II*, above, paras 62-67 (Waller LJ).
[245] Ibid, para 125 (Moore-Bick LJ).

The *National Navigation* and other cases are raised here to illustrate the scope for recognition and enforcement problems under the Brussels Regime with an arbitration exclusion. The Brussels I Recast makes small changes in this respect, most notably reversing part of the ruling in *West Tankers*, with the effect that the decisions of the Higher Regional Court of Düsseldorf and the English Court of Appeal in *National Navigation II* are now out of date insofar as they recognise a judgment on the validity of an arbitration clause. In general, though, as will be discussed below, the Brussels I Recast has if anything muddied the waters in respect of these recognition and enforcement problems.

(5) Treatment of judgments confirming or setting aside arbitral awards

A different enforcement question is raised by the differing treatment in member states of judgments confirming or setting aside an arbitration award. On the face of things it would seem obvious that, following the Court of Justice jurisprudence, the subject matter of such a judgment relates to arbitration and the judgment is therefore excluded from the Brussels Regime. According to the authors of the Heidelberg Report, however, this approach has not been uniformly adopted in the member states and some courts enforce such judgments under the Regulation.[246] Of course, countries are free under the New York Convention to enforce judgments confirming or setting aside arbitral awards if they so choose.[247] The problem with enforcing these judgments *under the Regulation* is that this implies an obligation to do so. If this obligation extends to confirming judgments, it would also cover set-aside judgments. This is

[246] *Heidelberg Report*, para 120. The report states this position without citing any supporting cases.
[247] The New York Convention is silent on the treatment of judgments confirming an arbitral award, but the courts of some signatories have been happy to enforce such judgments under the New York Convention: see, for example, *Seetransport Wiking Trader Schiffahrtsgesellschaft GmbH & Co v Navimpex Cerntrala Navala*, US Court of Appeals, Second Circuit, 1994, 29 F.3d 79. As regards set aside, the New York Convention explicitly states at Art V (1) (e) that a signatory *may* refuse recognition and enforcement of an award set-aside where rendered. See also Briggs (2014), above, 1029, which suggests that English courts would be happy to enforce orders of foreign courts in the same terms as an arbitral award as it would a judgment of that court, but not to enforce an order granting leave to enforce the award. Briggs's work suggests that neither of these possibilities would be considered by the English Courts as engaging the New York Convention at all.

clearly at odds with the current practice in France, where confirmation or set-aside judgments are viewed as effective only where rendered.[248]

Again it can be seen that the exclusion of arbitration has caused some confusion and divergent practices amongst the courts of member states. It should be noted that Recital 12 of the Brussels I Recast now makes expressly clear that such actions should not be covered by the Brussels Regime.

A logical extension of the exclusion of set-aside judgments from the Brussels Regime is that a problem can arise where multiple awards are rendered in the same dispute. This problem arises because many arbitration laws provide that, when set aside of an arbitral award is granted, the matter may be submitted to the arbitral tribunal for reconsideration and the award edited or another award rendered.[249] Indeed it stands to reason that if an award is set aside in its entirety but the arbitral tribunal had good jurisdiction, for example where set aside was for a procedural irregularity, the only possible rehearing of the claims would occur in arbitration. This could result in multiple awards being rendered in the same dispute. If the courts of a second member state do not respect the result in the set-aside action and choose to enforce the first award, then the courts at the seat enforce the second award, the arbitral process becomes fraught with uncertainty and confusion.

This was the scenario in the *Putrabali* cases.[250] These cases concerned a contract for the sale of spices between Putrabali and a French buyer. The contract contained a clause for arbitration in London.

The cargo was lost at sea and in 2000 Putrabali commenced arbitration in London in accordance with the International General Produce Association (IGPA) rules. The arbitral tribunal issued an award in favour of Putrabali (Award 1), which the buyer

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[248] *France No 36 – Directorate General of Civil Aviation of the Emirate of Dubai v International Bechtel Co Limited Liability Company (Panama)*, Court of Appeal of Paris, 29 September 2005, (2006) XXXI YBCA 629, para 5, in which the Court of Appeal of Paris refused to recognise a set-aside order under a bilateral enforcement treaty with the UAE, ruling that such proceedings 'do not have international effect because they apply only to a defined territorial sovereignty'.

[249] See Rule 72, sch 1 Arbitration (Scotland) Act 2010; Art 34 (4) UNCITRAL Model Law 2006; s 68 (3) Arbitration Act 1996.

[250] *France No 42 – PT Putrabali Adyamulia (Indonesia) v Rena Holding, et al*, French Supreme Court First Civil Chamber, 29 June 2007, (2007) XXXII YBCA 299 ('*Putrabali French Supreme Court*').

successfully appealed to the IGPA Board of Appeal. In 2001 the Board reversed the tribunal, holding that the buyer was not liable for the contract price (Award 2). Putrabali in turn appealed the Board's award to the High Court on a point of law under s 69 Arbitration Act 1996, as provided for by the IGPA Rules. Putrabali obtained in 2002 partial set-aside of the award, with the case being remitted to IGPA arbitration.[251] In 2003, the arbitral tribunal issued a new award in favour of Putrabali (Award 3).

In the meantime, however, the French buyer had been granted recognition of Award 2 by the First Instance Court of Paris. Between 2005 and 2007, seeking enforcement of Award 3, Putrabali appealed the decision to recognise Award 2 to the French Supreme Court. The French Supreme Court upheld the decision to recognise Award 2.[252] It was already clear that, in French law, the setting-aside of an award does not provide valid grounds for refusal of recognition and enforcement of an arbitral award.[253] The court further reasoned that '[a]n international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.'[254] As such, the fact that Award 2 had been set aside in England had no bearing on its ability to be recognised in France. Award 2 had been recognised, and therefore Award 3 could not be recognised and enforced as a matter of *res judicata*.

This meant that Award 2 had been given effect in France, whilst Award 3 would presumably be enforced in England, assuming the French party had assets there. The approach of a third country to enforcement would depend on that country's application of Art V (1) (e) New York Convention.

The *Putrabali* decision has been subject of much commentary and detailed criticism.[255] This criticism and more will be discussed further below, in the context of discussions

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[251] *PT Putrabali Adyamulia v Socit Est Epices* [2003] 2 Lloyd's Rep 700.
[252] *Putrabali French Supreme Court*, above.
[253] See Arts 1520 and 1525 (*ex* Art 1502) Code de procédure civile; *France No 23 – Hilmarton Ltd (UK) v Omnium de Traitement et de Valorisation-OTV (France)*, French Supreme Court, 23 March 1994, (1995) XX YBCA 663 ('*Hilmarton*'), para 4.
[254] *Putrabali French Supreme Court*, above, para 2.
[255] T Berger, 'Case Comment: PT Putrabali Adyamulia v Rena Holding' (2007) 10(6) *Int ALR* N69 ('Berger'), N71; MB Holmes, 'Enforcement of annulled arbitral awards: logical fallacies and fictional systems' (2013) 79(3) *Arbitration* 244 ('Holmes'), 245; M Ahmed, 'The influence of the delocalisation

about the delocalisation of arbitration and the potential solutions to the problems created by the arbitration exclusion as currently exists. For now, the case is mentioned to demonstrate a concrete, practical example of problems exacerbated by the exclusion of arbitration from the Brussels Regime.

The disharmony and uncertainty inherent in this state of affairs is obvious, and could easily be solved by rethinking the arbitration exclusion.

(6) Award and judgment conflict

A logical extension of the parallel proceedings problem is the possibility of both an award and a judgment – possibly with different results – being rendered in the same case. If this were to happen, a raft of problems would ensue. The arbitral award would be enforceable worldwide under the New York Convention. The judgment would be enforceable within the European Union under the Brussels Regime. The approach of national courts to such a potential problem would be impossible to predict with any certainty.[256]

The courts of the country in which the judgment was rendered would not enforce the arbitral award and most likely the courts of the country where the award was made would not enforce any judgment. Each could rely on the doctrine of *res judicata* or the relevant public policy exceptions to justify this decision.[257] What would happen in the court of a third member state would be entirely impossible to predict. The New York Convention does not specifically allow non-enforcement on the basis of an existing judgment; nor does the Brussels Regulation allow non-enforcement on the basis of an existing arbitral award.[258] This would therefore come down to public policy. The decision would involve a weighing of the public policy interests in enforcing the judgment or the award and there is no predicting how such a determination would end in any given case. There would undoubtedly be problems with defining the appropriate

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and seat theories upon judicial attitudes towards international commercial arbitration' (2011) 77(4) *Arbitration* 406 ('Ahmed'), 410-412.

[256] Layton and Mercer, above, 26.083.

[257] Art 34 (1) Brussels I Regulation; Art V (2) (b) NY Convention.

[258] The Brussels I Regulation only allows non-enforcement where there is a pre-existing judgment in that jurisdiction or another Regulation judgment (Art 34 (3)-(4)).

scope of public policy under the New York Convention and within European Law.[259] English courts have already sought to address this problem by granting recognition of declaratory awards as judgments under s 66 (1) and (2) Arbitration Act 1996, thereby 'trumping' inconsistent Regulation judgments by triggering the Art 34 (3) exception, at least in respect of enforcement actions in the UK.[260] This situation breeds uncertainty, gives rise to potential inconsistencies in approach between member states, and is therefore clearly undesirable.

It may be argued that the Brussels I Recast changes this situation through the language of Recital 12.[261] This possibility will be addressed in full in the following chapter, where it will ultimately be submitted that a plain reading of the Brussels I Recast does not support this conclusion.[262]

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[259] The case law of the Court of Justice implies that public policy in this context should be interpreted narrowly, though it concedes that it is not for the Court of Justice to tell national courts what forms part of their country's public policy. See: *Krombach*, above; Case C-38/98 *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento* [2000] ECR I-02973 ('*Maxicar*'). For an example of how this can cause problems in national courts, see *National Navigation I* and *National Navigation II*, above. As regards the public policy exception under the New York Convention, although Art V (2) (b) points to the public policy of the state where enforcement in requested, there is a longstanding movement towards interpreting this exception as referring to a wider-reaching notion of 'international public policy', similar to the interpretation of public policy under the Brussels Regime. See, *inter alia*, *Spain No 76 – Sierra-Affinity LLC v Wide Pictures SL*, Superior Court of Justice of Catalonia, Case No 46/2013, 25 March 2013, [2013] XXXVIII YBCA 465 ('*Sierra-Affinity*'), para 22; *Germany No 146 – H v F (in liquidation)*, Higher Regional Court of Karlsruhe, Case No 9 Sch 2/09, 4 January 2012, and Federal Court of Justice of Germany, Case No III ZB 8/12, 20 December 2012, (2013) XXXVIII YBCA 379, paras 19-20 and 45-47. See also: P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in P Sanders (Ed), *International Council for Commercial Arbitration Congress Series No 3: Comparative Arbitration Practice and Public Policy in Arbitration* (1987) 258, *passim*.

[260] See *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm), paras 28-30, 'Where […] the victorious party's objective in obtaining an order under s 66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award', confirmed in *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWCA Civ 27; *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm), [2011] 2 Lloyd's Rep 531, para 26; *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain & Anor (The Prestige)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309, paras 181-198.

[261] N Erk, *Parallel Proceedings in International Arbitration: A comparative European Perspective* (2014) ('Erk, *Parallel Proceedings*'), 67-68.

[262] See Chapter 4.C.4 below. See also Dowers and Holloway, above, N21.

(7) Why these are serious problems

It may be pointed out that problems such as parallel proceedings, the ineffectiveness of declaratory judgments, the inconsistent treatment of judgments rendered in spite of arbitration agreements, and the varying treatment of judgments setting aside or confirming arbitral awards exist as a matter of course in the world beyond the Brussels Regime. There are, however, three major differences between the European situation and that in the world at large. Firstly, outside the territorial scope of the Brussels Regime, the courts do not face an obligation to enforce judgments; they have discretion to allow or refuse recognition and enforcement by granting or denying comity as they see fit. Within Europe, courts faced with such a judgment are bound to recognise and enforce judgments under the Brussels Regime.[263] Where a judgment is rendered in spite of an arbitration agreement, the court is equally bound under the New York Convention to recognise and enforce what it views as a valid arbitration agreement, or a valid arbitral award if one has been rendered.[264] This creates a potential conflict of international duties not generally existing in the rest of the world. Secondly, the European Union recognises and has the remit to address these problems. Finally, within Europe, there is supposed to be a spirit of judicial co-operation and mutual trust, which does not exist in the world at large, and which these problems undermine. This notion of mutual trust will be examined at length in Chapter 5, but it is mentioned here simply by way of explanation that the situation described above is undesirable and different in nature from the *status quo* in the world at large.

C. Preliminary conclusions

It has been shown that the scope of the arbitration exclusion has proved a controversial issue and has necessitated litigation before the Court of Justice. This litigation has only gone as far as partially defining the scope of the exclusion, with certain difficult questions remaining undecided. Furthermore, the scope as defined has created its own problems. Many of these problems could potentially be solved by a rethinking of the Brussels Regime's relationship with arbitration. Such a rethinking at last became a

[263] Art 33 (1) Brussels I Regulation.
[264] Art II (3) and Art III New York Convention.

realistic prospect during the process of recasting the Brussels I Regulation. This thesis will now move on to consider the process of reform, the proposals presented, and the outcome of the recasting process.

4. THE EXCLUSION WITHIN EUROPE PART 2 – THE BRUSSELS I RECAST

The previous chapter argued that the interface between the Brussels I Regulation and arbitration was causing practical problems and was subject to much scrutiny when the recasting process began in 2005. With the EU's having legislative authority over jurisdiction and a lengthy review of the Regulation's provisions ahead, the ground was fertile for the Brussels Regime's relationship with arbitration to be reformed.

This chapter charts the process of recasting the Brussels I Regulation, from the Heidelberg Study to the adoption of the Recast in late 2012. The chapter shall first describe briefly the process of recasting, identifying the important milestones, documents, and *travaux préparatoires* that defined that process. It shall then identify the main proposals for reform, both legislative and in scholarship, and offer an evaluation of each. The next section shall present the relevant changes in the Brussels I Recast as passed, together with an assessment of these changes and their implications. The final section of this chapter shall offer some brief criticism of the minimal substantive reform in the Recast, leading to the conclusion that the Recast represents little-to-no real progress on the situation under the Brussels I Regulation.

A. The recasting process

In summary, the path by which the Recast became law is as follows. As mentioned earlier in this thesis, the Heidelberg Study was conducted in 2005 and included a question on whether the member state respondents thought arbitration should be brought within the scope of the Brussels I Regulation. Most, but not all, member states answered negatively, but several identified problems at the interface between the Regulation and arbitration. These problems have been extensively discussed and the member-state responses cited in the previous chapter.

The member state responses also formed the basis of the Heidelberg Report. The Heidelberg Report is very lengthy, thorough, and considers many aspects of the Brussels I Regulation and proposals for reform. 15 pages of the Report are given over

to the arbitration problem.[265] The Heidelberg Report proposed sweeping reform of the Regulation's relationship with arbitration, including deletion of the arbitration exception at Art 1 (2) (d), bringing court proceedings and judgments concerning arbitration within the scope of the Regulation.[266] It would supplement these changes with a number of bespoke rules about the interface between the Regime and arbitration.[267] These suggestions will be considered in more detail in the next section, but it is worth noting that one of the proposed provisions was the inclusion of a mandatory stay provision in favour of the courts of the seat of arbitration, regardless of the order in which the courts were seised.[268] The Commission prepared a short report[269] and circulated a Green Paper[270] proposing roughly the changes advocated by the Heidelberg Report.

Although this approach received some positive responses from Member States, the proposal was also harshly criticised, both by Member State respondents to the Green Paper and in literature, and ultimately a drastically scaled back proposal for reform was made.[271] The proposal was to maintain the arbitration exclusion, but to insert a new *lis pendens* rule at (proposed) Art 29 (4), requiring a mandatory stay of proceedings on the merits when a court in proceedings ancillary to arbitration or an arbitral tribunal had been seised at the seat.[272] This proposal shall again be considered in more detail in the following section.

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[265] *Heidelberg Report*, above, 51-65.
[266] Ibid, para 122.
[267] Ibid, paras 132-134.
[268] Ibid, para 134 *et seq*.
[269] European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* COM(2009) 174 final ('Commission Report'), 7.
[270] European Commission, *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 ('Commission Green Paper'), 6.
[271] 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 ('*Commission Proposal'*).
[272] Ibid, 36

The Parliament replied with a short Report strongly opposing the inclusion of arbitration in the Regulation to any extent.[273] This was justified on the familiar basis that the New York Convention was thought to 'satisfactorily deal with' this area, and that no agreement could be reached between the member states on the Commission's proposed *lis pendens* rule.[274] The Parliament proposal even went so far as to suggest the reinstatement of the anti-suit injunction, fully reversing *West Tankers*.[275] This proposal too will be considered in more detail in the following section.

The Recast as passed is very close to the Parliament's proposal. As will be demonstrated below, however, it could not be said to reverse *West Tankers* to the extent that the anti-suit injunction would be reinstated.

B. Proposals for reform

(1) Abolition of the arbitration exclusion

It has been suggested that 'pure and simple abolition of the arbitration exclusion' is one of the possible solutions to the difficulties at the interface between the Brussels I Regulation and arbitration.[276] 'Abolition' in this context means the deletion of Art 1 (2) (d) without the insertion of any specialised rules for jurisdiction over court actions relating to arbitration. Solutions in which the exception is deleted and specialist rules added are known as 'partial abolition' of the exclusion.[277]

Simply to delete the arbitration exclusion and let proceedings related to arbitration fall under the general jurisdictional rules of the Brussels I Regulation would be to take no account of the 'peculiarities of arbitration'.[278] The general rule of jurisdiction, for example, in the Brussels I Regulation is that a defendant may be sued in the courts of its domicile.[279] In matters relating to arbitration, this would make little sense. Parties

[273] European Parliament, *Report on the implementation and review of Council Regulation (EC) 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters*, Session Document A7-0219/2010 (2009/2140(INI)) ('Parliament Report'), 8.
[274] Ibid, 5.
[275] Ibid, 5.
[276] Radicati, 'Seeds of Home Country Control', 429.
[277] Ibid, 433.
[278] Ibid, 429.
[279] Art 2 (1) Brussels I Regulation.

tend to eschew each other's places of business as venues for arbitration, the neutrality of the forum being one of the most attractive features of arbitration as a form of dispute resolution.[280] The likely result is that courts other than those in the place in which the arbitration is set to take place would have jurisdiction over applications for ancillary measures, which makes no sense at all. Even if an arbitration agreement were viewed as a simple contract, and the courts at the place of the performance of the obligation in question – the place of arbitration in cases concerning the performance of an obligation to arbitrate – were to have jurisdiction under the Regulation, this would not provide a complete or workable solution.[281] Not every arbitration agreement specifies where the arbitration is to be performed, and in such a situation the general rule of jurisdiction falling to the courts at the defendant's domicile would be the only possibility to found jurisdiction.[282] This would again mean the parties were forced into a court action in a forum that makes little practical sense. Furthermore, the courts of the parties' domiciles would have jurisdiction over set-aside actions, which does not align with Art V (1) (e) New York Convention.[283] This would be all the more troublesome given the likely fear of litigants that national courts hearing international cases tend to favour parties from their country. In short, the general rules of jurisdiction of the Brussels I Regulation are woefully ill-suited to allocate jurisdiction in court actions relating to arbitration.

These examples are some of many reasons that the simple deletion of the arbitration exclusion would be unworkable. In a very thoroughly-referenced survey article, Radicati does not cite one serious advocate of this option.[284] It was nevertheless discussed and is therefore raised in this thesis for completeness's sake.

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[280] For one of the few surveys conducted on the reasons for choosing international commercial arbitration over other methods of dispute resolution, see C Bühring-Uhle, *Arbitration and Mediation in International Business* (1996) ('Bühring-Uhle'), 135-143.
[281] Art 5 (1) (a) Brussels I Regulation.
[282] For an example of the general rule of jurisdiction being applied in the absence of other grounds, see the judgment of the House of Lords applying the Civil Jurisdiction and Judgments Act 1982 to questions of unjustified enrichment in *Kleinwort Benson Ltd, Respondents v Glasgow City Council, Appellants* [1999] 1 AC 153.
[283] Art V (1) (e) strongly implies that only the court in the place where the award was rendered should have jurisdiction over a set-aside action.
[284] Radicati, 'Seeds of Home Country Control', above, 429.

(2) Partial abolition of the arbitration exclusion

However, various groups have seriously advocated the solution of 'partial deletion' of the arbitration exclusion in the sense described above. These include the authors of the Heidelberg Report and the Commission, through its Report and Green Paper.

The Heidelberg Report proposes deletion of the arbitration exclusion at Art 1 (2) (d), bringing judgments concerning arbitration within the scope of the Regulation.[285] It would supplement this with a number of bespoke rules at the interface between the Regime and arbitration. The first of these would be to add a paragraph 6 to Article 26 (*ex* Art 22), giving exclusive jurisdiction in ancillary proceedings to the courts at the place of the arbitration.[286] The Report also proposes adding to the Regulation a new *lis pendens* rule at Art 27A, requiring a mandatory stay of proceedings where the existence of an arbitration agreement is alleged and a court at the designated place of arbitration has been seised for declaratory relief.[287] The final recommendation is the insertion of a recital defining the place of arbitration for the purposes of Arts 26 (6) and 27A.[288] The Report proposes maintaining the prevalence of the New York Convention under Art 71, while providing for the non-enforcement of a Regulation judgment on the basis of a pre-existing arbitral award, as had been suggested in some of the literature.[289] The Commission Green Paper argued for the adoption of these proposals,[290] and several member states supported them in their responses to the Green

[285] *Heidelberg Report*, above, para 131.
[286] *Heidelberg Report*, above, para 132. 'Article 26. The following courts shall have exclusive jurisdiction, regardless of domicile, (…)
(6) in ancillary proceedings concerned with the support of arbitration the courts of the Member State in which the arbitration takes place'.
[287] *Heidelberg Report*, above, para 134. 'A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement'.
[288] *Heidelberg Report*, above, para 136. 'The place of arbitration shall depend on the agreement of the parties or be determined by the arbitral tribunal. Otherwise, the court of the Capital of the designated Member State shall be competent, lacking such a designation the court shall be competent that would have general jurisdiction over the dispute under the Regulation if there was no arbitration agreement'. The 'designated Member State' refers to the member state in which the arbitration is agreed to take place, where no other agreement has been reached on the legal 'place' of the arbitration.
[289] *Heidelberg Report*, above, see especially paras 129-131. See also van Houtte, above, 519-520.
[290] Commission Green Paper, above, 9-10.

Paper.[291] Such a solution had been suggested in earlier scholarship, and was also supported in later academic writing.[292]

The argument in favour of this position is simple: the exclusion of arbitration has caused or exacerbated several problems, such as those outlined above, which deletion of that exclusion could solve.[293] The argument is appealing for its simplicity, and it forms part of the argument for the partial deletion of the arbitration exclusion that will be presented later in this thesis.

The Heidelberg Report and Commission proposal on the partial abolition of the exclusion has, however, been strongly criticised in the literature, as well as in some of the member state responses to the Green Paper.[294] The criticism largely focused on

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[291] See: *Dutch Response to Brussels I Green Paper*, available from the European Commission website at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/netherland_en.pdf (last accessed: 21 April 2015), para 28;
Answers of Spain to the Green Paper on the review of the Council Regulation Brussels I (Regulation 44/2001), available from the European Commission website at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/spain_en.pdf (last accessed: 21 April 2015), 6-8;
Ministry of Justice (Stockholm, Sweden), *Comments on the Green Paper on the Review of the Brussels I Regulation*, available from the European Commission Website at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/sweden_en.pdf (last accessed: 21 April 2015), 2;
Ministry of Justice of the Slovak Republic, *Replies by the Ministry of Justice of the Slovak Republic: Green Paper on the Review of Council Regulation EC No 44/2001*, available from the European Commission website at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/slovakia_en.pdf (last accessed: 21 April 2015), 4-5.

[292] See van Houtte, above, especially 516-520. See also the independent scholarship of the authors of the *Heidelberg Report*: PF Schlosser, 'Europe – is it time to reconsider the arbitration exception from the Brussels Regulation?' (2009) 12(4) *Int ALR* 45; B Hess, 'Improving the Interface Between Arbitration and European Procedural Law: The *Heidelberg Report* on the EU Commission's Green Paper on the Reform of Regulation Brussels I' [2010] *Les Cahiers de l'Arbitrage/Paris Journal of International Arbitration* 17; B Hess, T Pfeiffer, PF Schlosser, 'The Findings and Proposals of the *Heidelberg Report* – a Reply to the ICC French Working Group' [2009] *Transnational Dispute Management* 1.

[293] *Heidelberg Report*, above, paras 115-129; Van Houtte, above, 512-520.

[294] See P Pinsolle, 'The proposed reform of Regulation 44/2001: a poison pill for arbitration in the EU?' (2009) 12(4) *Int ALR* 62, 62-65 ('Pinsolle'); A Pullen, 'The future of international arbitration in Europe: West Tankers and the EU green paper' (2009) 12(4) *Int ALR* 56 ('Pullen'); The Arbitration Committee of the IBA, 'IBA Submission to the European Commission on Regulation (EC) No. 44/2001' (2009) 10 *BLI* 302; UK Ministry of Justice, *Review of the Brussels I Regulation (EC 44/2001): Comments from the United Kingdom* (3 September 2009), ('UK Green Paper Response') available from the European Commission website at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/united_kingdom_en.pdf (last accessed: 21 April 2015), 7; *Hungarian Response to the Commission's Green Paper on the Review of Council Regulation EC No 44/2001*, available from the European Commission website at:

fears that the proposals would have caused arbitration law in progressive, pro-arbitration countries to regress towards the mean, eroded arbitral competence-competence, and undermined the operation of the New York Convention. This is because one member state with particularly strict requirements for, for example, the validity of an arbitration agreement could force other member states to apply those restrictions indirectly by issuing a Brussels I Regulation judgment on the validity of the arbitration agreement or setting aside an award. This state of affairs would be anathema to a pro-arbitration country such as France, which, as demonstrated in the previous chapter, does not recognise the judicial annulment of awards in another country under any circumstances.[295] This proposal received scathing criticism in scholarship, including that it 'would have backhandedly rammed through a pervasive regulation of arbitration that would have prematurely stifled the freedom of Member States…'.[296]

The UK Ministry of Justice response to the Commission's Green Paper also criticises these proposals on the basis that it believes their implementation 'would inevitably entail ceding external competence on arbitration matters to the Community.'[297] Whilst this criticism is more measured, its accuracy is questionable: the Regulation contains

http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/malta_en.pdf (last accessed: 21 April 2015), 8;
Response of the Republic of Slovenia to the Green Paper on the Application of Council Regulation No 44/2001 EC ('Slovenian Green Paper Response'), available from the European Commission website at: http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/slovenia_sl.pdf (last accessed: 21 April 2015) (translation with the assistance of Miss Janja Čevriz), 10-11;
Permanent Representation of the Republic of Poland at the European Union, *Answers to the questions from the Green Paper on the Review of Council Regulation EC No 44/2001*, available from the European Commission website at:
http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/poland_pl.pdf (last accessed: 21 April 2015) (translation with the assistance of Miss Marysia Łabno), 8-9;
La Delegation Français, *French Response to the Green Paper on the review of Council Regulation (EC) No 44/2001*, available from the European Commission website at:
http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/france_fr.pdf (last accessed: 21 April 2015) (translation with the assistance of Mlle Évodie Fleury), 23;
Bundesministeriums des Justiz, *Response of the German Federal Ministry of Justice to the Green Paper on the Review of Council Regulation No 44/2001 EC*, available from the European Commission website at:
http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/germany_de.pdf (last accessed: 21 April 2015) (translation with the assistance of Frau Eva Loef).

[295] See the discussion of the *Putrabali* saga at Chapter 3.B.5.
[296] Radicati, 'Seeds of Home Country Control', above, 434.
[297] UK Green Paper Response, above, 7.

rules on jurisdiction for contracts and torts,[298] yet no one could argue this to mean the EU is competent to legislate in these substantive fields of law.

It is important to note for the purposes of this thesis, which will advocate the partial deletion of the arbitration exclusion in a different form, that many of the criticisms aimed at the proposals in the Heidelberg Report and Commission Green Paper are not criticisms of the idea of partial abolition *per se*; rather they are criticisms of those specific proposals. Some of the criticisms, such as the concern that partial deletion would in some circumstances force pro-arbitration member states to accept the more conservative approach to arbitration of other member states, apply equally to any proposal for partial deletion. This criticism shall be addressed later in this thesis, by reference to principles underlying ongoing European integration and the New York Convention, which will be outlined in the coming chapters.[299] This section, however, is concerned more with introducing the concepts of the proposed solutions, how they were justified when proposed, and how they were received by the legal community. It is therefore not the place for a detailed justification of this solution for the purposes of this thesis.

(3) A 'true' arbitration exclusion

The UK Government's response to the Commission's Green Paper consultation process proposed maintaining the exclusion, but wording it more broadly, to the extent that it would revive the anti-suit injunction and render *West Tankers* irrelevant.[300] The exact proposal from the UK falls into three parts.

Firstly, it would reword the arbitration exclusion at Art 1 (2) (d), making its scope absolutely clear. The reworded exclusion would read: 'arbitration, and in particular an action in respect of which the parties have made an arbitration agreement within the meaning of Article II of the New York Convention; an action or judgment on the

[298] Art 5 (1), (3) Brussels I Regulation. The EU clearly has competence to regulate IPL in these fields – see Treaty on the Functioning of the European Union ('TFEU') Art 81 (*ex* Art 65 Treaty Establishing the European Community ('TEC')) – but not to harmonise the substance of the laws.
[299] For the principles in European international private law, see Chapter 5, below. For the principles in international commercial arbitration, see Chapters 6 and 7, below. For the analysis of this proposal's interaction with these principles and responses to possible objections, see Chapter 8.D and 8.E, below.
[300] UK Green Paper Response, above, 7.

validity, effect or scope of such an agreement; and ancillary proceedings in relation to such an agreement or any aspect of the arbitral process'.[301]

It would then include a recital that a court may refuse recognition and enforcement of a judgment irreconcilable with an arbitration agreement.[302] Finally, it would insert a provision stating: 'Nothing in this Regulation affects the application of the New York Convention'.[303]

This approach also found support in the European Parliament Report.[304] The policy reasons for this proposal – insofar as it would reinstate the anti-suit injunction – are summarised in the judgments of Lords Hoffmann and Mance in the *West Tankers* preliminary reference to the Court of Justice, discussed above.[305] They reason that denying European courts the right to issue anti-suit injunctions to protect arbitration puts European arbitral seats at a competitive disadvantage, and is unfair to the party relying on the arbitration agreement.

This proposal would in general be favoured by those who support the anti-suit injunction and resisted by those who oppose the remedy. The controversy surrounding the anti-suit injunction in general and its turbulent relationship with the Brussels Regime was examined in the previous chapter. The Court of Justice took a strong stance against the anti-suit injunction in *Turner* and *West Tankers* as being an anti-European remedy that undermines the spirit of trust and co-operation between member

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[301] Ibid, 7-8. It is difficult to see how this language would actually reverse *West Tankers*. Perhaps it is suggested that, because any 'action in respect of which the parties have made an arbitration agreement within the meaning of Article II of the New York Convention' is excluded from its scope, court actions on the merits in such cases would no longer qualify for the protection of the Brussels Regulation, extended to them in *West Tankers*. If so, it is difficult to see why the enjoining court's assessment of the validity of the arbitration agreement should take precedence. At any rate, this discussion is irrelevant, as the proposals were never adopted.

[302] Ibid, 8: "In order to ensure that all aspects of arbitration are kept outside the scope of this Regulation, and to safeguard the full application and operation between Member States of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('the New York Convention'), unaffected by this Regulation, this Regulation should not apply to actions in respect of matters governed by an arbitration agreement under Article II of the New York Convention; actions or judgments on the existence, validity, effect or scope of such an arbitration agreement; or ancillary proceedings relating to such an arbitration agreement or any aspect of the arbitral process; and a judgment should not be recognisable under this Regulation in so far as it is irreconcilable with such an arbitration agreement."

[303] Ibid.

[304] Parliament Report, above, 5.

[305] *West Tankers HL*, above, paras 20-21, 30.

states. Legislative reversal of this rule has therefore always been an unlikely prospect. As shall be shown below, however, this proposal appears to have influenced the ultimate approach taken in the Brussels I Recast, though not to the extent that it could be argued to reverse *West Tankers*.

(4) *Ad hoc* harmonisation of arbitration law at the EU level

Another possibility that has been discussed is the *ad hoc* harmonisation of arbitration law through European legislation.[306] This would improve the interface between the Brussels Regime and arbitration in the fashion described in chapter 2 in the discussion of the European Uniform Law Convention: by ensuring a uniform standard for the validity of arbitration agreements, set-aside standards, and so on. This proposal would be more effective, however, than the European Uniform Law Convention, because it would have a supranational body – the Court of Justice – to ensure uniform interpretation and application. This proposal could therefore feasibly solve, or at least drastically reduce the effect of, the problems caused by the exclusion of arbitration from the Brussels Regime.

This proposal has been criticised as both legally and practically unviable. This is because the EU has no legal basis to legislate, and the legislation would at any rate likely result in a less arbitration-friendly law than that currently in place at major European arbitral centres.[307] The law would be less arbitration friendly than might be desired because it would represent a compromise position between the traditionally pro-arbitration jurisdictions, such as France and the UK, and those with less involvement in and trust of international arbitration. The compromise would inevitably be less progressive than the former group of member states would like, but would disproportionately affect the arbitration business conducted within their borders. This makes such a plan practically very unappealing, as well as lacking in legal basis.

[306] Radicati, 'Seeds of Home Country Control', 434.
[307] Ibid.

(5) A *lis pendens* mandatory stay rule

Following Member State responses to its Green Paper, the Commission radically scaled back its proposal. It proposed only to include a new *lis pendens* rule at Art 29 (4), together with a definition of when an arbitral tribunal would be considered 'seised' at Art 33 (3).[308]

The *lis pendens* rule differed from the mandatory stay provision included in the Heidelberg Report and the Green Paper in that it would require a stay where either the courts at the seat or *the arbitral tribunal itself* had been seised. This was an important amendment to that provision, because it would mean parties would not have to go to court before commencing arbitration; an onerous requirement which would have delayed the proceedings and added expense in cases where, for example, institutional rules would obviate any need for court involvement.

This proposal finds support in the writings of several commentators. Radicati took the view that this would solve the most significant problem with the Brussels I Regulation's relationship with arbitration – parallel proceedings – without being overly intrusive into the domestic arbitration law of member states.[309] Bennedettelli was broadly supportive of the Commission Proposal, whilst arguing that there remained room for further inclusion of arbitration-related court action in the Brussels Regulation, whilst Harris supported the mandatory stay provision, but would extend

[308] *Commission Proposal*, above, 35-36. Art 29 (4) 'Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement. This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.
Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.
This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II.'
Art 33 (3) 'For the purposes of this Section, an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution'.

[309] Radicati, 'Seeds of Home Country Control', above, 436-440.

its effects to any arbitration agreement, not only agreements to arbitrate within a member state.[310]

The obvious criticism of this proposal is that it would allow the bad-faith tactical litigant to delay or 'torpedo' potential court proceedings by attempting to begin arbitration proceedings where no arbitration agreement had been concluded, thereby obstructing the court proceedings. It is therefore submitted that this proposal needed more thought – thought that is hopefully reflected in the *lis pendens* rule put forward by this thesis – but that the goal of eliminating parallel proceedings is nonetheless admirable.

(6) A European protocol to the New York Convention

It has been suggested in scholarship that EU member states could conclude a protocol to the New York Convention to govern the validity of arbitration agreements.[311] A protocol is seen as the necessary instrument because it is unlikely that the New York Convention itself could be amended, given it is so widely in force.[312] Van Houtte also suggests such a protocol could provide for the possibility of appeal to the Court of Justice to ensure it is interpreted and applied in the same fashion in each member state.[313]

This proposal has faced the criticism that it is doctrinally similar to the calls for *ad hoc* harmonisation of arbitration law within the EU, and therefore open to the same practical criticisms.[314] That view is hard to argue with, as a treaty protocol would be subject to agreement and compromise to an even higher degree than legislation passed by a supranational legislature. For this reason it is an unlikely solution to the problems caused by the exclusion of arbitration from the Brussels I Regime, even if the problem of legal basis does not present itself.

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[310] MV Benedettelli, "'Communitarization' of International Arbitration: A New Spectre Haunting Europe?" (2011) 27(4) *Arb Intl* 582 ('Benedettelli'); J Harris, 'The Commission's Proposal for reform of the Judgments Regulation' (2011) 26(7) *BJIB & FL* 389 ("Harris, '*Commission Proposal*'").
[311] Van Houtte, above, 516.
[312] Ibid, 517.
[313] Ibid.
[314] Radicati, 'Seeds of Home Country Control', above, 434.

(7) Further Court of Justice decisions

The Italian response to the Heidelberg Study, as well as the Slovenian Green Paper Response, requested further Court of Justice decisions to resolve the issues at the interface between the Brussels Regime and arbitration.[315] Such an approach cannot provide a workable, long-term solution for three main reasons. First, such decisions could serve as a stopgap, short-term solution, but would be lacking the comprehensiveness and coherence of a legislative overhaul of the Regulation. Second, the Court of Justice can only decide the matters brought before it. The solutions to the problems would therefore be piecemeal, incomprehensive, and may in fact never arrive. Finally, it is highly difficult to see how the Court of Justice could resolve some of the issues raised without overturning its existing case law. This is true of parallel arbitration and court proceedings, which must be allowed under the combined case law of *Marc Rich* and *West Tankers*. It is therefore submitted that waiting and hoping for the right cases to come before the Court of Justice at the right time, and for the court to reach appropriate solutions was never a viable option.

(8) Maintain the *status quo*

There were those who argued that the problems discussed above were not sufficiently serious to warrant reform and that the best option was to leave things as they were.[316] This 'if it's not broken, don't try to fix it' approach became untenable for political reasons, the Commission being determined to come up with some kind of reform.[317] For this reason, those who originally favoured that approach tended to begin to favour more minimalist reforms, such as the Commission Proposal of nothing but a *lis pendens* rule. Nonetheless the intervention of the Parliament eventually meant that the Recast approach, of all the proposals discussed above, is actually closest in form to this.

[315] Heidelberg Study, above, 67; Slovenian Green Paper Response, above, 11.
[316] Radicati, 'Seeds of Home Country Control', above, 435; U Draetta and A Santini, 'Arbitration exception and Brussels I Regulation: no need for change' (2009) 6 *IBLJ* 741.
[317] Ibid.

(9) Summary

In summary, there were a number of hotly debated options for the EU legislature to decide between in its recasting of the Brussels I Regulation, though some were more realistically viable than others. The next section shall introduce the Brussels I Recast as passed, together with an analysis of the changes it brought in.

C. The Recast as passed

The Brussels I Recast was passed in late 2012 and came into effect in January 2015.[318] The Recast maintains the exclusion of arbitration at Art 1 (2) (d). It makes, however, two main changes relevant to arbitration. The first is the insertion of the rather lengthy Recital 12, which contains four paragraphs concerning the Recast's relationship with arbitration. The second is the insertion of Art 73 (2), which expressly preserves the supremacy of the New York Convention over the Recast. This section shall first consider why the majority of the changes have been introduced by way of a recital rather than enacting provisions and the effects this might have. It shall then examine the changes in each paragraph of Recital 12 and in Art 73 (2) in turn. Finally, it shall consider the question of how the Recast will handle anti-suit injunctions.

(1) Choice of recital over enacting provision

The majority of the relevant changes made in the Brussels I Recast are made in the form of Recital 12. Why a recital was chosen is not entirely clear, but one might conjecture that it was to maintain the simple exclusion of arbitration in the enacting provisions without any additional explanation.

At any rate, to understand the potential effects of the changes contained in Recital 12, it is necessary as preliminary questions to ask what the legal nature of a recital is, and how it should interact with the enacting provisions. The legal nature and extent of effect of a recital could have a key bearing on interpretation of that recital, rendering its meaning and implications different from its plain wording.

[318] Art 66 Brussels I Recast. The Recast will apply to court proceedings initiated on or after 10 January 2015.

Most commentaries on the Brussels I Recast and arbitration do not consider this question, simply assuming that Recital 12 is operative in its entirety.[319] Carducci, a vocal scholar in this field, briefly considers the question in his comment on the provisions of the Recast.[320] He concludes that Art 288 TFEU renders an EU regulation in its entirety, including its preamble where relevant, binding on member states.[321]

This explanation rather oversimplifies what is admittedly a complex matter. What is more, it does so in a fashion that could impact upon the proper interpretation of Recital 12.

The purpose of recitals in EU legislation, according to the EU institutions' drafting guide, is to set out reasons for the enacting provisions, without reproducing them or containing normative provisions.[322] This is in line with the academic view that recitals should lend context to the enacting provisions.[323]

In so doing, recitals can help in the judicial interpretation of unclear enacting provisions.[324] The Court of Justice has developed a number of principles regarding the effect of recitals to EU legislation.[325] It has been held that the language of a recital

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[319] See Erk, *Parallel Proceedings*, above, 66-68; L Hauberg-Wilhelmsen, 'The Recast Brussels I Regulation and Arbitration: Revisited or Revised?' (2014) 30(1) *Arb Intl* 169 ("Hauberg-Wilhelmsen, 'The Recast'"); SP Camilleri, 'Recital 12 of the recast Regulation: a new hope?' 2013 62(4) *ICLQ* 899 ("Camilleri, 'Recital 12'").

[320] G Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration: With Notes on Parallel Arbitration, Court Proceedings and the EU Commission's Proposal' (2013) 29(3) *Arb Intl* 467 ("Carducci, 'The New EU Regulation'"), 469.

[321] Ibid, 469. Art 288 (*ex* Art 249 TEC) Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01 provides in relevant part 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'. Note that the TFEU is the latest incarnation of the Treaty of Rome, as renamed by the Treaty of Lisbon.

[322] See Legal Services of the European Parliament, Council and Commission, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation* (2nd edn, 2013), available from the EU website at http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf (last accessed: 21 April 2015), 19: 'The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations'.

[323] Editorial, 'Contextual legislative elements as formites' (2004) 25(3) *Stat LR* iii, iii.

[324] See, for example, *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 37-39; *Case concerning rights of nationals of the United States of America in Morocco*, 27 August 1952, [1952] *ICJ Rep* 176, 196.

[325] This is summarised neatly in T Klimas and J Vaiciukaite, 'The Law of Recitals in European Community Legislation' (2008) 15 *ILSA J Int'l & Comp L* 61, 83-87.

cannot restrict a right granted by the enacting provisions.[326] Furthermore, the Court has held that a recital cannot confer a right otherwise clearly not granted or denied by the enacting provisions.[327] The court is, however, ready to use recitals to interpret the scope of enacting provisions.[328] This makes sense given its usual purposive approach to statutory interpretation.

The relevance to the discussion of Recital 12 is obvious. The recital will be capable of giving context to a provision whose meaning is unclear from its wording, such as the arbitration exclusion. It will not, however, be able to grant any sort of right not contained in the enacting provisions, nor to restrict access to any right contained in the enacting provisions. This may prove relevant to the discussion of the enforcement of a Brussels Regime judgment rendered in spite of an arbitration agreement. With this in mind, the following sections shall introduce the provisions of Recital 12 Brussels I Regulation.

(2) Recital 12, first paragraph

The first paragraph of Recital 12 states:

> 'This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.'

The first sentence of this paragraph merely restates the arbitration exclusion at Art 1 (2) (d), adding no wider context to the exclusion. The second sentence essentially enshrines the *Marc Rich* principle: that an action on the merits in one member state falling within the scope of the Regulation cannot prevent a court of another member

[326] Case C-162/97 *Criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn* [1998] ECR I-07477, para 54. '…the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question'.
[327] Case C-308/97 *Giuseppe Manfredi v Regione Puglia* [1998] ECR I-07685, para 30.
[328] Case C-288/97 *Consorzio fra i Caseifici dell'Altopiano di Asiago v Regione Veneto* [1999] ECR I-02575, para 23.

state from hearing proceedings ancillary to arbitration, such as for the appointment of an arbitrator.

The new recital, however, makes one subtle but potentially important change to the *Marc Rich* rule. Under *Marc Rich*, the applicability of the Regulation was decided using a subject matter test.[329] The right of the court seised of proceedings ancillary to arbitration to continue in spite of merits proceedings in another Member State was contingent on the very fact that those proceedings were ancillary to arbitration. Conversely, according to *Marc Rich* and *West Tankers* where the main subject matter before the court was a merits action, those proceedings in their entirety, including incidental questions as to the validity of an arbitration agreement, would fall within the scope of the Regulation.[330] This would mean that, where a court in one member state was seised of a merits action and another court in a second member state was subsequently seised of another action on the merits of the same dispute, the second court would have been bound under the Regulation's *lis pendens* rules to dismiss or stay the action pending resolution of the action in the court first seised, including the decision as to the validity of the arbitration agreement. The second court would not be able to decide on the validity of the arbitration agreement for itself and indeed would be bound to recognise the decision of the first court.

Under the new version of the *Marc Rich* rule in the first paragraph of Recital 12, this would no longer be the case. Recital 12, paragraph 1 provides: 'Nothing in this Regulation should prevent the courts of a Member State*, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement*, from referring the parties to arbitration…'.[331] This would mean that a court second seised of a merits action could consider the validity of the arbitration agreement before, if appropriate, staying the merits action and referring the parties to arbitration.

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[329] *Marc Rich*, above, para 26.
[330] *West Tankers*, above, para 26, '…the verification of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope' (the judgment here was paraphrasing the Evrigenis-Kerameus Report, above. The judgment goes on to state in para 27, 'It follows that the objection of lack of jurisdiction… on the basis of the existence of an arbitration agreement, including the validity of that agreement, comes within the scope of Regulation 44/2001…'.
[331] Emphasis added.

The first paragraph of Recital 12 therefore tweaks the Court of Justice's jurisprudence in a subtle, arbitration-friendly fashion, allowing arbitration agreements to function more effectively. The Recital in this way provides guidance on the interpretation of the scope of the enacting provision at 1 (2) (d).

In his comment on the new recital, Carducci argues that the rules of jurisdiction of the Regulation still apply in cases concerning arbitration, only the rules on recognition and enforcement of judgments being excluded by Art 1 (2) (d).[332] He reaches this conclusion by reference to the language of paragraphs two and three of Recital 12, which will be discussed in detail below. Paragraph two refers to the fact that judgments on the validity of an arbitration agreement cannot be recognised and enforced under the Regulation, whilst paragraph three refers to a court 'exercising jurisdiction under this Regulation' determining that an arbitration agreement is invalid. He reasons that this means the exclusion applies only to recognition and enforcement, whilst jurisdiction is not excluded. Carducci therefore argues that the *lis pendens* rule in the Regulation can apply where the court of one member state is seised for the purpose of rendering a declaratory judgment on the validity of the arbitration agreement and the court of another is later seised for the same purpose.[333]

This interpretation cannot be accepted. It blurs the lines between actions on the merits and actions ancillary to arbitration in a fashion contrary to *Marc Rich*. More seriously still, it interprets paragraphs 2 and 3 of Recital 12 in a fashion clearly inconsistent with paragraph 1, which is why discussion of the argument has been included in the analysis of that paragraph. Paragraph 1 states that '*[n]othing in this Regulation* should prevent the courts of a Member State from referring the parties to arbitration […] or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed'.[334] This must exclude the *lis pendens* rule, as something in the

[332] Carducci, 'The new EU Regulation', above, 472-473.
[333] Ibid, 473. He argues that if a likely respondent in arbitration seeks a ruling declaring the arbitration agreement invalid in a court 'in the EU, for instance in Spain, he enjoys the favourable treatment of *lis pendens* and related actions under the Regulation. If, for whatever reason, the claimant in arbitration seizes subsequently a second court of an EU Member State, for instance in France, for the same cause of action between the same parties, seeking a court ruling declaring that the arbitration agreement is not 'null and void, inoperative or incapable of being performed,' the French court shall of its own motion stay its proceedings until the jurisdiction of the Spanish court is established. If and when it is established, the French court shall decline its jurisdiction.'
[334] Emphasis added.

Regulation, from preventing a court from doing these things. It is submitted that paragraphs two and three of Recital 12 should be read in a fashion consistent with paragraph one if at all possible. Carducci's interpretation must therefore fail.

Finally, it is also interesting that paragraph 1 of recital 12 mentions that courts may assess 'whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law'. The reference to national law seems to be at odds with the New York Convention's provisions, which would imply that the question should be judged according to the law chosen by the parties, failing which the law of the juridical seat of the arbitration, failing which, the law determined by the international private law rules of the forum as properly applicable to the arbitration agreement.[335] This may mean that, in their desire not to interfere with the operation of the New York Convention, the European legislators have in fact impliedly created a new rule entirely at odds with it.

In conclusion, the first paragraph of Recital 12 makes a slight change to the *Marc Rich* rule by defining the scope of the vague and general exclusion of arbitration more clearly.

(3) Recital 12, second paragraph

The second paragraph of Recital 12 states:

'A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.'

This paragraph overturns the rule in *West Tankers* that judgments on the validity of an arbitration agreement will be subject to the Regulation where the main subject matter of the proceedings is also covered by the Regulation. Thus in a scenario where a court is seised on the merits of a dispute allegedly subject to an arbitration agreement, the judgment of that court as to the validity of the arbitration agreement will no longer fall within the scope of the Recast and will not be capable of directly binding another

[335] See Arts II, V (1) (a) New York Convention; see also discussion in chapter 6 of this thesis, below.

Member State court under the Recast. This is a departure from the 'predominant interpretation' of the arbitration exclusion before the Brussels I Recast, and would mean that if *National Navigation II* were decided today, the English court would be free to reach a different result.[336] Here again Recital 12 gives a slightly different meaning to the arbitration exclusion by clarifying its intended scope.

(4) Recital 12, third paragraph

The third paragraph of Recital 12 states:

"On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation."

The first sentence of this paragraph provides that when a court renders a judgment in spite of an alleged arbitration agreement, holding that arbitration agreement not to be valid or applicable, its judgment on the merits (but not the arbitration agreement, according to paragraph 2, above) will remain enforceable under the Brussels I Recast. The effect of the second sentence is somewhat less clear.

The second sentence addresses the relationship between on the one hand the duty to enforce under the Regulation judgments in which the issuing court has considered a jurisdictional challenge on the basis of an arbitration agreement and found the dispute not to be subject to arbitration, and on the other the duty to enforce an arbitral award under the New York Convention.[337] Recital 12 states that the duty to enforce such judgments will be 'without prejudice to the competence of the court' to decide on its New York Convention obligations to enforce arbitral awards.

[336] Hauberg Wilhelmsen, 'The Recast', above, 181-182.
[337] Art III New York Convention.

It has been suggested in scholarship that the effect is that a court faced with a conflicting judgment and arbitral award in the same dispute can recognise and/or enforce the arbitral award in preference to the judgment.[338] This suggestion is not consistent with a plain-text reading of the Brussels I Recast. The existence of a contradictory arbitral award is not a ground for refusing recognition and enforcement of a judgment under the Recast. [339] Therefore a court faced with a conflicting judgment and arbitral award would be considered bound to recognise and/or enforce both the judgment under the Brussels Regime and the arbitral award under the New York Convention.

Two arguments support this view. The first is the legal nature of Recital 12, which, as set out above, means it is not capable of creating rights not contained in the enacting provisions, nor capable of causing derogation from any right expressly contained in the enacting provisions. The enacting provisions of the Brussels I Recast give a litigant the right to have Regulation judgments recognised and enforced virtually automatically in the courts of other member states.[340] They also contain an exhaustive list of grounds for refusal of recognition and enforcement.[341] Those grounds for refusal do not include the existence of a contradictory arbitral award. Recital 12, by its legal nature, is not capable of changing these facts.

The second argument is that, although the New York Convention is given precedence over the Regulation in the enacting provisions in Art 73 (2), discussed below, the New York Convention does not in any way provide rules for the recognition and enforcement of judgments, only arbitral awards. In that sense, its precedence means little; that precedence has a much more obvious application, for example, in terms of the effect of an arbitration agreement on court jurisdiction, as will be discussed in more detail below under the heading of Art 73 (2).[342]

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[338] Erk, *Parallel Proceedings*, above, 67. 'In other words, a Member State court may enforce an arbitral award it considers valid under the New York Convention in preference to a court judgment invoked under the Recast Brussels Regulation'.
[339] Art 45 Brussels I Recast contains the list of grounds for refusal of recognition and enforcement of judgments under the Recast.
[340] Arts 36 and 39 Brussels I Recast.
[341] Art 45 Brussels I Recast.
[342] See Chapter 4.C.6, below. Because the New York Convention contains a rule on court jurisdiction in Art II, this rule takes precedence over the rules of the Brussels I Regulation for the purpose of

For these reasons, the contention that Recital 12, paragraph 3 allows the refusal of enforcement of a Regulation judgment on the basis of the existence of a contradictory arbitral award is to be rejected. More plausible is Camilleri's argument that courts could, in the above situation, justify refusal of enforcement of the judgment under the public policy exception.[343] This is no different to the situation before the conclusion of the Brussels I Recast, although Camilleri's point that Recital 12 adds force to the argument that enforcement of arbitral awards is an element of international public policy is well made.[344]

Still less clear is the approach to the recognition and enforcement under the Brussels I Recast and Recital 12, paragraph 3 of a judgment rendered in spite of what the enforcing court considers a valid agreement to arbitrate. The proper approach to this issue is no clearer under the Brussels I Recast than it was under the Brussels I Regulation.

The reason is that the first sentence of Recital 12, paragraph 3 states that, where another court has rendered a judgment in spite of an arbitration agreement, its judgment on the merits is enforceable under the Recast. The second sentence qualifies this rule as not prejudicing the competence of courts to decide on the enforcement of *arbitration awards* under the New York Convention, which takes precedence over the Recast. Art 73 (2), discussed below, states expressly in the enacting provisions that the New York Convention should take precedence over the Recast.

As mentioned above, the New York Convention also provides a jurisdictional rule: that a court '…seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] shall, at the request of one of the parties, refer the parties to arbitration…'.[345]

Recital 12, paragraph 3 does not in any way address the correct approach for a court to take in the situation where it is asked to enforce a judgment rendered in spite of

establishing jurisdiction over a dispute in respect of which the parties have made an arbitration agreement, as it always has done.
[343] Art 45 (1) (a) Brussels I Recast.
[344] Camilleri, 'Recital 12', above, 915.
[345] See Chapter 2,B.1, above. Art II (3) NY Convention.

what it views to be a valid arbitration agreement (not award), and is therefore incapable of altering the correct approach to this situation. The first sentence of paragraph 3 states that the court judgment on the merits should be enforceable. The court will find itself facing conflicting obligations under the Brussels I Recast, as interpreted according to Recital 12, paragraph 3 of the Recast and Article II New York Convention, if it considers the enforcement of a judgment on the merits to constitute 'a matter in respect of which' the parties have made an arbitration agreement, which will be discussed in more detail below in the context of Art 73 (2). It is submitted that the difficulties posed by a judgment rendered in spite of an arbitration agreement will continue to trouble courts under the Recast regime.

(5) Recital 12, fourth paragraph

The final paragraph of Recital 12 states:

'This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.'

This is simply a restatement of the meaning given to the arbitration exclusion in *Marc Rich*,[346] but gives no indication that the exclusion has been strengthened in the fashion desired by the UK to reinstate the anti-suit injunction in such proceedings.[347] That said, it should be noted that Advocate General Wathelet in his opinion in the *Gazprom* case cites this paragraph in support of the contention that anti-suit injunctions in support of arbitration are once again permitted under the Recast.[348] The debate about anti-suit injunctions goes beyond a simple paragraph in Recital 12, so shall be considered separately below.

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[346] *Marc Rich*, paras 21 and 26.
[347] Erk, *Parallel Proceedings*, above, 68; Camilleri, 'Recital 12', above, 904-908. Even Moses, who clearly supports the anti-suit injunction and raises the question of the reinstatement of the remedy via the complete exclusion of arbitration, concludes that this is an unlikely outcome. See ML Moses, 'Arbitration/Litigation Interface: The European Debate' [2014] *Loyola University Chicago School of Law Public Law & Legal Theory Research Paper No 2014-5/6* ("Moses", 'The European Debate'"), 45.
[348] *Gazprom*, above, Opinion of Advocate General Wathelet, paras 136-137.

(6) Article 73 (2)

Art 73 (2) states:

'This Regulation shall not affect the application of the 1958 New York Convention.'

This provision makes express what many would have argued was, or ought to have been, true under Article 71 of the Brussels I Regulation:[349] that the New York Convention takes precedence over the Regulation.[350] It has been argued that the judgments in *Marc Rich* and *West Tankers* falsify any claim that the New York Convention retained ultimate supremacy over the Regulation, at least in so far as conflicts between court and arbitration procedure are concerned.[351] Furthermore, although never tested before the Court of Justice, the alleged supremacy of the New York Convention would likely have been subject to the same narrow interpretation of Article 71 supremacy given to the CMR[352] in the *TNT* case: that the CMR was held only to be supreme insofar as it was consistent with the principles underlying the Brussels I Regulation.[353]

The express precedence provision in Art 73 (2) could be interpreted to mean that the New York Convention takes precedence over the Recast completely, not only insofar as it is consistent with the underlying goals of the Recast. This could possibly include giving precedence to the obligation to enforce an arbitral award over the obligation to enforce a Brussels Regime judgment on the same matter, as mentioned above. This argument falls foul of the analysis that there is no actual substantive conflict between the New York Convention and the Brussels I Recast: the New York Convention does not provide any rules concerning the enforcement of court judgments in matters in

[349] Art 71 (1) Brussels I Regulation provides: 'This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.'
[350] See, for example, C Roodt, 'Conflicts of procedure between courts and arbitral tribunals with particular reference to the right of access to court' (2011) 19(2) *AJICL* 236 ('Roodt'), 239; Pullen, above, 58.
[351] See Roodt, above, 239; Pullen, above, 58, particularly note 27.
[352] Geneva Convention on the Contract for the International Carriage of Goods by Road, May 19 1956, 399 UNTS 189. The official abbreviation 'CMR' comes from the French title of the Convention (**C**onvention relative au contrat de transport international de **m**archandises par **r**oute).
[353] Case C-533/08 *TNT Express Nederland BV v Axa Versicherung AG* [2010] ECR I-0000, [2010] ILPr 35 ('*TNT*'), in which it was held at paragraph 51 that 'Article 71 of Regulation 44/2001 cannot have a purport that conflicts with the principles underlying the legislation of which it is part.'

respect of which the parties have made an arbitration agreement, nor does the Brussels I Recast contain provisions to deal with conflict between a Regime judgment and a contradictory arbitral award or an arbitration agreement, as did the Hague Convention 1971.[354]

The New York Convention has always been treated as supreme in respect of its rule on the effect on court jurisdiction where the parties to a dispute have concluded an arbitration agreement. That is to say: where the parties have concluded an arbitration agreement, a court will never have jurisdiction over the substance of the dispute, even if it otherwise would under the Brussels Regime. The New York Convention will presumably retain this supremacy under the Recast.

A separate question, introduced above, is whether the jurisdiction provision of Art II (3) New York Convention, requiring courts 'seised of' a matter in respect of which the parties have made an arbitration agreement to refer those parties to arbitration, could be used to justify refusal of enforcement of a judgment rendered in spite of an arbitral agreement. This argument that it could is weak, especially because the court asked for enforcement of a Regime judgment in respect of a matter would be unlikely to view itself as 'seised of' the matter which forms the substance of the judgment. This view is supported by the rule in the Brussels I Recast that a foreign judgment may not be reviewed as to its substance in a court asked for recognition and enforcement, and with the rule naming the recognition and enforcement of a judgment as a subject matter capable of founding exclusive jurisdiction in itself, distinct from the matter that forms the subject of the judgment.[355] These two rules make clear that the enforcement proceedings are distinct from the underlying subject matter of the dispute, and therefore that a court 'seised of' recognition and enforcement proceedings is not 'seised of' the matter that forms the substance of the award, in respect of which the parties have made their arbitration agreement.

Any other interpretation of the precedence of Art II (3) New York Convention would lead to impossible conclusions, such as a court asked for recognition and enforcement

[354] Carducci, 'The New EU Regulation', above, 477.
[355] Art 52 Brussels I Recast, 'Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed'; Art 24 (5) Brussels I Recast.

of a Brussels Regime judgment having to found jurisdiction over the subject matter of the substance of the judgment before being able to grant such recognition and enforcement. It is therefore submitted that a court asked for the recognition and enforcement of a judgment is 'seised of' a request for recognition and enforcement of a judgment – a matter in respect of which the parties would be incapable of forming an arbitration agreement, given it entails a decision about the exercise of national sovereign power, and must surely be considered not to be capable of settlement by arbitration.

Furthermore, the Brussels I Recast provides that the jurisdiction of the court of origin may not be reviewed, unless jurisdiction was taken in violation of one of the rules of exclusive jurisdiction.[356] To refuse enforcement of a judgment on the basis that an arbitration agreement had been concluded between the parties entails would either be to review the jurisdiction of the issuing court, or effectively to raise the jurisdictional rule in Art II (3) New York Convention to the level of a rule of exclusive jurisdiction in favour of the arbitral tribunal under the Brussels I Regulation, placing the judgment of the enforcing court on jurisdiction paramount to that of the originating court. This would make little sense, because the implementation of Art II (3) New York Convention relies upon the court's assessment of the validity of the arbitration agreement, does not provide which court has jurisdiction to make that assessment, or that such a decision on the validity of the arbitration agreement should be enforceable in any other country. If this approach were taken, it would lead to the possibility of divergent approaches amongst member states to the question of whether a rule of exclusive jurisdiction has been breached, with judgments being refused enforcement in some member states and not in others. There would be obvious and direct conflict between those countries that have arbitration-friendly laws and those that more strictly regulate arbitration. Such an eventuality would hardly be possible in respect of, for example, exclusive jurisdiction over rights *in rem* in immovable property.[357] Such divergent approaches to recognition and enforcement are exactly the sort of thing the Brussels Regime's pro-enforcement bias is designed to eliminate. Opportunities to second guess the jurisdiction of the originating court are kept to the bare minimum for

[356] Art 45 (1) (e) (2) and Art 45 (3) Brussels I Recast.
[357] Art 24 (1) Brussels I Recast.

good reason, preferring certainty and finality to the endless litigation and relitigation of the same issues that review of jurisdiction upon enforcement could precipitate.

Accordingly it cannot be argued that Art II (3) New York Convention justifies the refusal of recognition and enforcement of a Brussels Regime judgment rendered in spite of an arbitration agreement, even if the New York Convention takes absolute precedence over the Brussels I Recast. In conclusion, therefore, it is difficult to see how the specific provision for the precedence of the New York Convention in the Brussels I Recast makes any difference to the general supremacy it had been granted under the Brussels I Regulation.[358]

(7) The Recast and anti-suit injunctions

A large amount of attention has been given to the question of whether the provisions of Recital 12 are strongly-worded enough to resurrect the anti-suit injunction in support of arbitration. As mentioned above, the consensus amongst most commentators is that it has not. This comfortable analysis has been somewhat upset by the opinion of Advocate General Wathelet in the *Gazprom* case, the judgment in which was discussed above.[359] In a remarkable opinion going far beyond the scope of the question referred, the Advocate General argues that the Brussels I Recast has reinstated the anti-suit injunction in support of arbitration. The Court of Justice's eventual decision has not gone nearly so far, holding that enforcement of at least arbitral anti-suit injunctions that do not impose penalties for non-compliance is compatible with the Brussels I Regulation, and making no mention of the Brussels I Recast.

Advocate General Wathelet, however, applied the Brussels I Recast to the questions referred, arguing that Recital 12 has an effect similar to a 'retroactive interpretative law', making clear how the exclusion of arbitration should always have been interpreted.[360] The Court of Justice applied the Brussels I Regulation rather than the

[358] Erk, *Parallel Proceedings*, above, note 390.
[359] See above, Chapter 3.A.4.
[360] *Gazprom*, Opinion of Advocate General Wathelet, above, para 91: 'Admittedly [the Brussels I Recast] will be applicable only from 10 January 2015, but[…] I think that the Court should take it into account in the present case, since the main novelty of that regulation, which continues to exclude arbitration from its scope, lies not so much in its actual provisions but rather in recital 12 in its preamble,

Recast, so it is appropriate to consider Wathelet's analysis separately, because he considers how the Recast would address the issue of the anti-suit injunction.

Assuming the question were to be decided under the Brussels I Recast, there is a strong argument that recognition and enforcement of any arbitral award tantamount to an anti-suit injunction is now compatible with the Brussels I Regulation. This is because, as discussed above, Recital 12 and Art 73 (2) make very clear that the New York Convention takes precedence over the Recast, and that the provisions of the Recast are 'without prejudice to the competence of the courts' to recognise and enforce arbitral awards under the New York Convention.[361] Together, these provisions make it tolerably clear that the recognition and enforcement of arbitral awards exists entirely outside, and free from interference from, the Brussels Regime. It is therefore submitted that the Recast would permit enforcement of any arbitral anti-suit injunction. Moses in her article on the Brussels I Recast adopts this position, but points out that the Court of Justice may nonetheless proscribe the anti-suit injunction in a purposively-reasoned judgment that equates an arbitral anti-suit injunction with a court-issued anti-suit injunction in its effects.[362] Wathelet's Opinion is, it is submitted, correct in this regard.

Wathelet's analysis in his Opinion goes one step further than this, arguing that the Brussels I Recast has reinstated the anti-suit injunction in court actions ancillary to arbitration, even though this question was not referred to the Court of Justice. He does so with reference to the legislative history, arguing that this makes clear that the European legislature meant to extend the scope of the arbitration exclusion and fully reverse *West Tankers*.[363] He points to the fact that Recital 12 makes clear that decisions on the existence, validity, and scope of an arbitration agreement are not subject to the rules of recognition and enforcement of the Regulation, which he argues means the Regulation does not apply to jurisdiction in foreign merits proceedings where the

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which in reality, somewhat in the manner of a retroactive interpretative law, explains how that exclusion must be and always should have been interpreted'.

[361] Recital 12, paragraph 3, second sentence makes clear that the obligation to enforce a Brussels I Recast judgment is 'without prejudice to the competence of the courts' to recognise and enforce arbitral awards. Although that may seem limited, because the scheme of automatic enforcement is the lifeblood of the Brussels Regime, it is reasonable to argue that the paragraph can be extended to cover all the rules of the Regime.

[362] Moses, 'The European Debate', above, 34.

[363] *Gazprom*, Opinion of Advocate General Wathelet, above, paras 126–132.

existence of an arbitration agreement is alleged (such as the Italian proceedings in *West Tankers*) until such time as the court has decided that the arbitration agreement is void or not applicable.[364] He concludes that this means that the court seised on the merits is not entitled to the protection of the Regulation until such time as it decides there is no valid or applicable arbitration agreement, and states that the fact that its judgment on the substance could be enforced under the Regulation cannot change this analysis, because it would deprive Recital 12 of the effect the European legislature intended it to have.[365]

This analysis is astonishing, given the legislature barely expressed the intention to reverse the decision in *West Tankers* in its entirety. Advocate General Wathelet does not cite an express statement of that intent in his lengthy and thorough opinion. Rather, he relies on the wording of Recital 12 and the resolution that the Parliament '[s]trongly oppose[d] the (even partial) abolition of the exclusion of arbitration from the scope' of the Recast.[366] It is submitted that the wording of Recital 12 itself is far too vague to lead to that conclusion, and that the Parliament's resolution is much more likely aimed at the Commission's proposed *lis pendens* rule than the *West Tankers* decision. It is true that the preamble to the Resolution cited by Wathelet mentions that the Parliament may wish to restore the pre-*West Tankers* status quo,[367] but the Resolution also suggests adding a paragraph to Art 31 Brussels Regulation stating that a judgment granting provisional or protective measures will not be recognised if it violates the arbitration law of the country requested to enforce the document.[368] The Parliament Resolution is a shopping list, and clearly a list from which not all items were bought.

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[364] Ibid, para 133. A similar point about the ongoing relevance of *West Tankers* is raised in a slightly different way in R Fentiman, *International Commercial Litigation* (2nd edn, 2015), 535-537, although the author points out that Court of Justice may well nonetheless refuse to allow anti-suit injunctions on different reasoning.

[365] Ibid, para 136. For the contrary position, see Camilleri, above, 904-905, which argues that the mutual-trust-based rationale for the *West Tankers* decision still applies as long as there is the potential for a court seised on the merits to issue an enforceable Regulation judgment if it declines to enforce the arbitration agreement. Moses, 'The European Debate', above, 24-25, points out that the practical reasons for banning the anti-suit injunction in *West Tankers*- in the form of the controversy caused by the remedy – persist under the Recast.

[366] Ibid, para 120. Parliament Report, above, paras 9-10.

[367] Parliament Report, above, Preamble para M.

[368] Ibid, para 10.

Wathelet's argument that, because under paragraph 2 of Recital 12, the judgment of a court seised of merits proceedings on the validity of an arbitration agreement is not subject to the Recast's rules of recognition and enforcement, those court proceedings are also not entitled to the protection of the Regulation until such time as the court decides there is no valid or applicable arbitration agreement is equally astonishing. Taken to its logical conclusion, this would mean that, if a court were seised of merits proceedings in respect of a dispute in which there was clearly no arbitration agreement, but a recalcitrant litigant alleged that there was, putting the preliminary question of the existence of an arbitration agreement before the court, those proceedings would cease in their entirety to be covered and protected by the Regulation's jurisdictional rules until such time as the court rejected the challenge to its jurisdiction. It would then be open to either party to start parallel merits proceedings in another court, because there would be, on Wathelet's view, no Regulation proceedings to trigger the application of the *lis pendens* rules until such time as the original court had decided that the arbitration agreement did not exist or apply.[369] This is a profound departure from the rules of the Regulation, which consider a court 'seised' for the purposes of the *lis pendens* rule when the documents initiating the proceedings are lodged with the court.[370] Such an outcome surely cannot have been intended by the legislature. The flaw in Wathelet's analysis in this respect is that it presupposes the arbitration agreement must be valid and applicable, thereby lending it too much power.

Furthermore, paragraph 1 of Recital 12 provides that '[n]othing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement from[…] examining whether the arbitration agreement is null and void, inoperative, or incapable of being performed, in accordance with their national law'. Wathelet's wide

[369] This could have profound consequences. Imagine merits proceedings validly started before the courts of a member state. The defendant in those proceedings alleges an arbitration agreement applies to the dispute. Those proceedings immediately no longer fall within the scope of the Regulation. The defendant then begins an action on the merits before the courts of a member state with a slow-moving legal system. Those proceedings can continue because there are no parallel proceedings falling within the scope of the Regulation, and therefore the *lis pendens* rule is not triggered. When the original court decided that there is no valid arbitration agreement and proceeds to the merits, it will find that there are already Regulation proceedings in another member state, and will have to stay pending the resolution of the later-in-time but first-in-law proceedings. If these proceedings take a long time to resolve, the defendant has effectively torpedoed the earlier court action against it.

[370] Art 32 Brussels I Recast.

interpretation of para 2 to allow anti-suit injunctions could be used to prevent the court whose proceedings are subject to the anti-suit injunction from doing just that. In fact, reading the Recital to allow every court to rule on its own jurisdiction and no court to rule on any other court's jurisdiction is consistent with its established case law that no court is better place to rule on a court's jurisdiction than the court whose jurisdiction is challenged.[371]

Finally, *West Tankers* is perhaps the most controversial and debated decision of the Court of Justice under the Brussels Regime, or at least the Brussels Regulation. To suggest that the legislature would reverse a high-profile decision such as *West Tankers* without further debate, or clear and express language, beggars belief. By contrast, the language reversing the *Gasser* decision on choice of court agreements and *lis pendens*, both in the enacting provisions and the preamble to the Brussels I Recast, is completely clear as to its effect and purpose.[372]

It is submitted that there is a good reason to draw a distinction between the enforcement of an arbitral anti-suit injunction and the issuing of an anti-suit injunction in support of arbitration by a court. The reason is that the enforcement of an arbitral anti-suit injunction involves the direct exercise of obligations under the New York Convention – recognising and/or enforcing an arbitral award – which is clearly stated to be a process not prejudiced by the rules of the Brussels I Recast.[373] Furthermore, it involves the fulfilment of obligations under an instrument that clearly takes precedence over the Brussels I Recast. The system of enforcement of arbitral awards is clearly intended to exist independently from and outside the Brussels Regime.

On the other hand, issuing an anti-suit injunction in court proceedings in accordance with domestic procedural laws does not in any way involve the exercise of New York Convention obligations: the New York Convention obliges the court only to recognise as valid the arbitration agreement and refer the parties to arbitration. No question of

[371] See, for example, *Overseas Union*, above, para 23.
[372] Recital 22 and Art 31 (2) Brussels I Recast. See Chapter 5.D, below.
[373] It is possible that the arbitral anti-suit injunction could be issued by way of an order rather than an award. This raises the question of whether the New York Convention applies to an order at all. This is a complicated issue that could perhaps form the subject of a separate thesis; this thesis shall assume that the New York Convention applies to all arbitral anti-suit injunctions, directly or indirectly (because the consequences of the ignoring an order of the tribunal would likely be reflected in the ultimate award).

supremacy of a New York Convention obligation ever arises, and so there is thus no reason to believe the court does not face a duty to act in a way that does not interfere with the operation of the Brussels Regime.

It is therefore submitted that Advocate General Wathelet's argument that the Brussels I Recast has returned the anti-suit injunction in court proceedings ancillary to arbitration will not be adopted by the Court of Justice if the issue is referred. At any rate, even if it is and the anti-suit injunction is revived, this will not comprehensively solve any of the problems at the interface between the Brussels Regime and arbitration. Although it will provide English and Scottish courts with a mechanism to prevent parallel court proceedings to arbitrations seated in those countries, the majority of EU countries whose courts will not issue anti-suit injunctions will be left without a solution. Furthermore, such a remedy, rooted in unilateralism and uncooperativeness, is hardly an appropriate solution for parallel proceedings within Europe. Even if the anti-suit injunction is back, it will change little and should not be welcomed.

D. Criticism of the Recast approach

Various criticisms can be made of the Brussels I Recast's approach to arbitration. The most obvious is that it makes only minor and relatively insignificant changes to the Brussels I Regulation's relationship with arbitration, failing to address the many problems that had been identified and the proposals made in an attempt to address these.

One might very reasonably wonder why the proposals for reform were dropped so quickly. The original Heidelberg Report and Commission proposals were obviously scaled back in the face of member state opposition after the circulation of the Commission's Green Paper. The scaled back proposal of a mandatory stay provision was rejected following strong opposition in Parliament. The Parliament Report states that: 'it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in

this area, to try to force their hand'.[374] Anecdotal evidence, as well as the reference to competition for arbitration business, suggests that the UK and French representatives were the main stumbling block. The Council's press release upon the conclusion of the Recast also chooses to focus on other issues, such as the abolition of *exequatur*, and to address these urgently as a priority.[375] This may have left no time to reach a more far-reaching compromise on arbitration.

The addition of Recital 12, as outlined above, has changed next to nothing and addressed none of the previously identified problems at the interface between the Brussels Regime and arbitration. To be particularly regretted is the failure to restrict parallel proceedings. As stated above, this had been identified as the most significant problem with the relationship between the Brussels I Regulation and arbitration. It was also clearly identified by the Commission as a priority for reform, given it was the focus of the scaled back proposal following the Green Paper consultation.

The failure to eliminate parallel proceedings will be discussed in more detail in the context of the principle of the promotion of legal certainty and predictability, presented in the next chapter.[376] In short summary, however, allowing parallel proceedings runs contrary to the principle of mutual trust between member states of the European Union; it undermines the predictability of and certainty provided by the Brussels Regime; it is inconsistent with the Regime's approach to *lis pendens* in other matters; and it does not align with the principles enshrined in the Recast's provisions on choice of court agreements, which expressly promote party autonomy. These criticisms will be addressed in greater detail as part of the justification for this thesis's proposal for reform, which will follow the introduction over the next three chapters of certain key principles. It would seem, however, incomplete to conclude this chapter's presentation of the Brussels I Recast changes without some evaluation of their worth.

[374] Parliament Report, above, 5.
[375] Council of the European Union, *Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU* 16599/12 PRESSE 483.
[376] See Chapter 5.C, below.

E. Preliminary conclusions

In summary, because of legislative inertia and the vested interests of states with a large arbitration practice, the Brussels I Recast makes little to no change to or progress on the relationship between the instrument and arbitration. It does not address any of the problems at that interface, as had been identified by member states and commentators well in advance of the recasting process. This is to be regretted, as there was scope for, and even proposals tabled to effect, change for the better. But problems still exist at the interface between the Brussels Regime and arbitration, and this thesis will now move on to consider how they might in future be addressed.

5. PRINCIPLES IN EUROPEAN INTERNATIONAL PRIVATE LAW

So far, this thesis has looked back at the arbitration exclusion: from its original drafting to its survival of numerous, sometime extensive, proposals for reform. Attention will now move from the past to the future. Having established what the arbitration exclusion is, why it was included, what it means, and what problems it causes or exacerbates, the new focus is on what can be done to improve the situation.

Before making a proposal on the changes that could improve the relationship between the Brussels Regime and arbitration, a preliminary issue is to identify the relevant goals and principles that should be taken into account in drafting any changes. The first of these will be the principles underlying European international private law, or often more specifically the European law of jurisdiction, which will be set out in this chapter. The second investigation will concern international commercial arbitration more generally, which will be the subject of the next two chapters.

The focus in this chapter remains on European international private law, as it is a developed system of international private law and has been the main subject of the thesis so far. This thesis is still concerned with jurisdiction conventions more generally as well as within Europe, and it is recognised that not all those principles that underlie European international private law may well be relevant to the subject in the world at large.

This chapter will first discuss briefly the aims of the project of creating a European law of jurisdiction. It will then consider the principles underlying that law as it operates today. The principles identified will include: mutual trust, a principle of fundamental importance in both European international private law and EU law more generally; legal certainty and predictability; and respect for party autonomy. This chapter will conclude that goals of and the principles underlying the European law of jurisdiction should be taken into account when considering the Brussels Regime's relationship with arbitration.

A. The purpose of a European law of jurisdiction

The purpose of the Brussels Regime – the European law of jurisdiction – is clear, undisputed, and needs relatively little discussion. Of far more relevance are the principles that have been used to achieve that goal, and analysis of these will form the bulk of this chapter. It is, however, relevant to consider the ultimate goal of the Brussels Regime: why it was created and what it was supposed to achieve. This lends context to the discussion of its underlying principles.

As mentioned in chapter two, the Brussels Convention was concluded under Art 220 Treaty of Rome. The purpose of Art 220 was to obligate the member states to enter into various multilateral agreements to serve a variety of purposes.[377] The conclusion of such agreements 'uniformly interpreted and applied, is necessary to make the free movement of persons, goods, services and capital fully effective and to ensure equality of competitive conditions'.[378] It can therefore be seen that the higher purpose of the creation of the Brussels Regime was to facilitate the implementation of the four fundamental freedoms and thereby the creation of a common market. This makes sense, because a common market could not properly function if the various courts within that common market clashed over jurisdiction and the enforcement of judgments: this would create considerable uncertainty and undermine cross-border business.[379]

The goal of supporting the common market will remain relevant throughout this chapter, and should be borne in mind when considering the principles that have been relied upon to achieve this goal.

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[377] These include, as well as the recognition and enforcement of judgments and arbitral awards, the elimination of double taxation; the mutual protection of persons and rights; and the mutual recognition of companies.

[378] PE Herzog and H Smit, *The Law of the European Economic Community: A Commentary on the EEC Treaty* (1976), 6-193.

[379] Other common markets also rely on similar rules, including the Civil Jurisdiction and Judgments Act 1982 in the UK and the 'Full Faith and Credit Clause', Art IV § 1 Constitution of the United States of America.

B. Principle one – mutual trust

The principle of mutual trust has become one of the defining features of European international private law in recent years. Although never specifically mentioned in any of the treaties from Rome to Lisbon, it has proved the decisive factor in a number of high-profile international private law judgments handed down by the Court of Justice, both before and after its first appearance in relevant legislation in the preamble to the Brussels I Regulation.[380]

Mutual trust does not, however, exist only as a principle in international private law; in fact, it was already 'a widespread postulate' of other areas of EU and EEC law long before it took on major significance in European international private law.[381] The prevalence of the concept in case law and legislation concerning the fundamental freedoms reflects the almost constitutional significance mutual trust has come to hold within the EU, whether it be trust in court systems, the implementation of directives, regulatory law, or certification and inspection procedures. Indeed, the case law can be said to require member states to place trust in the exercise of the powers of state by other member states, whether judicial power such as taking jurisdiction and rendering judgment in a civil case; legislative power such as implementing an EU directive in domestic law; or executive power such as ensuring compliance with EU law within that state's territory.

It may not at first glance be obvious why the use of mutual trust in other areas of EU law is relevant to a discussion of mutual trust in the context of the European law of jurisdiction. The reason is that mutual trust is often used in the context of the 'fundamental freedoms' – those things that are supposed to enjoy free movement within the EU. The fundamental freedoms are so called because they are absolutely central to the proper functioning of the common market. The European law of jurisdiction is also commonly referred to as creating the 'free movement of

[380] Recitals 16 and 17 Brussels I Regulation.
[381] F Blobel and P Spath, 'The tale of multilateral trust and the European law of civil procedure' (2005) 30(4) *EL Rev* 528 ('Blobel and Spath'), 534. See also M Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11(1) *J Priv Int L* 64 ('Weller'), 76.

judgments'.[382] Free movement of judgments is increasingly seen as a further essential free movement for the successful functioning of a common market, albeit one that may not have been politically expedient to enunciate in the early stages of the EEC, because judicial authority is inherently linked to sovereignty and therefore jealously guarded by states. Mutual trust is a principle that underpins free movement, specifically by preventing invasive review that undermines free movement, thereby supporting the common market. It is submitted for this reason that the same principle of mutual trust is used in the European law of jurisdiction and the fundamental freedoms. This underlines the importance of free movement of judgments, the role played by the principle of mutual trust, and demonstrates the relevance of discussion of mutual trust in other areas of European Union law to a discussion of mutual trust in the European law of jurisdiction: it is the same principle used for the same reason.

Without mutual trust, the whole common market could collapse in a mire of inefficient review procedures. The concept has therefore come to be used as a restriction on member state behaviour: effectively a prohibition of state behaviour that demonstrates distrust. It may be noted that it somewhat ironic that mutual trust only needs to be called upon as a normative concept when one member state demonstrates mistrust of another.

Finally, mutual trust is incredibly important and is given detailed attention in this chapter because it is precisely what makes Europe different. As will be elaborated upon in more detail in Chapter 8 of this thesis, the other principles underlying the Brussels Regime – such as legal certainty, party autonomy, and the sound administration of justice – are likely equally relevant principles in the world at large. The most likely reason that similar conventions have not developed worldwide is that, in the world at large, mutual trust does not exist, and at any rate there is no supranational body to compel states to act in accordance with its spirit. As will be demonstrated below, mutual trust is the principle that is constantly relied upon to compel member states to act in a way necessary to support the common market,

[382] See Recitals 6 and 10 Brussels I Regulation; S Lane, 'Free movement of judgments within the EEC' (1986) 35(3) *ICLQ* 629.

including in the context of the European law of jurisdiction. This is why mutual trust is not simply important in general, but vitally important to this thesis.

This section will outline the use of mutual trust as a guiding principle in European international private law, before drawing parallels with mutual trust as used in wider European Union law. This will serve to underline the importance of mutual trust not only to European international private law, but also to the common market and the project of European unification as a whole.

(1) Mutual trust in European international private law

Over the past 20 years, mutual trust has become one of the defining principles of European international private law, especially in judicial decision making. Its influence was originally indirect and frequently not expressly articulated, but in recent years its use has become far more overt.

In the international private law context, mutual trust has at its heart the notion that the courts of every member state should respect the courts of every other member state: respect those courts' ability to rule on their own jurisdiction, and respect the judgments they ultimately render by enforcing them without review. The principle of mutual trust has even been equated to each member state placing 'blind trust' in the legal systems of the other member states.[383] This principle underlies the Brussels Regime, even if it has only recently come to be known consistently by the name 'mutual trust'. Indeed, the Jenard Report on the Brussels Convention recognises the same principle in its explanation that Convention's rules on virtually automatic recognition and enforcement of judgments is based on 'complete confidence in the Court of the State in which the judgment was given' and the assumption that that court correctly applied the rules of jurisdiction.[384] Confidence in this context is synonymous with trust.

The principle thus underlies the substantive provisions of the Brussels Regime, but has also been used as a normative principle in interpreting and applying those provisions. The normative aspect of mutual trust began to show in the *Overseas Union* judgment

[383] Kruger, above, 1035-1036.
[384] Jenard Report, above, 46.

handed down by the Court of Justice under the Brussels Convention in 1989. This case centred on the interpretation of the *lis pendens* rule at Art 21 of the Convention. Proceedings were pending in the same dispute before the courts of France and the UK, having been started in that order. The English Court of Appeal referred several questions to the Court of Justice, including whether, if the court second-seised does not choose to decline jurisdiction, it is obliged to stay proceedings, or whether it can review the jurisdiction of the first-seised court under the Convention or otherwise. The Court of Justice ruled firmly that no review of jurisdiction could be permitted under the Convention, stating:

'…in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. Either the jurisdiction of the court first seised is determined directly by the rules of the Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them, or it is derived, by virtue of Article 4 of the Convention, from the law of the State of the court first seised, in which case that court is undeniably better placed to rule on the question of its own jurisdiction.'[385]

This line of reasoning is clearly doctrinally rooted in what would later become known as mutual trust. It clearly expresses the same principles: that courts must be allowed to assess their own jurisdiction and their assessment respected by other courts. Although mutual trust was not expressly mentioned, the same concept underpins the holding. Around the same time, the doctrine of mutual trust was expressly referred to in an Advocate General's opinion on an international private law case, but not expressly applied by the Court of Justice.[386]

In the *Gasser v Misat* case, however, the Court of Justice did turn to the language of 'mutual trust' to assist it in reaching its decision. The case was referred to the Court of Justice from the Austrian *Oberlandesgericht Innsbruck* (Higher Regional Court of Innsbruck). Gasser brought a claim for payment of outstanding invoices against MISAT before the Austrian court, which was designated in an exclusive choice of court agreement contained within invoices and accepted by conduct. Some eight months earlier, MISAT had brought proceedings before the *Tribunale Civile e Penale*

[385] *Overseas Union*, above, para 23.
[386] Case C-172/91 *Volker Sonntag (supported by Land Badenwürttemberg) v Waidmann* [1993] ECR I-1963 ('Waidmann'), Opinion of Advocate General Marco Darmon, paras 71-72. The case concerned the applicability of the Brussels Convention to a judgment given on a civil matter by a criminal court.

di Roma (Civil and Criminal District Court of Rome) for a declaration that the contract had been terminated. The Italian proceedings were still pending at the time the Austrian proceedings were started, so the Austrian proceedings should have been stayed under the *lis pendens* rule at Art 21 Brussels Convention.[387]

The Austrian court referred two questions relevant to this thesis to the Court of Justice: whether it was permitted to review the jurisdiction of the court first seised because, unlike in *Overseas Union*, it was nominated in a choice of court agreement; and whether the fact that the proceedings in the court first seised were taking an 'unjustifiably long' time could allow the court second seised to proceed, notwithstanding the *lis pendens* rule at Art 21.

The Court of Justice answered both questions in the negative: the first in the spirit of mutual trust; and the second expressly invoking the principle to justify the decision. The court refused to raise a choice of court agreement to the level of a rule giving exclusive or protective jurisdiction under the Brussels Convention, in which review of jurisdiction is permitted. The court cited *Overseas Union* in holding that 'the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them'.[388] The court continues '[t]hus… it is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seised as having exclusive jurisdiction'.[389] This approach places legal certainty paramount to party autonomy and achieving a fair result in the given dispute, using what would become the principle of mutual trust between the legal systems of member states to justify this approach.[390]

In addressing the second question, concerning the delay in the Italian proceedings, the Court of Justice was explicit in invoking the principle of mutual trust. The court

[387] Although *Gasser* was decided after the Brussels I Regulation had been passed, it was based on events before the Regulation was passed, and so was decided under the Brussels Convention.
[388] *Gasser*, above, para 48, citing *Overseas Union*, above, para 23.
[389] Gasser, above, para 49.
[390] Ibid, para 51.

reasoned 'the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect'.[391] The court also supported the decision with the principle of legal certainty and predictability, as it had its answer to the first question.[392] As will be discussed below, legal certainty and predictability often seem to go hand in hand with mutual trust in the court's reasoning.[393]

In *Gasser*, therefore, the principle of mutual trust was used explicitly to aid the court in reaching its decision. This represents a development from the position that existed before, where mutual trust was invoked in spirit but not in name, and set a precedent for the use of mutual trust as a decisive judicial tool in future international private law cases.

The Advocate General and the Court of Justice would again turn to mutual trust to support their conclusions in the *Turner* case, the case in which the Court of Justice effectively banned the use of the anti-suit injunction within Europe. Advocate General Ruiz-Jarabo Colomer believed that the use of the anti-suit injunction casts doubt on 'the reciprocal trust established between the various national legal systems'.[394] He argued that this should be decisive as the Brussels Convention represents an important milestone in European judicial co-operation, a project 'imbued with the concept of mutual trust, which presupposes that each State recognises the capacity of other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration'.[395] The Court of Justice agreed, using the principle of mutual trust as the foundation for its judgment.[396] The Court went on to state that it is in the interference with the foreign court's ability to determine its own jurisdiction – that

[391] Ibid, para 72.
[392] Ibid.
[393] It should also be noted that *Gasser* has been legislatively reversed by the Brussels I Recast, a decision which will be discussed in more detail later in this chapter.
[394] *Turner*, above, Opinion of Advocate General Ruiz-Jarabo Colomer, para 30.
[395] Ibid, para 31.
[396] *Turner*, above, paras 24-25.

central, trust-based rule of the Convention – that meant the anti-suit injunction was incompatible with the Convention system.[397]

The decision in *Turner* was severely criticised in England, perhaps most notably by Lord Mance, who was then a Lord of Appeal, soon to be elevated to the House of Lords. However, the case also received favourable appraisals.[398] Lord Mance argued that the post-*Gasser* system postulates a lack of trust in the ability of the court second seised to restrain abusive litigation and undermines the ability of courts to do practical justice in any given case.[399] In so arguing, Lord Mance raises a point that will be discussed later in this thesis: that mutual trust can often seem like a blunt decision-making instrument when applied to individual cases. In its promotion of an ideal of European unification, mutual trust often takes precedence over what may seem like pressing concerns of individual fairness in a given case. The same could be said of *Gasser*, and indeed Lord Mance and others make this criticism of the use of the principle in each case.[400] In most cases, however, there is a balancing of competing principles to be performed, and cases of mutual trust are no different. This is why courts are allowed to review the jurisdiction of the courts of another member state for compliance with rules of exclusive and protective jurisdiction despite the wide-ranging principle of mutual trust, which yields in the face of particularly strong connections between the subject matter of the dispute and a given legal system, or the need to protect a specific class of vulnerable litigant.[401] The difficulty of drawing the appropriate borders to cases in which mutual trust should be decisive is underlined by the decision of the EU legislature to reverse *Gasser* in the Brussels I Recast, discussed in more detail below.[402] Nonetheless, while its weighting of principles is often criticised, the court clearly appreciates the value of the principle of mutual trust as a

[397] Ibid, para 27.
[398] See for example Kruger, above.
[399] J Mance, 'Exclusive jurisdiction agreements and European ideals' (2004) 120 *LQR* 357, 363. Lord Mance raised this objection in the context of his argument that dissenting judgments should be permitted in the Court of Justice.
[400] Ibid. See also L Merrett, 'The enforcement of jurisdictional agreements within the Brussels regime' (2006) 55 *ICLQ* 315, 329; EB Crawford, 'The uses of putativity and negativity in the conflict of laws' (2005) 54 *ICLQ* 829, 838.
[401] Art 35 (1) Brussels I Regulation.
[402] See Chapter 5.C, below.

decision-making tool, even if the principle is not absolute and should not be considered a 'trump card'.

Since 2001 the principle of mutual trust has been enshrined in legislation, albeit in recitals. Recital 16 of the Brussels I Regulation provides '[m]utual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute', whilst Recital 17 states 'By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid'. The regulation thus enshrines the principle of mutual trust as it had begun to be expressed in case law, although with the emphasis on its role in the recognition and enforcement rather than the jurisdiction aspects of the Regulation, which often seem to prove the more controversial in practice. This expression of the principle of mutual trust is repeated in similar terms in the Brussels I Recast.[403]

Since the inclusion of the principle in the Brussels I Regulation, and especially in the last five years, the principle of mutual trust has been used by the Court of Justice with increasing regularity to justify its international private law decisions. Perhaps the most famous instance of the use of mutual trust came in the *West Tankers* case in 2009, when the Court held, as mentioned above, that the use of anti-suit injunctions to protect arbitration agreements within the European Union 'runs counter to the *trust* which the Member States accord to one another's legal systems and judicial institutions and *on which the system of jurisdiction under Regulation No 44/2001 is based*'.[404] The Court cites *Turner* in support of this statement, although the statement in *West Tankers* is wider than that in *Turner*, which limited itself to saying that mutual trust underpins certain jurisdictional rules. In *West Tankers*, trust is stated to underpin the entire Brussels Regime. This assessment is hardly controversial, but represents a development in the importance the court is willing to ascribe to mutual trust in its

[403] Recital 26 Brussels I Recast.
[404] *West Tankers*, above, para 30. Emphasis added.

judgments, perhaps precipitated by the enshrinement of the principle in the recitals to the Brussels Regulation.

Following *West Tankers*, the principle of mutual trust has been used frequently by the Court of Justice in its international private law cases. In the *TNT* case referred to above, the Court held that the jurisdiction provisions of the CMR took precedence over the Brussels Regulation only in so far as those provisions aligned with the key principles underlying the Regulation. This meant that provisions of the CMR permitting the review of the jurisdiction of the originating court by an enforcing court could not be applied because they run contrary to the Regulation system of recognition and enforcement and its founding principles. The judgment refers repeatedly to mutual trust as a crucial principle underlying the Regulation that must be respected by other sets of jurisdictional rules, notwithstanding that they seem on a literal reading of Art 71 (1) to take precedence over the Regulation.[405] Again this judgment raises the profile of mutual trust still higher, in effect saying that promoting and maintaining mutual trust between the member states is itself a goal more important than the enacting provisions of the Brussels Regulation. This means that the importance of mutual trust goes beyond its inclusion in a recital, because as has been discussed above, recitals are not capable of displacing enacting provisions. Maintaining mutual trust in the *TNT* case therefore ceases to be an underlying, guiding principle, instead becoming an end in itself.

In *Prism Investments*, the Court of Justice relied on the doctrine of mutual trust to justify its holding that an automatic declaration of enforceability made under Art 41 Brussels I Regulation may only be appealed under Art 45 on the grounds listed in Arts 34 and 35.[406] The fact that there may be other good reasons not to enforce the judgment – such as the fact that it has already been complied with where issued – do not have any bearing upon its enforceability *per se*, only the actual process of enforcement.[407]

[405] *TNT*, above, paras 49, 54-56.
[406] Case C-139/10 *Prism Investments BV v Jaap Anne van der Meer, in his capacity as receiver in the liquidation of Arilco Holland BV* [2011] ECR I-9511, paras 27-31.
[407] Ibid, para 43.

The court expressly referred to recitals 16 and 17 in providing legal context to its decision.[408] Again, mutual trust was vital in steering the court towards its holding.

In the *Trade Agency* case, the Court of Justice referred to mutual trust, which favours automatic recognition of foreign judgments, as a principle pulling against concerns of procedural fairness, though ultimately the Court found that the procedural safeguards included in Art 34 (2) Brussels I Regulation should take precedence.[409] Once more, the judgment emphasises the crucial importance of mutual trust in the European law of jurisdiction, even if that importance was not in this case decisive.

In the *Wolf Naturprodukte* case, the Supreme Court of the Czech Republic asked the Court of Justice whether, for a judgment to be enforceable under the Brussels I Regulation, it was necessary that the Regulation was in force in both the issuing and recognising state at the time when the issuing court rendered judgment.[410] The court referred to the mutual trust in reasoning that the Regulation's strict rules of jurisdiction and relatively liberal rules of recognition and enforcement are closely linked, with the former helping foster trust for the purpose of the latter.[411] It is therefore necessary that the Regulation was in force in both member states at the time the judgment was issued for a state to be bound to recognise the judgment.[412] Mutual trust is again referred to as effectively underpinning the entire Brussels Regime.

The principle of mutual trust continues to be referred to by the Court of Justice in its international private law decisions, for example in deciding that a court must recognise a judgment whereby the court of another member state declines jurisdiction under a choice of court agreement.[413] The Court has also referred extensively to mutual trust

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[408] Ibid, para 3.
[409] Case C-619 *Trade Agency Ltd v Seramico Investments Ltd* [2012] OJ C 72/25, paras 40-46. See especially para 43: 'the system of appeals for which it provides against the recognition or enforcement of a judgment aims to establish a fair balance between, on the one hand, mutual trust in the administration of justice in the Union, and, on the other, respect for the rights of the defence, which means that the defendant should, where necessary, be able to appeal in an adversarial procedure against the declaration of enforceability'. See Weller, above, 89-90.
[410] Case C-514/10 *Wolf Naturprodukte GmbH v SEWAR spol. S r o* [2012] ILPr 37.
[411] Ibid, para 25.
[412] Ibid, para 34.
[413] Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* [2013] ILPr 7, para 28-29, '…mutual trust would be undermined if a court of a Member State could refuse to recognise a judgment by which a court of another Member State declined jurisdiction on the basis of a jurisdiction clause', and para 36, 'If a court of the Member State of origin, in the assessment of its own jurisdiction, has held

in justifying its decision that Art 34 (4) of the Regulation does not apply to irreconcilable judgments given by the courts of the same member state[414] as well as in decisions regarding recognition of family law judgments rendered under the Brussels II Regulation.[415]

Mutual trust has clearly become a defining principle of the European law of jurisdiction. Its application is not always popular, nor does it necessarily lead to the fairest results in any given case, but it is in general necessary to ensure the proper circulation of judgments within the European Union. The free movement of judgments in turn aids the common market by allowing business to take place in an atmosphere of legal certainty. Indeed, the language of mutual trust in European international private law bears a striking resemblance to language used in cases concerning the fundamental freedoms, suggesting that mutual trust is a vital tenet of European Union and the common market. The following section will explore the use of the principle of mutual trust in other areas of EU law, with a focus on the law concerning the fundamental freedoms.

(2) Mutual trust in European Union law

Long before assuming central importance in European international private law, the principle of mutual trust was being used expressly and decisively by the Court of Justice in other areas of European law. The doctrine is most often used to support the so-called fundamental freedoms: namely the free movement of goods, workers, and

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such a jurisdiction clause to be valid, it would in principle be contrary to the principle of mutual trust between the courts of the European Union to allow a court of the Member State in which recognition is sought to review that very same issue of validity.'

[414] Case C-157/12 *Salzgitter Mannesmann Handel GMBH v SC Laminorul SA* [2014] ILPr 6, paras 31-40. The rule in Art 34 (4) requires a member state court to refuse recognition and enforcement of a judgment irreconcilable with an enforceable judgment of another member state or of a third state in the same cause of action between the same parties. In this case, the German Federal Court of Justice referred the question of whether Art 34 (4) could be applied by analogy to situations where the courts of the same member state have issued what the enforcing court considers to be irreconcilable judgments. Para 36 of the judgment directly states that such an application would be inconsistent with the principle of mutual trust. See Weller, above, 86-87.

[415] Case C-92/12 *Health Service Executive v SC* [2013] ILPr 6, paras 102-103.

services.[416] The principle has also been invoked in cases concerning the administration of criminal justice. This section will consider cases in each of these areas in turn.

(a) The free movement of goods

The area of European Union law in which the principle of mutual trust has had the greatest impact, other than perhaps international private law, is the free movement of goods. It can be seen, for example, in the judgment of the Court of Justice in the seminal *Cassis de Dijon* case, which remains an important element of European free movement of goods law to this day.[417]

By way of background, Art 30 of the Treaty of Rome prohibited quantitative restrictions on trade (quotas, tariffs, taxes, charges) and measures having equivalent effect ('MEQRs'), which had been given a broad definition in the *Dassonville* judgment.[418] It was clear that national standards on product features like packaging, labelling, and composition would fall under Art 30 as MEQRs, whether directly or indirectly, intentionally or unintentionally discriminatory.[419] Such measures could nonetheless be justified under Art 36 for a broad range of reasons, provided they were neither 'a means of arbitrary discrimination' nor 'a disguised restriction on trade'.[420]

A plain reading of articles 30 and 36 would suggest that, where a national product standard is an MEQR, but it served one of the legitimate goals enunciated in Art 36 and was genuinely made in furtherance of that goal and not for reasons of discrimination or protectionism, the standard would be permitted. The Court in *Dassonville* laid the groundwork for the *Cassis de Dijon* decision, which would turn this understanding on its head, with profound effects on the common market.

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[416] The fourth fundamental freedom is the free movement of capital, which will not be addressed in this section because no relevant case law could be found.
[417] Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR I-649 ('*Cassis de Dijon*'); P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th Edn, 2008) ('Craig and de Burca'), 677-679; D Chalmers, C Hadjiemmanuil *et al*, *European Union Law: Text and Materials* (2006) ('Chalmers *et al*'), 676-678.
[418] Case C-8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.
[419] Ibid, paras 5-9.
[420] 'The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic historic or archaeological value; or the protection of industrial and commercial property'.

The case concerned the importation of cassis to Germany from France. German national law contained a rule that liqueurs must have a minimum alcohol content of 25%; the cassis in question was around 15-20%. The cassis could therefore not legally be marketed in Germany. The German government argued that the provision could be justified under Art 36 on the grounds of the protection of public health and of consumers. The Court of Justice rejected these arguments before making the landmark holding that: 'there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into the market of any other Member State…'.[421]

This would become a central principle of free movement of goods law known as 'the rule of mutual recognition'.[422] The Court recognised in its judgment that, in principle, product standards in areas not regulated by EU law were within the purview of the Member States.[423] Far from placing the states' rights to regulate product standards paramount, however, the court required each Member State to recognise the validity of the regulatory systems of its peers, allowing derogation from this principle only to the extent that one of the mandatory requirements of Art 36, narrowly construed as exceptions, could be proven.[424]

This reasoning is remarkably similar to the application of the principle of mutual trust in international private law cases, as discussed above. In fact, it could be said to be the operation of the same principle in a different area of law, with goods that pass national product standards substituted for judgments rendered after the national courts of one member state have accepted jurisdiction under the Regulation. This argument finds support in the opinion of Advocate General La Pergola in *Commission v France* in which he expressly equates the *Cassis de Dijon* rule of mutual recognition to the "principle of 'mutual trust'".[425] Although *Cassis de Dijon* was decided 'without

[421] *Cassis de Dijon*, above, para 14.
[422] Craig and de Burca, above, 679; Chalmers *et al*, above, 679.
[423] *Cassis de Dijon*, above, para 8.
[424] Craig and de Burca, above, 679.
[425] C-184/96 *Commission of the European Communities v France* [1998] ECR I-6197, Opinion of Advocate General La Pergola, paras 28-32.

explicit reference' to the principle, academics have argued that 'mutual trust is an important part of the philosophy' of the judgment.[426]

This certainly seems to be the case, especially when the decision is viewed in light of the comments of Advocates General and the Court of Justice itself in later cases. In the *Denkavit* case, Advocate General Marco Darmon reasoned that German legislation requiring animal foodstuffs to have a veterinary certificate either from Germany or from the country of production 'far from subjecting imports to double controls, … [is] based on *mutual trust between member-States*, since the German authorities accept as sufficient proof the production of a Dutch veterinary certificate.'[427]

As in the *Waidmann* international private law case, the Court of Justice did not apply Advocate General Marco Darmon's wording in *Denkavit*.[428] It would not be long, however, before the Court of Justice would itself turn to the language of 'mutual trust' to help decide free movement of goods cases. In the 1988 *Bouchara* case the Court of Justice considered Member State rules for the certification of the composition of textiles. The Court considered a French regime for ascertaining the composition of textiles by requiring re-testing of the materials, holding that:

'…although member-States are not prohibited from requiring prior approval of certain products, even if those products have already been approved in another member-State, the authorities of the State of importation are however not entitled unnecessarily to require technical or chemical analyses when the same analyses or tests have already been carried out in another member-State and their results are available to those authorities. *That rule is a particular application of a more general principle of mutual trust between the authorities of the member-States*'.[429]

This principle is clearly very similar to the principle of mutual trust as applied in international private law, except that it is certificates rather than judgments that must be recognised, and the decision to issue the certificate rather than the decision to take jurisdiction that must be trusted.

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[426] Blobel and Spath, above, 533.
[427] Case C-73/84 *Denkavit Futtermittel GmbH v Land Nordrhein-Westfalen* [1985] ECR 3181, Opinion of Advocate General Marco Darmon, para 10.
[428] *Waidmann*, above.
[429] Case C-25/88 *Ministere Public v Esther Renee Bouchara (Wurmser) and others* [1989] ECR 1105, para 18.

Further similarities can be seen in the judgment in *R v Ministry of Agriculture*, when the Court of Justice again used the language of mutual trust with respect to checks carried out under a harmonising directive, in this case rules for the protection of farm animals. The Court stated that 'the Member States must rely on mutual trust to carry out checks [for compliance with the Directive] on [sic] their respective territories.'[430] The trust in this case must be placed in different exercises of the powers of state: legislative power that has been used to implement the directive correctly and executive power has been properly used to ensure that the implementing legislation is properly enforced. The trust in international private law cases must be placed in the exercise of judicial power to accept or decline jurisdiction where appropriate.

The principle of mutual trust clearly underlies much of European free movement of goods law. It is visible in spirit underlying the court's approach to the seminal case of *Cassis de Dijon* and expressly in later cases. Mistrust could have impeded the functioning of the common market in goods even after the prohibition of quantitative restrictions and MEQRs: whether mistrust of regulatory systems, certificatory systems, or the implementation of relevant EU law. The common market could only develop freely if member states as a rule put trust in one another's systems, with derogation from this rule of trust permitted only in very limited circumstances.[431] The Court of Justice has used the principle of mutual trust to compel member states to act in this fashion. The similarities between its approach to that problem and the similar international private law problems it would later face are striking.

(b) The free movement of workers

The principle of mutual trust most commonly arises in this field in decisions and judgments concerning recognition of workers' training and qualifications. The

[430] Case C-1/96 *R v Ministry of Agriculture, Fisheries and Food ex parte Compassion in World Farming Limited* [1998] ECR I-1251, para 47.
[431] As stated in Weller, above, 100, '[t]he functioning of the fundamental freedoms relies on the mutual recognition of the exercise of regulatory powers'.

European Communities had passed certain directives on these topics, including one relating to dental qualifications[432] and one concerning medical qualifications.[433]

These two directives are similarly structured, with Art 2 reading:

'Each Member State shall recognize the diplomas, certificates and other evidence of formal qualifications… awarded to nationals of Member States by the other Member States… and which are listed in Article 3 of this Directive, by giving such qualifications, as far as the right to take up and pursue the activities of a doctor [/dental practitioner] is concerned, the same effect in its territory as those which the Member State itself awards.'

In article 3, the Directives set out a list of qualifications that entitle those professionals to practise. Elsewhere they set out minimum standards for those qualifications to be awarded.[434]

Cases under these similar Directives came before the Court of Justice, both concerning the extent to which a Member State is bound by another Member State's decision to recognise foreign qualifications as equivalent to those listed in Art 3. In the *Tawil-Albertini* case, the court held that France was not bound under the Dental qualifications Directive to recognise Belgium's decision to accept Lebanese qualifications as equivalent to Belgian.[435] In advising the court, Advocate General Marco Darmon quoted a Commission official in stating that the Dental qualifications Directive is based on the principle of mutual trust as should be its application.[436]

Although the Court did not adopt the Advocate General's approach, it would in a later case. The *Tennah-Durez* case concerned the Medical qualifications Directive.[437] In this

[432] Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services [1978] OJ L 233/1 ('Dental qualifications Directive').
[433] Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications [1993] OJ L 165/1 ('Medical qualifications Directive').
[434] Art 2 Dental qualifications Directive refers to another: Art 1 Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners [1978] OJ L 233/10; Art 23 Medical qualifications Directive.
[435] Case C-154/93 *Abdullah Tawil-Albertini v Ministre des Affaires Sociales* [1994] ECR I-451 ('*Tawil-Albertini*'), para 15.
[436] *Tawil-Albertini*, above, Opinion of Advocate General Marco Darmon, para 15.
[437] Case C-110/01 *Tennah-Durez v Conseil National de L'ordre des Medecins* [2003] ECR I-6239.

case an Algerian trained as a doctor in Algeria for six years, before obtaining Belgian citizenship and being admitted to the seventh year of studies in a Belgian medical school. She completed this year and was awarded a basic medical diploma before receiving a specific medical diploma in general practice: a qualification covered by the Medical qualifications Directive. The question before the court was whether the French authorities were obliged to recognise her qualification.

The Court of Justice relied heavily on the principle of mutual trust in its reasoning, stating:

'*Recognition is automatic and unconditional* in that Member States are obliged to accept the equivalence of certain diplomas and cannot require the persons concerned to comply with requirements other than those laid down by the relevant directives. It is *underpinned by the Member States' mutual trust* in the adequacy of the medical diplomas awarded by *other Member States*...'[438]

The judgment continues to hold that the host member state was bound under the Directive to recognise the qualification:

'The diploma at issue in the main proceedings is in fact not a diploma awarded in a third country but a diploma awarded by a university in a Member State in accordance with its own rules. The fact that the diploma is of Community origin entitles the other Member States to conclude that the competent authority of *the Member State which awarded it has complied with its obligations of verification under Directive 93/16*, so that *the mutual trust underlying the system of mutual recognition* established by Directive 93/16 is not jeopardised.'[439]

The Court then considered the question of whether the host state would be entitled to look behind the qualification to establish it conformed with the substantive training requirements of the Directive. The Court held that this was not permitted, '[s]ince the aim of the Community system… is that *qualifications should be given automatic and unconditional recognition, the system would be seriously jeopardised if it were open to Member States at their discretion to question the merits of a decision taken by the competent institution of another Member State* to award the diploma.'[440]

[438] Ibid, para 30. Emphasis added.
[439] Ibid, para 69. Emphasis added.
[440] Ibid, para 75. Emphasis added. The Court went on to outline at paras 76-80 that the correct approach in cases of legitimate doubt would be for the host Member State to ask the issuing Member State to review the case and confirm that the individual met the requirements of the Directive for the award of the qualification.

Again, the language and content of the holding are strikingly similar to that used in international private law cases, especially those concerning the unconditional recognition of a judgment without review of the issuing court's decision on its jurisdiction. Indeed, the decision in *Tawil-Albertini* also mirrors the Brussels Regime, with a decision to recognise a foreign qualification not requiring mutual trust, whereas the decision to issue a qualification itself in *Tennah-Durez* did demand recognition. This is similar to the distinction between judgments on judgments and judgments on the merits under the Brussels Regime, briefly discussed in Chapter 4. In cases concerning the free movement of workers, therefore, as with the free movement of goods, the focus is on mutual trust in the exercise of legislative and executive power rather than judicial power.

(c) The free movement of services

The impact of mutual trust can also be seen in cases concerning the free movement of services. The 1995 *Commission v Belgium* case[441] concerned the application of the Broadcasting Directive.[442] The Broadcasting Directive provides at Art 2 (2) that 'Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive'. The Directive also sets down certain broadcasting standards.[443]

Belgian regulators pursued a policy of prior authorisation of all broadcasts from other member states. The Court of Justice had to consider, *inter alia*, whether this policy was a valid implementation of the Directive.

The Belgian Government argued that it should be for each Member State to verify whether the state of origin of the broadcast is actually complying with the provisions of the Directive at the time of broadcasting.[444] The court did not accept this logic,

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[441] Case C-11/*95 EC Commission v Belgium (Re Cable Television Broadcasts)* [1996] ECR I-4115 ('*Commission v Belgium*').
[442] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23 ('Broadcasting Directive').
[443] Arts 10-23 Broadcasting Directive.
[444] *Commission v Belgium*, above, para 87.

stating that '*the Member States must have mutual trust in each other* as far as controls carried out on their respective territories are concerned.'[445] The court also ruled that the protection of public policy, public morality, or public security could not justify a general requirement for prior approval, as this would effectively 'entail abolition of the freedom to provide services.'[446]

Again, parallels can be drawn between the court's approach to this issue and its approach to international private law cases. The concept that a lack of trust between the member states could undermine the entire piece of legislation is familiar, as is the use of the principle of mutual trust to ensure the member states behave as if they trust one another.

(d) The administration of criminal justice

One final area in which the Court of Justice has applied the principle of mutual trust is the relationship between the criminal justice systems of the Member States. The *Gözütok* case is worth noting not only because it evinces the Court's willingness to use mutual trust in a wide array of contexts, but also because of Advocate General Ruiz-Jarabo Colomer's espousal of the doctrine as something more fundamental, more far reaching than simply a way to resolve the instant dispute.[447] The Advocate General's opinion, considering the goal of creating an area of freedom, security and justice, stated:

"This shared goal cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in a true 'common market of fundamental rights'. Indeed, recognition is based on the thought that while another State may not deal with a certain matter in the same or even a similar way as one's own State, the outcome will be such that it is accepted as equivalent to a decision by one's own State because it reflects the same principles and values. *Mutual trust is an essential element in the development of*

[445] Ibid, para 88. The court continues at para 89 to state that 'if a Member State considers that another Member State has failed to fulfil its obligations… it may bring Treaty infringement proceedings under Article 170 of the Treaty or request the Commission itself to take action against that Member State under Article 169 of the Treaty'.
[446] Ibid, para 92.
[447] Case C-187/01 *R v Gözütok and Brügge* [2003] ECR I-1345 ('*Gözütok*').

the European Union: trust in the adequacy of one's partners' rules and also trust that these rules are correctly applied."[448]

The Advocate General has here succinctly expressed the concept of mutual trust as an overarching principle of the European Union. The Court itself used the language of mutual trust in its judgment, but confined its application of the principle to the facts at issue in the case at hand, stating:

'…the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.'[449]

Gözütok demonstrates once more the far-reaching nature of the principle of mutual trust. The Court's application of mutual trust to criminal matters shows how wide-ranging the principle has become. The Advocate General – ever a proponent of mutual trust – expressed the principle with a breadth and importance not usually seen in official materials, even if such breadth and importance can be inferred by analysis such as this chapter.

(3) Importance of mutual trust

It has been shown that the Court of Justice has used a very similar principle of mutual trust in case law concerning international private law, the fundamental freedoms, and the administration of criminal justice. Mutual trust has been utilised by the Court to ensure member states place the necessary level of trust in the exercises of the powers of state in other member states. The relevance of this discovery to this thesis is clear: it underlines the crucial importance of mutual trust not just in international private law, but EU law as a whole. Indeed, the fact that mutual trust is a central principle in case law concerning the fundamental freedoms demonstrates its importance to the common market and the project of European economic integration as a whole. It is therefore a principle that should be given a lot of weight in drafting laws, albeit that weight will not always be decisive. This is true in the context of the European law of jurisdiction when, for example, a court is given exclusive jurisdiction, the grant of which implies

[448] *Gözütok*, above, Opinion of Advocate General Ruiz-Jarabo Colomer Opinion, para 124. Emphasis added.
[449] *Gözütok*, above, para 33.

some other supervening principle taking precedence over mutual trust and the usual, heavily trust-centric legal structure.[450] It can also be seen in the reversal of *Gasser* in the Brussels I Recast, which will be discussed below, showing that party autonomy can take precedence over inter-member-state mutual trust, albeit within an already inherently trust-based structure. This balancing of mutual trust and other principles will be crucial to the proposals for reform presented in this thesis.

C. Principle two – legal certainty and predictability

Both the Brussels I Regulation and the Brussels I Recast contain recitals stating that '[t]he rules of jurisdiction should be highly predictable'.[451] The Brussels Regime has always sought to provide clear rules as to where jurisdiction should lie and a simple *lis pendens* procedure – perhaps too simple – for resolving conflicts of jurisdiction.[452] Simplicity, predictability, and legal certainty are given even more importance at the recognition and enforcement stage. This is achieved by making virtually all bases of indirect jurisdiction 'required' bases, regardless of whether they are required, permitted, or even excluded as indirect bases.[453] This asymmetric structure with a strong emphasis on enforcement of judgments is clearly designed to enhance legal certainty.[454]

Indeed, the strict *lis pendens* rule in Art 29 Brussels I Recast[455] is and always has been concerned with the prevention of parallel proceedings and attendant risk of irreconcilable judgments, which are considered to undermine legal certainty and

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[450] See, for example, the grant of exclusive jurisdiction over actions concerning rights *in rem* over immovable property to the courts at the location of the property. It is submitted that this is rooted in the fact that power over immovable property within a state's boundaries goes hand in hand with sovereignty. Alternatively, it could be seen as a significant, supervening connection between the subject-matter of the dispute and the legal system of a particular country. See also L de Lima Pinheiro, 'Art 22' in Magnus and Mankowski, above, 415-416.

[451] Recital 15 Brussels I Recast (*ex* Recital 12 Brussels I Regulation).

[452] See ibid, the Brussels I Recast and Brussels I Regulation generally, and specifically the *lis pendens* rules at Art 29 Brussels I Recast (*ex* Art 27 Brussels I regulation).

[453] Art 45 (3) Brussels I Recast provides that 'the jurisdiction of the court of origin may not be reviewed' and that the test of public policy under Art 45 (1) (a) cannot be applied to the basis of jurisdiction. This is without prejudice to review of jurisdiction in matters where exclusive jurisdiction is provided for under the Recast (Art 24). The rules were similarly structured under the Brussels I Regulation.

[454] The principle that judgments should be enforceable across the European Union, or should have 'free movement', is known as *favor executionis*, and goes hand in hand with legal certainty and predictability. See *TNT*, above, para 56.

[455] *Ex* Art 27 Brussels I Regulation, *ex ex* Arts 21-23 Brussels Convention.

predictability.[456] The law is focused on preventing parallel proceedings and keeping the system predictable[457] to the extent that it can be criticised for being overly rigid, encouraging tactical litigation, and for being unduly unfair.[458]

It may in fact be argued that legal certainty and predictability are principles as important as mutual trust in the sphere of international private law. The two certainly seem to go hand in hand in many of the cases concerning mutual trust cited above. In the *Gasser* judgment, for example, it is expressly stated that the trust-based system of compulsory jurisdiction 'seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction'.[459] Furthermore, in the recent *TNT* case, the Court of Justice expressly stated that the principles underlying the Brussels I Regulation included '*predictability as to the courts having jurisdiction and therefore legal certainty for litigants*, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union'.[460]

A further example of the importance of predictability under the Brussels Regime, and how it can be rigidly applied to the potential detriment of fairness, is the infamous *Owusu* case.[461] In this case, a UK national suffered a serious injury when using a private beach on holiday in Jamaica. He had access to the beach after renting a villa from another British national, domiciled in the United Kingdom. He brought proceedings in England against the UK-domiciled lessor, founding jurisdiction under Art 2 Brussels Convention, as well as various Jamaican companies as co-defendants.

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[456] See: Case C-144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR 4861, para 8 ('*Gubisch Maschinenfabrik*'); *Overseas Union*, *above*, para 16; *Gasser*, above, paras 41, 51; Jenard Report, above, 41; R Fentiman, 'Article 27', in Magnus and Mankowski, above, 582-584.
[457] R Fentiman, 'Introduction to Arts 27-30' in Magnus and Mankowski, above, 558-562, 568; Layton and Mercer, above, 794.
[458] Fentiman, 'Introduction to Arts 27-30' in Magnus and Mankowski, above, 569-574; T Simons, "Cross-border 'torpedo' actions: the lis pendens rule in European cross-national legislation" [2003] *Eu LF* 287. For the question of unfairness, see the discussion of potential breach of Art 6 European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221) in *Gasser*, above, para 56. As has been mentioned and will be discussed in more detail below, *Gasser* has since been reversed legislatively in the *Brussels I Recast*, but the points hold for cases not concerning choice of court agreements, such as *Overseas Union*.
[459] *Gasser*, above, para 72.
[460] *TNT*, above, para 49.
[461] Case C-281/02 *Owusu v Jackson, Trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ILPr 25.

The defendants argued that the English courts should decline jurisdiction under the local doctrine of *forum non conveniens*, on the basis that Jamaica had closer connections with and was therefore the more appropriate forum for the resolution of the dispute. The English Court of Appeal made a preliminary reference to the Court of Justice on the whether the English court could decline Brussels Convention jurisdiction on the basis of the *forum non conveniens* doctrine. The Court of Justice held that it could not, holding that that, in relevant part:

'[a]pplication of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to *undermine the predictability of the rules of jurisdiction* laid down by the Brussels Convention, in particular that of Art 2, and consequently to undermine *the principle of legal certainty, which is the basis of the Convention*.'[462]

Once again, it can be seen that legal certainty and predictability are emphasised over reaching a fair or appropriate result in the given case. This serves once again to underline the overriding importance of the principles.

The emphasis placed on predictability and legal certainty in recitals, case law, and academic commentary demonstrates the fundamental importance the principle has come to hold in the European law of jurisdiction. Perhaps most telling is the frequency with which the principle is elevated to the level of mutual trust, which has already been shown to be a central principle of European law more generally. It is therefore submitted that clear jurisdictional rules creating predictable results and enhancing legal certainty are to be preferred.

D. Principle three – upholding party autonomy

With the passing of the Brussels I Recast, the importance placed on the principle of respect for party autonomy was clearly increased. That principle had previously been placed secondary to mutual trust and legal certainty in the *Gasser* judgment, which was legislatively reversed in the Recast's new provisions on choice of court agreements.[463]

[462] Ibid, para 41. Emphasis added.
[463] Art 31 (2) and (3) and Recital 22 Brussels I Recast.

The *Gasser* judgment had been strongly criticised for the lack of importance it placed on party autonomy, as well as for creating a 'torpedo' power for parties opposed to litigation in the chosen forum.[464] Furthermore, the way in which the judgment disregarded party autonomy is odd given the central importance placed on the principle in the rules of the Rome Regulations on the applicable law to disputes concerning both contractual and non-contractual obligations.[465]

The provisions of the Brussels I Recast reversing *Gasser* create a new *lis pendens* rule that gives priority to the court designated in an exclusive choice of court agreement over the courts of any other member state, effectively raising the status of exclusive jurisdiction conferred on a court by the parties to almost the same level as exclusive jurisdiction under the Brussels Regime itself.[466] The reason for the change was stated to be 'to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics'.[467]

In reversing *Gasser* and choosing to protect choice of court agreements, the European legislature has demonstrated that party autonomy is an important principle in contemporary European international private law.[468] The fundamentally important principles of both mutual trust and legal certainty had formed the bedrock of the Court of Justice's holding in *Gasser* that the designated court, if second seised, should stay

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[464] See, for example: P Briza, 'Choice-of-court agreements: could the Hague Choice of Court Agreements Convention and the reform of the Brussels I Regulation be the way out of the Gasser-Owusu disillusion?' (2009) 5(3) *J Priv Int L* 537; Roodt, above, 271; J Forner Delaygua, 'Choice of court clauses: two recent developments' (2004) 15(9) *ICCLR* 288 ('Forner Delaygua'), 295; P Veron, 'ECJ restores torpedo power' (2004) 35(6) *IIC* 638 ('Veron'). The torpedo power works the same way as that discussed elsewhere in this thesis: the tactical litigant, expecting to be sued in the designated court, brings an action before the courts of another member state with a slow-moving court system. If the basic, first-in-time *lis pendens* rule applies to the court designated in the choice of court agreement, it has no choice but to wait months or years for the court seised in tactical litigation to decline jurisdiction.

[465] Art 3 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2009] OJ L 177/6 ('Rome I Regulation'); Art 14 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40 ('Rome II Regulation').

[466] Art 31 (2) Brussels I Recast provides that 'where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement'. Art 31 (2) provides that when the designated court has established its jurisdiction, all other member state courts shall decline jurisdiction over the dispute.

[467] Recital 22 Brussels I Recast.

[468] See also comments to this effect in Fentiman, above, 536.

proceedings pending the judgment of the first-seised court.[469] In *Gasser*, those principles were placed paramount to concerns about abusive tactical litigation and party autonomy. It is submitted that the reversal of *Gasser* shows a change in the ranking of these principles, albeit applicable only to the specific situation and within a broader system still based on principles of mutual trust and ensuring legal certainty. The overall priorities and founding principles of the Brussels Regime have not changed, but in an evolving legal climate, party autonomy has taken on comparable importance where relevant.

On one view the *Gasser* decision has been reversed because of concerns about tactical litigation as well as party autonomy, with the potential for torpedo actions to frustrate exclusive choice of court agreements. It is submitted, however, that prevention of tactical litigation should not be seen as the driving force behind the reform. This is because tactical litigation is still permitted – some would argue encouraged – by the structure of the Brussels I Recast in other areas. For example, if a seller from one member state delivers goods to a buyer at the buyer's place of business and domicile, then needs to sue the buyer for non-payment, it is clear that the only court having good jurisdiction under the Brussels I Recast to hear his action would be the courts at the buyer's place of business.[470] If the buyer, anticipating being sued, begins a spurious action against the seller in the slow-moving courts of another member state, he has torpedoed the seller's action using the strict first-in-time *lis pendens* rule at Art 29 Brussels I Recast. The Recast has made no changes to help this disadvantaged litigant.

It is therefore submitted that what makes the choice of court scenario special, justifying the application of a different *lis pendens* rule, is the exercise of party autonomy in concluding a choice of court agreement, and by extension the clear bad faith shown in going back on that agreement. It must therefore be concluded that party autonomy, rather than the restraint of tactical litigation, was the main principle underlying the

[469] *Gasser*, above, para 72.

[470] Art 4 (1) Brussels I Recast provides that a person domiciled in a member state shall be sued in the courts of that member state. That person may only be sued in another member state by virtue of the rules of jurisdiction from Art 7 onwards. Art 7 (1) (a) and (b) combined provide that in a sale of goods contract, the defendant may be sued at the place of delivery of the goods, notwithstanding that it is not his domicile. In the example above, the goods were delivered in the defendant's domicile, so only the courts of that member state will have good jurisdiction under the Brussels I Recast.

legislative reversal of *Gasser*, and party autonomy is thus a significantly important principle of the European law of jurisdiction.

E. The ranking of these principles

It is also necessary to consider whether and to what extent these relevant principles can be ranked against one another. The relationship between these principles could be important in assessing the extent to which each principle should be taken into account in the proposals advanced by this thesis.

It is difficult to rank mutual trust and legal certainty against one another, because they so often point in the same direction. This is because mutual trust requires respect for the courts of other member states' ability to determine their own jurisdiction, and the recognition and enforcement of the judgments they ultimately render. The former feature is manifest in the strict, first-in-time *lis pendens* rule, which also aids legal certainty by preventing parallel proceedings and the possibility of irreconcilable judgments. The latter feature is visible in the rule that judgments of member state courts should be virtually automatically recognised in other member states, which obviously aids legal certainty and predictability.

Party autonomy is relevant to the European law of jurisdiction in relatively limited circumstances, such as the enforcement of choice of court agreements. Considerations of mutual trust and legal certainty clearly took precedence over the exercise of party autonomy in the conclusion of a choice of court agreement at the time of the *Gasser* judgment, as has been discussed above. However, the reversal of the *Gasser* judgment indicates a shift in priorities, with party autonomy taking precedence over mutual trust and, perhaps to an extent, legal certainty.[471]

It is therefore clear that there is no obvious ranking of these principles: different principles will rank more highly depending on the circumstances. There is no one-size-fits-all approach. On the other hand, what is clear is that all three principles are highly

[471] It may of course be argued that upholding a choice of court agreement actually serves legal certainty, by allowing parties to rely on their agreements.

important to the European law of jurisdiction. It is therefore submitted that an ideal solution would respect all three of these principles if possible.

F. Preliminary conclusions

This chapter has outlined some of the main principles underlying the Brussels Regime. It first identified mutual trust, which is a principle of fundamental importance not only in the European law of jurisdiction, but also in EU law more generally, having been used extensively in cases concerning the fundamental freedoms. Legal certainty is frequently mentioned by the court as going hand-in-hand with the trust-based system of jurisdiction and must also be viewed as a vital principle in the European law of jurisdiction. Finally, recent developments in the Brussels I Recast indicate the increasing importance of respect for party autonomy, to the extent that *Gasser* decision has been legislatively reversed.

None of these principles is absolute and none can be applied to resolve every case of disagreement about the law or its application. Indeed, sometimes these principles stand in direct opposition to one another, like when applied to choice of court agreements and *lis pendens*. But they are all clearly important, and should all play into the balancing of principles that must be performed in considering the appropriateness of current rules or the drafting of new rules.

It is also true that other principles are mentioned frequently in cases concerning the European law of jurisdiction, such as the principle that judgments should have 'free movement' or be widely enforceable ('*favor executionis*'); the sound administration of justice; and minimisation of the risk of concurrent proceedings.[472] It is submitted that the principle of automatically enforceable judgments without formality or review is simply a more specific example of the application of the principles of mutual trust and legal certainty, as is the principle of minimising concurrent proceedings, with all the uncertainty raised when one court questions whether another is the appropriate forum. Because these principles can be seen as specific applications of larger umbrella principles, they have not been singled out for discussion, but discussed under the

[472] See for example *TNT*, above, para 49.

relevant general principles. The sound administration of justice is clearly a broad and malleable term and has been used by the court of justice to justify a common sense application of the law.[473] The principle, however, is not frequently referred to, and still less rarely in isolation of the other aforementioned principles, to decide a case. It is therefore submitted that, especially because of its generality and use secondarily to other principles, this principle does not need to be considered in its own right.

It is therefore concluded that the principles of mutual trust, predictability and certainty, and upholding party autonomy are the main relevant principles in the European law of jurisdiction. These principles will therefore be taken into account in this thesis's proposals for reform of the relationship between the Brussels Regime and arbitration.

[473] See Case C-438/12 *Weber v Weber* [2014] ILPr 29, para 58, where the court referred to the principle to justify a holding that the first-in-time *lis pendens* rule does not apply where the court second seised has exclusive jurisdiction under the Regulation. A literal reading of the Regulation suggests it should, but if the first court rendered judgment, that judgment would not be enforceable. The practically sensible approach, therefore, is not to apply the *lis pendens* rule in cases concerning exclusive jurisdiction.

6. PRINCIPLES IN INTERNATIONAL ARBITRATION PART 1 – THE NEW YORK CONVENTION

Having considered the major principles underlying the European law of jurisdiction and the Brussels Regime, this thesis will now turn its attention to the legal context and guiding principles in international commercial arbitration. This investigation will be split into two parts: first an analysis of the principles underlying the New York Convention, in a similar fashion to the previous chapter; and second a discussion of the ongoing 'delocalisation' debate in international commercial arbitration, and this thesis's place within that discussion. The former will be the subject of this chapter, whilst the latter will be considered in the next chapter.

Discussion of the New York Convention and its underlying principles is appropriate for two main reasons. First, the New York Convention has come to enjoy significant importance in the world of international commercial arbitration. It is very widely in force, and the ease it lends to international recognition and enforcement of arbitral awards is the principal reason for arbitration's popularity as a form of dispute resolution in international commercial cases.[474] Second, as was discussed in Chapter 2, the existence of the New York Convention has often been advanced as a reason for the arbitration exclusion in the Brussels Regime. As argued earlier, this justification is weak, but it nonetheless shows the importance placed on the New York Convention by the drafters of the Brussels Convention. Even if there would not be substantive overlap, it is submitted that the principles of the New York Convention should, if possible, be respected by the Brussels Regime in its approach to arbitration.

This chapter will first briefly address the goals of the New York Convention project, to lend context to the discussion of principles that follows. It will then analyse six key principles underlying the New York Convention: (1) a pro-enforcement bias; (2) home-country control; (3) respect for party autonomy; (4) a special role for the law of the seat of the arbitration; (5) harmonisation and autonomous application; and (6) maintaining fairness and due process. This chapter shall conclude by considering the

[474] See Bühring-Uhle, above, 135-143.

extent to which it is possible to rank the importance of these principles in the New York Convention regime.

A. The goals of the New York Convention

As when discussing the Brussels Regime, it is important to bear in mind the aims of the New York Convention project in discussing the principles upon which the achievement of those aims has been built. The Convention's aims give context to the its provisions and the principles.

The overarching goal of the New York Convention project was to develop international trade by facilitating the recognition and enforcement of awards rendered in international commercial arbitration.[475] This goal was to be achieved while 'at the same time maintain[ing] generally recognised principles of justice and respect[ing] the sovereign rights of States'.[476] That said, the aim of improving the enforceability of awards is visible in everything from the Convention's full title and its description of scope to its substantive provisions on the recognition and enforcement of awards, all of which will be discussed in more detail below.[477] It is an aim in which the Convention, now in force in 154 states, has enjoyed significant success. Yet it is important to remember that the promotion of enforceability of arbitral awards was not a goal to be achieved at all costs, but only insofar as reconcilable with principles of justice and the sovereign rights of states. The aim is balanced against these sometimes competing principles, resulting in a cleverly drafted Convention, which has been successful, hugely improving the prospects of recognition and enforcement of arbitral awards across the world. It might be suggested that this success has come in large part because of the Convention's provisions to protect states' rights, which have given it a very broad-based appeal, encouraging states to implement the Convention even if they are not in general particularly arbitration friendly.

[475] UN DOC E/2704, paras 12, 14.
[476] Ibid, para 14.
[477] Arts I (1), III and V New York Convention.

B. Principles underlying the New York Convention

The New York Convention, as mentioned in previous chapters, contains rules on both the recognition and enforcement of arbitral awards and arbitration agreements. The principles underlying the Convention will be discerned from both sets of rules, although the Convention contains far more, and more detailed, rules concerning the recognition and enforcement of arbitral awards.

This imbalance may be a product of the Convention's drafting. Arbitration agreements were originally intended to form the subject of a separate protocol,[478] as had been the case with the New York Convention's predecessors, the Geneva Protocol on Arbitration Clauses (1923)[479] and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927).[480] The Art II provisions were added at the very end of the drafting process,[481] when it was realised that such separation might undermine the effectiveness of the system, for example if the instruments were subscribed to by different groups.[482] This has led to concerns that the drafting of Art II might have been slightly rushed and not perfectly thought out, especially as regards its relationship with other parts of the Convention.[483] As will be discussed below, slightly creative legal reasoning has been required to enhance the effectiveness of the Convention's provisions on arbitral awards. For this reason the analysis of the principles underlying the Convention's provisions on arbitral awards will be based in the first place on a textual analysis of the Convention, especially the provision of Art V on reasons for non-recognition and enforcement of awards, which have been described as 'the heart

[478] J van den Berg, *The New York Arbitration Convention of 1958* (1981) ('van den Berg'), 9.
[479] 24 September 1923, 27 League of Nations Treaty Series 158.
[480] 26 September 1927, 92 League of Nations Treaty Series 302. The New York Convention provides specifically that each of these instruments shall cease to have effect between parties to the New York Convention at Art VII (2).
[481] The Art II provisions on the recognition of arbitration agreements were added on 6 June 1958, the final day of a 17-day drafting process. See UN DOC E/CONF.26/SR.1, for the opening of the drafting process on 20 May 1958; UN DOC E/CONF.26/L.59, for the insertion of the jurisdiction provisions on 6 June 1958; UN DOC E/CONF.26/L.61, for the publication of the draft convention, also on 6 June 1958.
[482] van den Berg, above, 9.
[483] E Geisinger, P Pinsolle and D Schramm, 'Article II', in H Kronke *et al* (Eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) ('Geisinger *et al* in Kronke *et al* (Eds)'), 38-39.

of the Convention'.[484] The analysis of the principles underlying the provisions on recognition and enforcement of arbitral awards will not rely too heavily on textual analysis and will instead place more weight on the leading cases and commentary. The relevant principles will now be considered in turn.

(1) Home-country control

An important reason for the success of the New York Convention is the emphasis it places on an enforcing country's ability to control which arbitral awards will be granted recognition and enforcement. States have broad discretion in this respect, both to allow and to refuse recognition and enforcement. It could be said that the New York Convention in fact places strict controls on when *the parties* to an arbitration agreement may challenge the award, as will be discussed below, but there are no such onerous restrictions on states, either to recognise and enforce or to refuse to do so. This dichotomous approach makes sense: it ensures parties are held to their agreements without limiting too greatly the sovereignty of implementing states. This in turn makes the Convention more appealing to states that may mistrust arbitration and look for a 'safety valve' to allow refusal of recognition and enforcement, whilst allowing states where arbitration is an established form of dispute resolution to go as far as they wish in enacting pro-enforcement laws. This section shall consider the various ways in which courts retain discretion to recognise and enforce or refuse to recognise and enforce both arbitral awards and arbitration agreements.

(a) Discretion to refuse recognition and enforcement of arbitral awards

The main 'safety valve' for states to refuse recognition and enforcement of arbitral awards is found in Art V (2) New York Convention, which states:

'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*; or

[484] P Sanders, *Quo Vadis Arbitration: Sixty Years of Arbitration Practice* (1999) ('Sanders, *Quo Vadis*'), 69.

(b) The recognition or enforcement of the award would be contrary to *the public policy of that country*.'[485]

The first point to note is that the *chapeau* of Art V (2) allows the court to find either of these grounds of its own accord, without their having to be raised or argued by the parties. This contrasts with those grounds for non-recognition and enforcement contained in Art V (1), sometimes called procedural grounds for non-recognition and enforcement, which must be alleged and proved by the party resisting recognition and enforcement. This underlines that the Art V (2) grounds for refusal of recognition and enforcement are designed to protect the rights of states rather than the rights of the individual parties to the dispute.

A second important point is that both provisions V (2) (a) and (b) refer expressly to the domestic law of the state where recognition and enforcement is sought, unlike any of the V (1) provisions. The provisions allow the forum court to refuse recognition and enforcement on the basis that it considers the subject matter of the award not to be capable of settlement by arbitration, or that recognition or enforcement of the award would violate its public policy.[486] In this way Art V (2) provides states with a so-called 'safety net' to reassure them that their public policy will not be circumvented or violated when parties avoid the court system by choosing arbitration.[487]

It is quite clear on the basis of a textual analysis that the public policy referred to in Art V (2) (b) is the public policy of the state where recognition and enforcement is sought. Some commentators have, however, argued that courts should nonetheless apply as a matter of 'best practice' a more narrowly-defined, international version of their public policy to cases under the New York Convention.[488] This would help reduce the impact of an obvious potential problem arising from Art V (2) (b): that application

[485] Emphasis added.
[486] LA Mistelis, 'Arbitrability – International and Comparative Perspectives', in SL Brekoulakis and LA Mistelis (Eds), *Arbitrability* (2009) ('Brekoulakis and Mistelis (Eds)'), 2, which states that, whilst an internationalised standard of public policy is often argued for and indeed applied under the New York Convention, 'the question [of what disputes are arbitrable] is ultimately still in the control of national courts and national laws, and it is still unclear as to whether an international or transnational concept of arbitrability exists'.
[487] R Wolff, 'Public Policy, Article V (2) (b)', in R Wolff (Ed), *New York Convention*: *Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1959 Commentary* (2012), 402.
[488] Ibid, 402; van den Berg, above, 360-362.

of domestic public policy would lead to unpredictable and inconsistent results.[489] It is however submitted that this standard is aspirational and cannot necessarily be expected to be complied with by all signatories, as it does not follow directly from the text of the Convention.[490] Various states have applied their own domestic standards of subjects capable of settlement by arbitration and public policy to New York Convention cases.[491] What can therefore certainly be said is that Art V (2) gives states wide discretion to refuse recognition and enforcement of awards to protect their public policy, should they choose to interpret it in that fashion.

(b) Discretion to recognise and enforce arbitral awards

On the other hand, the New York Convention also gives states wide discretion to allow recognition and enforcement of awards. This can be seen in two main places: the fact that refusal of recognition and enforcement under Art V is always at the discretion of the court asked for recognition and enforcement; and the 'more favourable right' principle in Art VII.

The chapeau to Art V (1) provides:

'Recognition and enforcement of the award *may be refused*, at the request of the party against whom it is invoked, only if…'[492]

while the chapeau to Art V (2) begins:

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[489] Wolff in Wolff (Ed), above, 402.
[490] Ibid.
[491] See for example: *Lithuania No 1 - K M v JSC A Sabonio Žalgirio krepšinio centras*, Supreme Court of Lithuania, Civil Case No 3K-3-65/2011, 21 February 2011, (2013) XXXVIII YBCA 414, para 15, 'Arbitral jurisdiction does not extend to disputes which, according to national law, must be decided by national courts. Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement are sought (in the case of Lithuania – the Court of Appeal of Lithuania) finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country[…] In line with Art 11 (1) and Art. 40 (2) (1) of the Law on Commercial Arbitration of the Republic of Lithuania, disputes arising from labor relations are not capable of settlement by arbitration'; *Brazil No 28 – Louis Dreyfus Commodities Brasil SA v Leandro Volter Laurindo De Castilhos*, Supreme Court of Justice of Brazil, SEC No 6.335 – EX (2011/0072243-3), 21 March 2012, (2013) XXXVIII YBCA 334, para 3, in which it is discussed that Art 39 of the Brazilian Law on Arbitration (Law no 9.307/96) provides for the refusal of recognition and enforcement of foreign arbitral awards based on Brazil's national standards of what disputes are capable of settlement by arbitration and public policy; *Sierra-Affinity*, above, in which the Spanish court clearly applied a Spanish conception of public policy rooted in the Spanish Constitution to a New York Convention recognition and enforcement case, albeit it found that public policy had not been violated.
[492] Emphasis added.

'Recognition and enforcement of an arbitral award *may also be refused if*…'[493]

This means that the courts are not required to refuse recognition and enforcement even if they find that one of the grounds under Art V is present. Examples of this would be where a national law requires substantial detriment to have resulted from the violation of the Art V standard in order to refuse recognition or enforcement,[494] or where a party is estopped from raising an issue at the recognition and enforcement stage that it could have raised earlier before the arbitral tribunal.[495]

This discretion is often read in conjunction with the more favourable right principle of Art VII (1), which reads as follows:

'The provisions of the present Convention shall not… deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

Thus, whilst the New York Convention provides in effect a minimum level for enforceability of awards, states are free to go beyond that level and allow awards to be recognised and enforced under less restrictive conditions. An example of this is the French approach to awards set aside where rendered, mentioned in chapter three in connection with the *Putrabali* cases, but which pre-dates those cases by some margin. The French Civil Code provides five grounds for refusal of recognition and enforcement of arbitral awards by the French courts, including those listed under Art V (1) (a)-(d) and V (2), but excluding the V (1) (e) ground that the award was set aside where rendered.[496] In the *Hilmarton* case, recognition and enforcement of an award could not be resisted on the basis that it had been set aside in Switzerland. The French Supreme Court ruled:

'[T]he lower decision correctly held that, applying Art VII of the [New York Convention], OTV could rely upon the French law on international arbitration concerning the recognition and enforcement of international arbitration awards

[493] Emphasis added.
[494] M Scherer, 'Violation of Due Process – Article V (1) (b)' in Wolff (Ed), 301-302, citing Oberlandesgericht Hamburg, April 3 1976, (1975) 21 Recht der internationalen Wirtschaft 342.
[495] *Hong Kong No 8 – China Nanhai Oil Joint Service Corporation Shenzhen Branch (PR China) v Gee Tai Holdings Co (nationality not indicated)*, Supreme Court of Hong Kong, 13 July 1994, (1995) XX YBCA 673, para 18.
[496] Arts 1520 and 1525 Code de procédure civile.

rendered abroad, and especially upon Art. 1502 [French Code of Civil Procedure], which does not list the ground provided for in Art V [(1) (e)] of the [New York Convention] among the grounds for refusal of recognition and enforcement.'[497]

The fact that an award has been set aside where rendered therefore can never be a reason to refuse recognition and enforcement of that award in France. This in turn is a particular application of the 'more favourable right' rule of Art VII of the New York Convention. The *Hilmarton* case is one famous example, but article VII has been invoked in countless other cases to justify the application of a more favourable right to have an arbitral award recognised or enforced.[498]

It can therefore be concluded that the court requested to recognise and enforce an arbitral award has wide discretion to allow recognition or enforcement, even where the New York Convention would allow, or even seem to require, non-recognition or enforcement.

(c) Discretion to refuse to enforce arbitration agreements

Article II (1) New York Convention states that contracting states shall recognise arbitration agreements within the meaning of the Convention 'concerning a subject matter capable of settlement by arbitration'. The question whether a subject matter is capable of settlement by arbitration is often referred to as 'arbitrability'. The issue of the law applicable to arbitrability at the agreement enforcement stage of arbitration proceedings is relevant here because it allows national courts a measure of control over which arbitration agreements they will recognise.

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[497] *Hilmarton*, above, para 4. The change in numbering of the relevant French Civil Code article is due to a recent redrafting.

[498] See, for example, *Netherlands No 43 – Nova Shipping Ltd v Med Marine Kilavuzluk ve Romarkaj Hizmetleri Insaat Sanayi ve Ticaret AS*, District Court of Amsterdam, Case No 505950/KG RK 11-3695, 26 July 2012, (2012) XXXVII YBCA 282, paras 1-3, in which the Dutch court applied Dutch domestic requirements as to the documents that must be presented for recognition and enforcement an arbitral award; *Germany No 139 – Claimant v Defendant*, Federal Court of Justice of Germany, 30 September 2010, (2011) XXXVI YBCA 282, paras 2-7, in which the German supreme court applied the Zivilprozessordnung's (German Code of Civil Procedure's) requirements for formal validity of an arbitration agreement over the New York Convention Art II (2)'s stricter requirements; *US No 230 – Chromalloy Aeroservices Inc v The Arab Republic of Egypt*, United States District Court, District of Columbia, Civil No 94-2339 (JLG), 31 July 1996, (1997) XXII YBCA 1001, para 5, in which the court allowed a party enforcing an award to rely on a more favourable right of enforcement under the Federal Arbitration Act to enforce a New York Convention award.

Art II (1) New York Convention is not clear on which law should govern arbitrability, so discerning the prevailing, or most appropriate, approach to this question is of vital importance. The following discussion is limited to the approach to arbitrability that should be taken by a national court applying the New York Convention to a request to enforce an arbitration agreement, not the approach that should be taken by an arbitral tribunal considering the same problem.

Article V (2) (a) New York Convention contains standardised rules for the law under which arbitrability should be assessed at the stage of recognition and enforcement of the award: the law of the country in which recognition and enforcement is sought, as discussed above. Some of the rules on recognition and enforcement of arbitral awards, such Art V (1) (a), can be applied by analogy to the enforcement of arbitration agreements, as will be discussed in more detail below. This cannot, however, be true of Art V (2) (a), for the simple reason that before an award is rendered, there is no way of telling with any certainty the court or courts in which recognition and enforcement of the award will be sought. As a result, courts applying the rule by analogy could face the choice between applying the law of the place where the award is most likely to be recognised or enforced, or cumulatively assessing arbitrability under the laws of all the countries where the award *might* be recognised or enforced.[499] This solution is undesirable for many reasons, including the uncertainty it creates as well as the fact that the greater the number of laws under which arbitrability is assessed, the more likely one of those laws will hold the dispute not to be arbitrable. This would sit uneasily with the general principle of the New York Convention to favour the enforceability of arbitral agreements and awards, discussed below. Furthermore, as arbitrability is inherently linked with public policy,[500] it makes better sense for this question to be left to home-country control at the recognition and enforcement stage. No country need recognise or enforce an award that it considers, for reasons of its own domestic public policy, to concern a subject matter not capable of settlement by arbitration. At the same time, that country's conception of arbitrability should not

[499] van den Berg, above 153.
[500] Ibid, 368.

necessarily bind the courts of other countries to the same conclusion.[501] Several courts have approached this question along these lines.[502]

That being said, in light of the public policy concerns inherent in an assessment of arbitrability, the best approach may well be for the court asked to enforce an arbitration agreement to apply its own domestic conception of arbitrability, albeit cautiously. This approach has been adopted in various courts and by leading commentators.[503] Born points out that this approach 'does not mean that the particular substantive non-arbitrability rules of the judicial enforcement forum should be applied mechanically'.[504] Rather, just as the court has discretion under V (2) (a) to allow recognition and enforcement of an arbitral award that it considers concerns a non-arbitrable subject-matter, the court should exercise the same discretion to enforce an arbitral agreement in similar circumstances. To borrow an example from Born: if parties from Germany and France decide to arbitrate a dispute concerning conduct in Germany and France in England, there is no compelling reason for the English courts to apply the English domestic concept of arbitrability to that dispute.[505] Any domestic conception of arbitrability should be held back and used only when there is a domestic interest at stake in the dispute.

A slightly more thorny issue arises when the applicable substantive law would hold the dispute non-arbitrable. Born posits that the best approach to this issue is for the forum court to enforce the otherwise enforceable arbitration agreement,[506] noting that this is in line with the practice of most courts.[507] This still allows the courts of other

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[501] Born, above, 599.
[502] See, for example: *US No 4 – Fritz Scherk v Alberto-Culver Company*, United States Supreme Court, 17 June 1974, (1976) I YBCA 203; *Italy No 37 – Compagnia Generale Construzioni 'COGECO' SpA v Piersanti*, Italian Supreme Court, 27 April 1979, (1981) VI YBCA 229 ('*Italy No 37*'). See also: Born, above, 598, especially n 656.
[503] *Italy No 37*, above; *Belgium No 13 – Colvi NV (Belgium) v Interdica (Switzerland)*, Belgian Supreme Court, 15 October 2004, (2006) XXXI YBCA 587, paras 5-7; van den Berg, above, 152; Born, above, 598-600; H Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited' (2001) 17(1) *Arb Intl* 73 ('Arfazadeh'), 79-82.
[504] Born, above, 599.
[505] Ibid.
[506] Ibid.
[507] See *inter alia*: *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc*, United States Supreme Court, 1985, 473 US 416 ('*Mitsubishi Motors*'); *US No 301 – Westbrook International LLC v Westbrook Technologies Inc*, United States District Court, Eastern District Michigan, 25 August 1998, (2000) XXV YBCA 864, 869 ('…the law of the forum court should apply to determine arbitrability…'); *Netherlands No 19 – Isaac Glecer v Moses Israel Glecer and, Estera Glecer-Nottman, President,*

states the opportunity to review the arbitrability of the dispute at the recognition and enforcement stage.[508] It should be noted once more that this approach does not encourage the application of the forum's law without considering the totality of the circumstances,[509] including especially having regard to the international character of the dispute.[510]

Those are far from the only approaches to the question, with others including the application of the law of the place of arbitration, the law applicable to the arbitration agreement, or the application of a transnational standard of arbitrability.[511] The *lex arbitri*, or law of the place of arbitration, is ill-suited to be applied by a foreign court in determining arbitrability, and its application has been described as 'premature' because the arbitrators and/or the forum court will likely have the chance to examine the arbitrability under that law at a later stage, and are better-placed to apply it.[512] Similarly, it has been argued that the arbitral tribunal is best placed to determine arbitrability by applying the law chosen by the parties to govern their agreement.[513] The application of an internationalised standard of arbitrability has been criticised as impractical, especially because it means little without uniform international application: although a foreign court may be willing to refer the parties to arbitration on the basis of an internationalised standard of arbitrability, others may not and may take jurisdiction, or the courts at the seat of the arbitration may refuse to offer support, undermining the arbitral process before it has begun.[514] These approaches are therefore less appropriate than a forum court applying its own law.

The relationship between the arbitrability of disputes and the enforcement of an arbitration agreement, due to its inherent public policy considerations, is thus best

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Rechtbank, Court of First Instance, Rotterdam, 24 November 1994, (1996) XXI YBCA 635, para 10; *Belgium No 12 – Matermaco SA v PPM Cranes Inc, Legris Industries SA,* Court of First Instance, Brussels, 20 September 1999, (2000) XXV YBCA 672, para 5; *Fincantieri I*, above, para 13. See generally: Born, above, 606-608.

[508] *Mitsubishi Motors*, above.

[509] See Born, above, 599.

[510] *Mitsubishi Motors*, above.

[511] See D di Pietro, 'General Remarks on Arbitrability Under the New York Convention', in Brekoulakis and Mistelis (Eds), above ('di Pietro in Brekoulakis and Mistelis'), 91.

[512] Arfazadeh, above, 83.

[513] Ibid, 84.

[514] di Pietro, above, in Brekoulakis and Mistelis, above 91-92.

decided according to the law of the forum, with the proviso that the forum should exercise its control in this respect sparingly, and only when it has a direct interest in the dispute. This seems to fall in line with prevailing international opinion and practice.[515] In turn, this demonstrates a measure of home-country control over the enforcement of arbitration agreements.

(d) Discretion to enforce arbitration agreements

The more favourable right principle of Art VII (1) discussed above, which allows parties to rely on pro-enforcement national law or other treaties in place of the New York Convention, clearly states that it concerns the right of a party 'to avail himself of an arbitral award', but makes no mention of arbitration agreements. It may be asked whether this was a deliberate exclusion or simply an example of Art II's imperfect relationship with the other provisions of the Convention caused by its eleventh-hour insertion.

The question whether the more favourable right principle applies to arbitral agreements as well as awards was an important one and could have had considerable effects. To give one extreme example, Art II – the article of the New York Convention concerning enforcement of arbitration agreements – states that it applies only to agreements 'in writing'. Article II (2) defines 'in writing' by setting out fairly restrictive requirements for formal validity based on the prevailing attitudes to arbitration and the common methods of communication available in 1958, including that the agreement must be 'signed by the parties' or 'contained in an exchange of letters or telegrams'.

It was inevitable that, sooner or later, these rules would fall out of step with commercial practice and available technology.[516] When this happened, some courts were forced to resort to creative reasoning to allow the enforcement under the New York Convention

[515] As set out above.
[516] See *Italy No 131 – Robobar Ltd v Finncold SAS*, Italian Supreme Court, 28 October 1993, (1995) XX YBCA 739, paras 2-4; N Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law out of Step with Commercial Practice?' (1996) 12(1) *Arb Intl* 28 ('Kaplan').

of arbitration agreements, for example, not signed by the parties[517] or accepted by conduct rather than in writing.[518]

This was plainly an undesirable, uncertain state of affairs, but given the extremely high number of parties to the New York Convention, it would likely prove very difficult or impossible to find a mutually acceptable update to the Convention by renegotiation. UNCITRAL therefore took the approach of liberalising the writing requirements at Art 7 of its Model Law[519] and issuing two recommendations on the interpretation of Art II and Art VII of the New York Convention.[520] These recommendations were: first, the conditions listed in Art II (2) for the formal validity of an arbitration agreement be applied as a non-exhaustive list of examples;[521] and second, that the more favourable right provision in Art VII (1) should apply to arbitration agreements as well as arbitral awards.[522] This approach had been suggested in scholarship before being adopted by UNCITRAL,[523] and has been broadly welcomed in commentary.[524] It has also been followed in case law.[525]

So the New York Convention provisions on arbitration agreements are also subject to the more favourable right rule of Art VII (1), despite the fact that this does not follow

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[517] See for example: *Sphere Drake Insurance PLC v Marine Towing Inc* US Court of Appeals, Fifth Circuit, 1994, 16 F.3d 666, in which the US Court of Appeals for the 5th Circuit used, with respect, the slightly strained reasoning that a textual analysis of Art II (2) means that only a free-standing arbitration agreement, and not an arbitration clause contained in a contract, was required to be signed by the parties.
[518] See for example: *Switzerland No 27 – Compagnie de Navigation et Transports SA v Mediterranean Shipping Co*, Swiss Supreme Court, 16 January 1995, (1996) XXI YBCA 690, para 13, in which the court relied on the principle of good faith to uphold an arbitration clause contained in a bill of lading.
[519] UNCITRAL Model Law 2006.
[520] *Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006)*, UN DOC A/61/453.
[521] Ibid, para 1, which recommends that Art II (2) New York Convention 'be applied recognizing that the circumstances described there in are not exhaustive'.
[522] Ibid, para 2, which recommends that Art VII (1) New York Convention 'should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of a country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement'.
[523] See, for example, Kaplan, above, 44.
[524] See, for example, *ICCA Guide*, above, 42-44; Geisinger *et al*, above, in Kronke *et al* (Eds), above, 47; R Wolff, 'Article II (1), (2)' in R Wolff (Ed), above, 149.
[525] See, for example, *Germany No 142 – First, Second and Third German Investors v Brokerage house X*, Federal Court of Justice of Germany, Case No XI ZR 351/08 (1), 25 January 2011, (2012) XXXVII YBCA 223, para 4, 'According to the constant jurisprudence of the Federal Supreme Court, in case of a conflict of laws the coming into existence and the validity of an arbitration agreement are ascertained according to the rules of German private international law'.

from a plain-text reading of the Convention. This demonstrates clearly the broad discretion allowed to national lawmakers and courts to enforce arbitration agreements. It is submitted that this approach makes a great deal of sense, as Art VII has always operated to allow recognition and enforcement of an award rendered under an arbitration agreement that does not meet Art II standards but meets more liberal standards in the national or treaty law of the enforcing state. It would seem strange to allow a country to recognise and enforce an award based on its own conception of an arbitration agreement, but not to judge arbitration agreements themselves by the same standard at the pre-award stage. This again underlines the importance of home-country control over the enforcement of arbitral awards.

(e) Summary

It is submitted that it is clear from the above discussion that a court asked for enforcement of an arbitration agreement or recognition and enforcement of an arbitral award retains a substantial measure of control over the process of enforcement. This control allows the court discretion either to refuse enforcement to protect its own, domestic public policy interests, or to allow enforcement under a more liberal conception of enforceability than that contained in the New York Convention. There is an argument, discussed below, that the New York Convention should be subject to autonomous interpretation and harmonious application, to aid legal certainty for parties who choose arbitration to settle their disputes. The argument in favour of this view is that a disparate interpretation and application of the convention in the contracting states would undermine the achievement of the stated goals of the New York Convention project. Nonetheless, the preservation of state sovereignty was an important proviso to that aim, and the scope for home country control under the Convention's rules allows contracting states to protect their sovereign interests. Indeed, it may be that this flexibility in the application of the Convention has actually attracted some of the contracting states, safe in the knowledge that their public policy interests would remain protected under the Convention regime. In this sense, it may be argued that the possibility of the inconsistent application of the Convention serves the Convention's goals: the more states apply the New York Convention, the more

enforceable arbitration agreements and awards are on a global scale, notwithstanding that they may be less easily enforceable in one contracting state than another.

Two conclusions are certain. The first is that home country control exists and its use is widespread, even if it is unpopular in some pro-arbitration countries and with some pro-arbitration commentators. The second is that this home country control is a vitally important principle of the New York Convention: one arguably central to its success.

(2) Maximising enforceability

It has already been mentioned that the purpose of the New York Convention was to enhance international trade by promoting the enforceability of arbitral awards. It can also be said that the New York Convention is based on principles of maximising the enforceability of awards.[526] This principle is reflected in several provisions of the Convention, though always ultimately yielding to home-country control.

The principle of maximising enforceability can be seen in the wide discretion allowed to states to recognise and enforce awards more freely than the New York Convention requires. As discussed above, this is achieved especially by giving the enforcing court discretion to recognise or enforce an award that violates an Art V standard, and by the inclusion of the more favourable right principle in Art VII.[527]

The principle is also present in the provisions of Art V that set harmonised, minimum standards for the enforceability of arbitral awards. A Convention award is presumptively enforceable, unless one of the Art V grounds for refusal of enforcement can be proved.

A further specific example is Art V (1) (c), which provides that where the arbitral tribunal decides some matters submitted to arbitration by the parties and some going beyond the scope of submission, that part of the award dealing with matters submitted to arbitration by the parties should remain enforceable; only those parts of the award

[526] See, for example, O Caprasse and B Hanotiau, 'Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention' (2008) 25(6) *J Intl Arb* 721 ('Hanotiau and Caprasse'), 721, in which the authors describe the convention as having a 'pro-enforcement bias'.
[527] J Paulsson, 'May or Must Under the New York Convention: An Exercise in Syntax and Linguistics' (1998) 14(2) *Arb Intl* 227 ("Paulsson – 'May or Must…'"), 228.

going beyond the scope of submission to arbitration may be refused recognition. The principle that underlies this provision is that enforceability of the award should be promoted to the extent possible, the drafters having been concerned that any small detail of the award falling outside the scope of submission to arbitration should not undermine the enforceability of the entire award.[528]

This pro-enforcement tendency of the New York Convention has led to the development of a principle known as *favor arbitrandum*: that the Convention, parties' agreements, and so on, should be given the interpretation most favourable to arbitration.[529] The principle has been suggested as amongst the most important guiding principles in interpreting the Convention.[530]

The principle of maximising enforceability has therefore taken on a life beyond what can be read directly from the Convention. It is, however, submitted that the principle relies on and yields to home-country control. That is to say that a pro-enforcement approach under Art VII requires a more favourable national provision to take precedence, and any country that wishes to take an anti-enforcement approach is free to do so, within the limits it has agreed to in the Convention, though with the general 'escape clause' of national public policy. Nonetheless, the principle of maximising enforceability seems to be gaining popularity internationally, and should be borne in mind as a key aspect of the New York Convention.

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[528] UN DOC E/CONF.26/SR.17, 9.

[529] See *Luxembourg No 2 – Sovereign Participations International SA v Chadmore Developments Ltd*, Luxembourg Court of Appeal, 28 January 1999, (1999) XXIV YBCA 714 ('*Luxembourg No 2*'), para 25; Hanotiau and Caprasse, above, 121; Paulsson, 'May or Must', above, 228; P Leboulanger, 'The Arbitration Agreement: Still Autonomous?' in AJ van den Berg (Ed), *International Arbitration 2006: Back to Basics?* (2007) ('Leboulanger in van den Berg (Ed)'), 3, 10; Born, above, 3415-3416;

[530] See Paulsson, 'May or Must', above, 229. The piece concerns the proper interpretation of Art V (1) of the New York Convention. Specifically, the French version of the Convention provides that recognition and enforcement 'shall not be refused… unless' one of the criteria is met ('*ne seront refusées… que*'). The English, and all three other official versions of the Convention, use the more permissive sounding '*may* be refused only if'. In his contribution to the debate over how the French text should be interpreted, Paulsson uses the 'pro-enforcement bias' of the Convention as a strong argument in favour of an interpretation allowing the enforcing court discretion. The principle in fact supplements the need for a harmonious interpretation of all the official versions of the Convention in his reasoning.

(3) Party autonomy

The importance of party autonomy in international arbitration is self-evident. Arbitration is a creature of contract, and every arbitration is, or should be, a direct result of the exercise of party autonomy to exclude the jurisdiction of the courts and opt for arbitration.[531] In that sense, in pursuing the goal of making arbitration agreements and awards more internationally enforceable, the New York Convention promotes party autonomy. But party autonomy also plays an important role in the provisions of the Convention relating to the recognition and enforcement of arbitral awards in Art V.

Article V (1) (a) provides a choice of law rule for the law to be applied at the recognition and enforcement stage to the validity of the arbitration agreement, which makes 'the law chosen by the parties' paramount. This is in line with standard practice concerning contracts in international private law.[532] Article V (1) (d) meanwhile provides that an award may be refused recognition or enforcement if 'the arbitral procedure was not in accordance with the agreement of the parties'. In both instances, the will of the parties is given special importance, indicating a respect for party autonomy.

The situation is not quite so clear where arbitration agreements are concerned, specifically the question of what law should apply to the decision whether an arbitration agreement is 'null and void, inoperative or incapable of being performed' under Art II (3). It seems logical, and the prevailing view is, that this should be determined by applying the law applicable to the arbitration agreement: the law chosen by the parties.[533] But the New York Convention does not give clear guidance as to what law is properly applicable to an arbitration agreement at the agreement-enforcement stage of proceedings. Art V (1) (a) does provide choice of law rules for the decision whether, at the recognition and enforcement stage, 'the agreement is not

[531] Redfern and Hunter, above, 18; MO Saville, 'The Denning Lecture 1995: arbitration and the courts' (1995) 61(3) *Arbitration* 157, 157-161.
[532] See, for example, the Art 3 (1) Rome I Regulation, which provides for party autonomy as the principal rule. See also SC Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014), ch 3; PE Nygh, *Autonomy in International Contracts* (1999); Briggs, above, 217.
[533] See: van den Berg, above, II-1.1.3; Wolff in Wolff (Ed), above, 105.

valid' (see above). Although some have argued that the semantic distinction between 'null and void, inoperative or incapable of being performed' and 'not valid' means the two cannot be analogised,[534] the prevailing view certainly seems to be that the V (1) (a) conflicts rules can and should be applied by analogy.[535]

This approach makes sense; an alternative approach which saw a court apply a different law to the question whether it should enforce an arbitration agreement before proceedings start than to its assessment of the validity of that same arbitration agreement at the recognition and enforcement stage has little to recommend it. Put differently, it would make little sense for a court to conclude that an agreement was valid under the law it applies pre-arbitration, when it and every other court would ultimately be likely to refuse recognition and enforcement to any award once rendered for invalidity of the agreement under a different law at the recognition and enforcement stage. This approach would not preclude different standards of review of validity of the arbitration agreements at different stages, such as under the French doctrine of the negative effect of competence-competence;[536] indeed, the language of the New York Convention might be argued positively to encourage such a system of review.[537] The application of the V (1) (a) conflicts rule at the stage of enforcement of the agreement therefore makes sense, which means in turn that the rule of autonomy has wider effects than can be established from a plain-text reading of the Convention.

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[534] See, for example, *US No 51 – Rhone Méditerranée Compagnia Francese di Assicurazioni e Riassicurazioni v Achille Lauro et al*, United States Court of Appeals for the Third Circuit, 4 October 1982, (1984) IX YBCA 474, paras 18-20, in which the court refused to accept that the choice of law provisions of V (1) (a) should apply by analogy to Art II (1). The court instead ruled that whether an arbitral agreement is 'null and void, inoperative or incapable of being performed' should be assessed under internationally recognised standards (e.g. fraud, duress, waiver) or where enforcement of the agreement would contravene fundamental policies of the forum. For more examples and details, see Born, above, 534-535 and especially note 329.

[535] See: *Austria No 2 – PAG v V*, Austrian Supreme Court, 17 November 1971, (1976) I YBCA 183; *Germany No 9 – West German Manufacturer v Dutch Distributor*, Regional Court of Heidelberg, 23 October 1972, confirmed by Court of Appeal of Karslruhe, 13 Match 1973, (1977) II YBCA 239; P Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 25(3) *Arbitration* 100 ('Sanders 1959'), 105; van den Berg, above, 126; TJ Fox and S Wilske, 'Article II (3)' in Wolff (Ed), above, 163.

[536] See the rule as applied in: *American Bureau of Shipping v Jules Verne et al*, French Supreme Court, 2001, (2002) 17 Mealey's Int'l Arb Rep 30, reproduced in JJ Barceló, T Várady, AT von Mehren, *International Commercial Arbitration: A Transnational Perspective* (2009) ('Barceló et al'), 141.

[537] '…not valid' seems to permit a broader review than 'null and void, inoperative or incapable of being performed'.

The rule in Art V (1) (a), as discussed above, is that in the first place the validity of the agreement should be assessed under the law that the parties have designated as applicable to the agreement. In order to maximise respect for party autonomy, it has been argued that any choice of law to govern the whole contract should also be read to include a choice of law to govern the arbitration agreement.[538] This has been described by van den Berg as a 'rule of autonomy', and indeed demonstrates the importance of the parties' choice.[539]

Art V (1) (c) provides that recognition and enforcement may be refused where: '[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration…' This ground for refusal of recognition enforcement is rarely pleaded and, when it is, rarely with success, but it clearly places great importance on respect for the parties' agreement as to the subjects to be resolved by arbitration.[540]

It is therefore submitted that party autonomy is a principle clearly underlying the New York Convention as well as the Brussels Regime.[541] The importance of respect for party autonomy for the proposals advocated later in this thesis is therefore abundantly clear.

(4) Special role for law of seat of arbitration

As will be discussed in detail in the next chapter, there is an ongoing debate about the proper role to be played by the courts and law of the seat of an arbitration. This larger

[538] Fox and Wilske, above, in Wolff (Ed), above, 165.
[539] It is interesting to note in the context of this thesis that this is not the approach implied by the Brussels I Recast, which states at recital 12 that courts may examine 'whether the arbitration agreement is null and void, inoperative or incapable of being performed, *in accordance with their national law*' (emphasis added). It will remain to be seen whether national courts read this to refer to their national law including international private law rules, which would presumably also include those international private law rules implied by the New York Convention, or as a direct reference to their internal law. Time will tell, but if courts were to use the recital as a basis for applying domestic validity requirements to international arbitral agreements come what may, this would likely prove far more offensive against the spirit and principles of the New York Convention than any proposed integration of arbitration ever was, despite the legislators' stated aim not to interfere with its operation.
[540] *Parsons and Whittemore Overseas Co v Societe Generale de l'Industrie du Papier (RAKTA)* US Court of Appeals, Second Circuit, 1974, 508 F.2d 969 ('*Parsons and Whittemore*'), paras 22-24; van den Berg, above, 312; RB von Mehren, 'Enforcement of foreign arbitral awards in the United States' (1998) 6 *Int ALR* 198, 201.
[541] As set out in the previous chapter.

theoretical question warrants a full discussion in its own right, and will therefore not be considered in this section. This section will only consider what role for the seat of arbitration emerges from the provisions of the New York Convention.

That role is relatively active, or at least important, and is visible in two main ways: first, the set-aside provision of Art V (1) (e); and second, the conflicts rules of Arts V (1) (a) and (d).

Article V (1) (e) allows refusal of recognition and enforcement when:

'The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'[542]

The majority view is that the phrase 'the country in which, or under the law of which' refers to the juridical seat of the arbitration.[543] This provision therefore gives potential international force to a decision by the courts of the seat to set-aside or vacate an award. This means that the decision of a court at the seat has greater international preclusive force than an ordinary action for refusal of recognition and enforcement.[544] This provision has been criticised for potentially exporting domestic standards of enforceability where international standards may be more appropriate.[545] However, the potentially pervasive effect of this provision is blunted by the discretion afforded to domestic courts in its application, as discussed above in the section on home-country control.[546] It is at any rate clear that this provision implies an important, supervisory role for the courts of the seat of the arbitration, a role which has long been recognised in this area.[547]

The conflicts rules in Arts V (1) (a) and (d) New York Convention also give an important role to the law of the seat of the arbitration. These rules were mentioned above in the discussion of party autonomy, as the rule of autonomy takes precedence in establishing the law applicable to the validity of the arbitration agreement and the

[542] Emphasis added.
[543] Fox and Wilske in Wolff (Ed), above, 276-277; van den Berg, above, 295.
[544] Barceló *et al*, above, 970.
[545] Van den Berg, above, 355; C Liebscher, 'Non-Binding Award, Article V (1) (e)' in Wolff (Ed), above, 356.
[546] See Chapter 6.B.1, above.
[547] Van den Berg, above, 20.

procedure to be followed by the arbitral tribunal. Failing a designation by the parties, these questions are to be determined by the law of the place 'where the award was made', or in other words, the law of the seat of arbitration.[548] This is described by van den Berg as a 'rule of territoriality', which serves to further underline the importance of the seat of the arbitration.[549]

It is clear that the New York Convention implies a relatively important role in the arbitral process for the seat of the arbitration. The extent to which this is appropriate shall be discussed in the next chapter, in the context of the delocalisation debate.

(5) Harmonisation and autonomous application

One of the crucial ways in which the New York Convention achieves its goals is by creating harmonised minimum standards of enforceability for arbitral agreements and awards. This harmonisation is achieved through a mix of substantive rules and conflicts rules, for the recognition of arbitral awards and agreements, as well as the circumstances under which recognition may be refused. The potential for harmonisation is intensified by arguments for an autonomous application of the Convention, which would use international rather than national standards where the Convention calls for the application of national law.

The New York Convention sets minimum standards for formal validity of arbitration agreements at Art II (2). This article provides "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". This rule was intended to create harmonised minimum standards for the formal validity of arbitration agreements

[548] Most interpret this phrase to mean the same as 'the country in which, or under the law of which' the award was made in Art V (1) (e). As stated above, the majority interpretation of this phrase is that it designates the law of the seat of the arbitration. The fall-back rule must obviously be read as 'where the award *will be* made' to make sense at the pre-award stage. See the discussion above about the application by analogy of provisions concerning the recognition and enforcement of arbitral awards to the enforcement of arbitration agreements.

[549] Van den Berg, above, 161. It is worth noting that a further obvious problem arises in that it may not be clear based on the agreement where the juridical seat or physical *situs* of the arbitration will be. In this case, and assuming there has been no express choice of law by the parties, this can be solved by the forum's applying its own conflict of law rules to determine the law applicable to the arbitration agreement. See Fox and Wilske in Wolff (Ed), above, 166.

across contracting states, demonstrating the importance of eliminating the disparate standards of formal validity in national law.[550]

As discussed above, the Convention provides 'full' conflicts rules for the substantive validity of the arbitration agreement, pointing directly to the country whose law is to be applied. This is determined according the rule of autonomy, with a fall-back position of a rule of territoriality. The provision concerning the law applicable to the arbitration agreement changed during the drafting process to provide a clear choice of law rule, taking the choice of relevant law entirely out of the hands of the court hearing recognition and enforcement proceedings.[551] This serves to underline the importance of a harmonious, consistent approach to the application of the Convention. It was feared that the application of inconsistent national laws to *inter alia* the validity of the arbitration agreement could lead to unnecessarily inconsistent approaches to recognition and enforcement, undermining the entire New York Convention regime.[552]

The Convention also provides a conflicts rule for the capacity of parties to enter into arbitration agreements. Article V (1) (a) provides that the capacity of a party to enter into an agreement to arbitrate is to be governed by 'the law applicable to' that party, sometimes referred to as the party's 'personal law'. This has been described as a 'half-way conflict rule', as it leaves the question of how to determine the personal law to the conflict rules of the forum, dictating only which conflict rule should be applied.[553] In this way, the rule seeks to promote uniformity to an extent, by discouraging the forum court's application of its own conception of capacity.

The drive for harmony has in turn led to debate about the autonomous, internationalised application of the New York Convention. This will be discussed in more detail in the next chapter, under the heading 'delocalisation', but the provisions of Art V (1) (b) provide an illustrative example.

Art V (1) (b) states that recognition and enforcement may be refused if '[t]he party against whom the award is invoked was not given proper notice of the appointment of

[550] van den Berg, above, 170; ICCA Guide, above, 42.
[551] UN DOC E/CONF.26/SR.23, 14.
[552] van den Berg, above, 291.
[553] van den Berg, above, 276-277.

the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'.

This provides for some basic protection of adversarial proceedings and procedural fairness. Some argue that this should be read as an international rule to be given uniform interpretation, though most courts agree with the US Court of Appeals for the Second Circuit's interpretation that V (1) (b) 'essentially sanctions the application of the forum's standards of due process'.[554] This led to fears of parochialism amongst authors, but courts have generally been consistent in holding that not everything that would be a violation of due process under domestic law could be considered a violation of Art V (1) (b).[555] So although V (1) (b) must be read as protecting the domestic procedural fairness rules of the forum because of the absence of an international standard,[556] the approach of courts has generally been to refuse recognition or enforcement only where there is a serious irregularity.[557] This may include, for example, cases where the violation of due process may have materially affected the outcome of the arbitration.[558] Therefore, although domestic standards of procedural fairness are ostensibly protected, it may be argued that a less-stringent, internationalised standard of procedural fairness is effectively applied.[559] This in turn demonstrates a movement towards a consistent, international, autonomous application of the Convention.

In summary, the New York Convention is clearly based on a principle of broad harmonisation, both direct and indirect, which promotes uniformity and lessens the chances that the effectiveness of the Convention could be undermined by inconsistent and parochial interpretation and application. This in turn has led to a broader movement towards an autonomous interpretation of even those provisions that point to a relevant national law, as pointing to a more internationally-acceptable standard.

[554] *Parsons and Whittemore*, above, para 16. See also van den Berg, above, 298 and especially n 186.
[555] van den Berg, above, 298.
[556] Scherer, above, in Wolff (Ed), above, 283.
[557] Ibid, 310.
[558] Discussed above.
[559] Scherer in Wolff (Ed), above, 286.

This movement, known as 'delocalisation' shall be discussed in detail in the next chapter.

(6) Maintaining fairness and due process

As stated above, maintaining due process was mentioned in the preparatory materials of the New York Convention as being a principle restricting the pursuit of the goal of improving the enforceability of arbitral awards. It is protected directly through Art V (1) (b) and indirectly through Art V (1) (d), as well as, if need be, through the public policy exception at Art V (2) (b).[560]

This principle, whilst important, shall not be covered in detail in this thesis, because it will be assumed that the Brussels I Regulation already adequately protects due process in its provisions. Indeed, EU member states should by definition trust that the courts of other member states operate according to due process, or at least within an acceptable range of derogation from the principle as understood by any other member state. It is therefore hoped that the inclusion of arbitration in the Brussels Regime would have no major effect on the protection of due process with respect to arbitration within Europe, and this thesis need not consider the principle further. It is mentioned simply because it is given such central importance in the New York Convention and preparatory materials that this chapter would be incomplete if it failed to mention it.

C. Ranking of these principles

As in the previous chapter, it is important to consider how these principles relate to one another, and whether any hierarchy can be established. Whilst it may not be possible to list the above principles in a strict descending order, it is submitted that some patterns can nonetheless be identified.

The first question is to consider what is the most important of these principles, if any. It is submitted that this is best achieved by looking back to the goal of the Convention, which was to promote international trade by 'facilitating' the recognition and

[560] See *Spain No 56 – Saroc, SpA (Italy) v. Sahece, SA (Spain),* Supreme Court Civil Chamber, Plenary Session 2065 of 2001, 4 March 2003, (2007) XXXIII YBCA 571, para 22, for an example of due process being considered as a public policy basis for refusal of recognition and enforcement of an award.

enforcement of arbitral awards. Because of this, and the 'pro-enforcement bias' supposedly demonstrated by Art VII, it has often been said that '*favor arbitrandum*', or maximising enforceability of arbitral awards and agreements is the most important principle underlying the New York Convention.[561] However, this position fails to take account of two points. The first is that, from the very beginning, this goal was mentioned whilst 'at the same time' preserving basic principles of justice and the sovereign rights of states. The wording 'at the same time' suggests these principles should be considered at least on an equal footing. The second derives from the structure of the Convention itself. As outlined above, the states are given very broad discretion, both to enforce and *not to enforce* awards and agreements. This suggests that state sovereignty, or what has been referred to in this paper as 'home-country control', is the supreme principle, taking precedence over the '*favor arbitrandum*' principle. It is hard to say exactly where the basic principles of justice – or due process – fits in, but they certainly come second to home-country control, and are probably on a par with maximising the recognition and enforcement of awards. In any given case, this balancing would be at the discretion of the enforcing court, which further underlines the importance of home-country control. In any event, as explained above, the ensuring due process is not a principle or particular relevance to the proposals in this thesis.

Party autonomy will rarely conflict with the above principles, but it is submitted that it should be considered as coming behind home-country control, due process, and maximising enforceability. This is true in respect of the former two because the parties to a dispute could not exercise their autonomy to circumvent the public policy of an enforcing country, nor, in most systems, to get around the fundamental tenets of due process, for example by agreeing on the appointment of a partial arbitrator. Maximising enforceability may be seen as promoting party autonomy by upholding their agreement to arbitrate and the result the process reaches. However, even where the arbitral process deviates from the parties' agreement, many courts would require a showing that this has caused some real detriment before refusing to recognise or

[561] See *Luxembourg No 2*, above; Hanotiau and Caprasse, above; Paulsson, 'May or Must...', above; Leboulanger in van den Berg (Ed), above.

enforce the award.[562] Furthermore, upholding party autonomy was not stated as an aim or leading principle of the Convention by the drafters.

The special role for the law of the seat of the arbitration that emerges from the New York Convention is lower down this hierarchy still. In the conflicts rules of V (1) (a) and (d), the law of the seat expressly comes second to the agreement of the parties. Under Art V (1) (e), it is for the court asked to recognise and enforce an award to decide whether or not it will recognise the set-aside judgment of the courts at the seat. So although there is clearly a special role for the courts at the seat, it carries less importance than the principles mentioned above.

The ongoing move towards harmonisation through an internationalised and autonomous interpretation and application of the New York Convention relies on national legislatures and courts adopting that approach. It is therefore clearly subordinate to home-country control. Indeed, the autonomous interpretation of the Convention does not directly follow from its text, which often points to national law rather than international standards. The value of this kind of harmonisation will be discussed in detail in the next chapter, under the name 'delocalisation'.

Some picture of the relationship between these principles can therefore be discerned. Home-country control certainly appears to be the most important, on a textual analysis of the provisions of the New York Convention.

D. Preliminary conclusions

A number of relevant principles have been identified as underlying the New York Convention. These include home-country control, maximising the enforceability of arbitral awards, promoting party autonomy, a special role for the law of the seat, and the autonomous interpretation of the Convention are important principles, and rank roughly in that order. These principles shall be taken into account in the proposals advanced by this thesis.

[562] See Scherer, above, in Wolff (Ed), above, 301-302

7. PRINCIPLES IN INTERNATIONAL ARBITRATION PART 2 – THE 'DELOCALISATION' DEBATE

A broader background to this thesis is the ongoing debate about the so-called 'delocalisation' of arbitration. Its relevance to this thesis is that both concern the proper relationship between national legal systems, national courts, and the arbitral process. Delocalisation, and the literature surrounding it, defies any attempt at simple summary, but its pivotal point is the question: from where does arbitration draw its binding force and legal legitimacy? Is it from the agreement of the parties? From a transnational legal order similar to the *lex mercatoria*? Or is arbitration only effective and binding insofar as permitted by the municipal law of the country in which it takes place?

The last is the traditional view: that arbitration is permitted by, and therefore also subject to regulation under, the law of the seat of the arbitration. This view, undeniably correct before the conclusion of the New York Convention, has in the past half century come to be challenged by proponents of delocalisation, who to varying extents view the arbitral process as part of a transnational legal firmament,[563] legitimised by party autonomy and international law, and capable of detachment from any given municipal legal system.

There are two distinct phases to the development of the delocalisation challenge to the traditional view. The first began in the 1970s and 1980s, when supporters of delocalisation argued that international arbitration should be detached from parochial restraint by mandatory provisions of the domestic law of the seat of arbitration. This view still holds that international arbitration should necessarily be subject to some degree of control at its seat, but that such control should be exercised only to protect internationally accepted norms, such as the parties' rights to due process. The second phase of the delocalisation argument has roots in the 1980s, but has come to prominence in the last two decades, and has seen commentators argue and, even some courts hold, that arbitration can and often should be entirely detached from the control

[563] See, for example, comments of Kerr LJ in *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, 301.

of any one domestic court or legal system. These phases of the delocalisation argument shall be referred to as 'weak delocalisation' and 'strong delocalisation' respectively.

This chapter will first set out the development of the traditional, territorial view of arbitration. It will go on to describe the weak and strong versions of delocalisation in turn, before drawing some conclusions on where the delocalisation debate currently stands. Finally, the chapter will consider the relationship between delocalisation theory and the interface between jurisdiction conventions and arbitration.

A. Territorial arbitration

The territorial view of arbitration has long been the norm, and before the conclusion of the New York Convention, was the only logically supportable approach. With the success of the New York Convention, territoriality is no longer an invulnerable concept, and legitimate arguments can be raised for a more delocalised conception of arbitration. This sections charts the development of the territorialism narrative in both the pre- and post-New York Convention eras. It shall then consider the narrative of pluralism, and how this competes with the territorialist perspective.

(1) Before the New York Convention

Before the conclusion of the New York Convention, an equivalent function was performed by two League of Nations instruments: the Geneva Convention of 1927[564] and the Geneva Protocol of 1923.[565] The former related to the recognition and enforcement of arbitral awards, the latter to the enforcement of arbitration agreements.

These instruments without doubt enshrined a territorial approach to arbitration. This can be seen in any number of examples, including most obviously the full title of the convention, which refers to the execution of 'foreign' arbitral awards rather than 'international awards'. This language clearly implies the belief that an arbitral award

[564] Geneva Convention, above. The convention was ratified by 27 countries and signed by three more. See: https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=544&lang=en (last accessed: 21 April 2015).
[565] Geneva Protocol, above. The protocol was ratified by 28 countries and signed by 11 more. See: https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=543&lang=en#2 (last accessed: 21 April 2015).

has some national character.[566] The substantive rules of each instrument also demonstrate a strictly territorial approach.

The Geneva Protocol provides that 'arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.'[567] The same article provides that each contracting state shall provide support to the arbitral process in accordance with the arbitration law in force within the territory of that state.[568] Each of these rules demonstrates a territorial view of arbitration: arbitration shall be subject to the law of the country in which it takes place, and procedural support will also be granted in accordance with the law of the forum. In each case, the arbitral process can only proceed insofar as permitted by the municipal law of a contracting state.

The Geneva Protocol further emphasises a territorial approach by providing that contracting states shall recognise those arbitral agreements made 'between parties, subject respectively to the jurisdiction of different Contracting States'.[569] Again, this demonstrates a highly territorial view of arbitration – agreements to arbitrate will only be recognised insofar as they are concluded by parties subject to the jurisdiction of a country which has conferred on them permission to arbitrate.

The Geneva Convention demonstrates a territorial approach still more clearly. The most obvious example is in the so-called 'double exequatur' requirement, which is seen in several places in the Geneva Convention. For instance, Art 1 provides that, for execution of an award, the award must conform to the procedural law governing the arbitration[570] and that the award has become final in the country in which it was made, meaning that it is not open to appeal or set-aside proceedings and that no such proceedings are ongoing.[571] Article 2 provides that execution 'shall' be refused where the enforcing court is satisfied that the award has been set aside in the country in which

[566] The New York Convention's title also refers to 'foreign' arbitral awards, but the provisions of the New York Convention suggest that awards are not entirely national in character, as will be discussed in more detail below.
[567] Art 2 Geneva Protocol.
[568] Ibid.
[569] Art 1 Geneva Protocol.
[570] Art 1 (c) Geneva Convention.
[571] Art 1 (d) Geneva Convention.

it was made.[572] Article 4 provides that, in order to obtain execution, the party relying on the award must provide a copy authenticated according to the standards of the law of the place where the award was made[573] and proof that the award has become final in the country in which it was made in the sense of Art 1 (d), i.e. that it is neither being appealed nor capable of being appealed in that country.[574]

All this effectively led to the requirement that a party must have the award certified enforceable by the courts in the country in which the arbitration took place before it could rely on that award in any other contracting state to the Geneva Convention. This requirement of 'double exequatur' was one of the driving factors behind the reform in the New York Convention.[575]

The double exequatur system and the rules underlying it reflect a highly territorial approach to arbitration. They vest in the courts of the place of the arbitration absolute control over the validity and enforcement of an arbitral award. This fits perfectly with the territorial theory that arbitration as a process derives its authority from the municipal law of the country in which it takes place, and any award only obtains international enforceability insofar as legitimised by that law.[576]

It is easily seen that the Geneva Convention and Protocol provided the grounding for the territorial conception of international arbitration. Looking back almost a century on, their rules can seem limited, parochial and understandably dated,[577] but it is important to remember that the Geneva instruments were the first step towards truly international arbitration and the vital progress they made in the development of arbitration as a viable form of international commercial dispute resolution.[578]

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[572] Art 2 (a) Geneva Convention.
[573] Art 4 (1) Geneva Convention.
[574] Art 4 (2) Geneva Convention.
[575] See UN DOC E/2822, Annex II, 13; *Redfern and Hunter*, above, para 1.219; Born, above, 66-67.
[576] Parallels can be seen with the system of exequatur of judgments in Europe, which has now been abolished under the Brussels I Recast. See *Commission Press Release*, above, 1.
[577] *Redfern and Hunter*, above, paras 1.217, 1.219; Born, above, 66-67.
[578] *Redfern and Hunter*, above, paras 1.56, 1.214, 1.219; Born, above, 66-67; R Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) 28(5) *J Intl Arb* 445, 445-446.

(2) The New York Convention

The New York Convention, which was concluded in 1958, marks the beginning of the modern age of international commercial arbitration.[579] The creation of the New York Convention can certainly be seen as a seminal moment in the development of international commercial arbitration, and, as discussed in the previous chapter, the Convention retains a quasi-constitutional significance in the field to this day.[580]

The abolition of the double exequatur of arbitration awards under the Geneva Convention was a driving force in the drafting of the New York Convention. In changing this and in other ways the New York Convention moved the law of international arbitration further away from the overt territoriality enshrined in the Geneva instruments.

One of the ways in which the New York Convention achieves this is to put the law of the country where the award was made secondary to the will of the parties, as discussed in the previous chapter. This is the case in assessing irregularities in the constitution of the tribunal or in the arbitral procedure,[581] as well as assessing the validity of the arbitration agreement.[582]

Furthermore, under the New York Convention, the fact that an award has been set aside where rendered is no longer, on a plain-text reading, a mandatory ground for refusal of recognition and enforcement of that award, albeit some would argue that it is.[583] True, recognition and enforcement *may* still be refused on the basis that the award has been set aside, but this is no longer an absolute bar to recognition and enforcement. More importantly still, the double exequatur requirement has been abolished, with arbitration awards automatically recognised as binding and enforceable[584] and the

[579] J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) *Arb Intl* 179 ("Lew, 'Autonomous Arbitration'"), 181-185.
[580] Born, above, 98: '[The New York Convention] provides what amounts to a universal constitutional charter for the international arbitral process'; *Redfern and Hunter*, above, para 1.221.
[581] Art V (1) (d) New York Convention.
[582] Art V (1) (a) New York Convention.
[583] The court *may* still refuse enforcement under Art V (1) (e) New York Convention, but is not bound to do so. *Cf* Art 2 (a) Geneva Convention. For the argument that set-aside is a mandatory basis for refusal of enforcement, see the next section, below.
[584] Art III New York Convention.

party seeking recognition and enforcement required to provide nothing more than originals or copies of both the award and the arbitration agreement.[585]

All these rules indicate the lessening importance of the seat of the arbitration. The seat still plays a vitally important role in the New York Convention scheme, but its importance is no longer absolute, as it effectively was under the Geneva instruments. This has in turn left room for the development of a theory of delocalised international arbitration,[586] which would have been logically unsupportable before the conclusion of the New York Convention. Before considering that theory, however, the following section shall briefly set out the territorial theory of international arbitration, as applicable in the modern, or post-New-York-Convention, era, as well as the modern pluralist theory.

(3) The territorial theory of international commercial arbitration

The territorial theory of international arbitration was most famously advanced by Francis Mann in his seminal and oft-cited essay, '*Lex Facit Arbitrum*'.[587] The essay is so much the fundamental expression of the territorial conception of arbitration and so regularly forms the basis for any discussion of the legal nature of arbitration that its arguments call for description and frequent quotation in this section.

For Mann, the delocalisation debate is one about 'the supremacy of the law in the field of arbitration' and those who support delocalisation 'advocate the freedom of arbitrators from the shackles of the law'.[588] In introducing the discussion, he quotes distinguished authors who were arguing for the possibility of arbitration detached from any system of municipal law even as early as the 1960s.[589]

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[585] Art IV New York Convention.
[586] Lew, 'Autonomous Arbitration', above, 179.
[587] FA Mann, 'Lex Facit Arbitrum', in P Sanders (Ed), *International Arbitration. Liber Amicorum for Martin Domke* (1967) ('Mann, *Lex Facit Arbitrum*'), 157. The title of the essay is worth describing briefly for those who, like me, are unfamiliar with Latin. The title loosely translates as 'the law makes the arbitrator', and is a play on the famous declaration '*lex facit regem*' or '*lex facit principem*', meaning roughly "the law makes the king/prince", and stated in the 13th Century in defiance of the concept that the Crown was above the law, or was the law. For more on *lex facit principem*, see F Schulz, 'Bracton on Kingship', (1945) 55(2) *English Historical Review* 136.
[588] Mann, *Lex Facit Arbitrum*, above, 157.
[589] Mann quotes Goldman arguing that '…la nature de l'arbitrage international débouche sur l'inéluctable nécessité d'un système autonome, et non national', which roughly translates as 'the nature of

In one of the most frequently quoted passages of his essay, Mann argues:

'Although […] it is not uncommon and, on the whole, harmless to speak […] of international arbitration, the phrase is a misnomer. In the legal sense, no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law'.[590]

He also argues that an international instrument such as the New York Convention:

'…applies only by reason of the fact that the State controlling the arbitration has become a Party to it. […T]he fact that the […] arbitration is an international one, does not by any means deprive the arbitration as a whole of its strictly and necessarily national character, or prejudice the supremacy of the municipal law applicable to it'.[591]

Similarly, exercises of party autonomy are only valid and carry legal force to the extent permitted by the municipal law to which the parties are subject.[592] 'It is primarily the law of the seat that decides whether and on what conditions arbitration is permitted at all. No country other than that of the seat has such complete and effective control over the arbitral tribunal'.[593]

Mann's argument, though strongly put and compellingly made, cannot be said to be complete, nor to remain entirely relevant in the modern day. First of all, the definition of the seat remains slightly elusive throughout the essay. It generally assumes the seat is the state in whose territory the arbitration takes place, but also accepts that '[t]he existence of a seat does not mean that all hearings will necessarily have to be held in the seat' and that for convenience, hearings may be held elsewhere, but does not delineate the point at which a hearing held in a country other than the proper seat

international arbitration leads to the inescapable necessity of an autonomous, non-national system', B Goldman, 'Les Conflicts de Lois dans l'arbitrage International de Droit Privé' (1963) 109(2) *Recueil de Cours* 351, 380, quoted in Mann, *Lex Facit Arbitrum*, 158. He also quotes Fragistas, who suggests parties may 'détacher l'arbitrage de tout ordre juridique et lui donner un caractère supranational', roughly translated as: 'detach the arbitration from any legal order and give it a supranational character'. C Fragistas, 'Arbitrage étranger et arbitrage international en droit privé' [1960] *Revue Critique de Droit International Privé* 1, 14, quoted in Mann, *Lex Facit Arbitrum*, 158.

[590] Ibid, 159.

[591] Ibid.

[592] 'Every right or power a private person enjoys in inexorably conferred by or derived from a system of municipal law'. Ibid, 160. 'No act of the parties can have any legal effect except as the result of the sanction given to it by a legal system'. Ibid, 160.

[593] Ibid.

becomes a hearing subject to the arbitration law of the state in which it is held.[594] Furthermore, much of Mann's analysis has been superseded by recent developments, including most notably the modern popularity of the New York Convention and movements towards harmonisation of national arbitration law. Nonetheless, Mann's remains the most concise, powerful statement of the territoriality theory.

There is support for such a conception of arbitration in literature, though few argue in such strong terms as Mann.[595] Park's 1983 article shows the beginnings of the arguments that characterise the weak version of the delocalisation process, arguing that the local judge should limit his intervention in international arbitrations,[596] whilst maintaining the fundamental narrative of legitimisation and control over arbitral proceedings by the courts at the seat.[597] His arguments shall be considered in more detail in the following section.

Van den Berg demonstrates support for territorialist theory, emphasising the importance of set-aside by arguing 'an award that has been set aside in the country of origin no longer exists legally. It is not possible that an arbitral award that has been set aside would be brought back to life during an enforcement procedure under the Convention in its country of origin or abroad.'[598] Sanders, one of the so-called 'founding fathers' of the New York Convention shared this view, stating that when an award has been set aside in the country of origin 'there does not longer [sic] exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility'.[599]

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[594] Ibid, 163.
[595] See: W Park, 'The Lex Loci Arbitri and International Commercial Arbitration' (1982) 32 *ICLQ* 21; AJ van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2010) 27(2) *J Intl Arb* 179 ('van den Berg 2010').
[596] Park, above, 22.
[597] Park, above, 21. See also the case of *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, cited by Park at 22, which is decided on the assumption that there is a *lex arbitri* supervising every arbitration.
[598] Van den Berg 2010, above, 186; see also AJ van den Berg, 'Consolidated Commentary Cases Reported in Volumes XXII (1997) – XXVII (2002)' (2003) XXVIII *YBCA* 562, 649 'Within the framework of the [New York] Convention it is difficult to conceive that the residual power to enforce would also apply to the case where the award has been set aside in the country of origin'.
[599] Sanders 1959, above, 109-110.

The territorial approach to arbitration therefore views the authority of arbitrators as rooted in the municipal law of the place of arbitration. It also allows for extensive control of the arbitral process and arbitral awards by the courts of the seat. It does so to prevent arbitration being used to circumvent the mandatory rules or public policy of the forum. As it was put in one English Court of Appeal case: 'there must be no Alsatia in England where the King's writ does not run'.[600]

(4) Pluralist theory

Paulsson advances an alternative to strict territorialism, which he refers to as 'the pluralistic thesis'.[601] Under this theory, arbitration draws its legal legitimacy from a potential variety of national legal systems. This is because the New York Convention leaves room for an arbitral award set-aside where rendered to be recognised and enforced by courts other than those of the seat of the arbitration via the chapeau to Art V (1) (e) and the Art VII more-favourable-right principle, even if this rarely occurs in practice.[602]

So, for example, where an arbitration takes place in Country A, and is immediately set-aside by the courts of that country, it may still be taken for recognition and enforcement in Countries B, C, and D. Country B may respect the set-aside decision of Country A and refuse to recognise and enforce the award. Country C may ignore the set-aside decision but decline to recognise and enforce the award under the New York Convention for its own reasons. Country D may ignore the set-aside decision and decide to enforce the award under its own national law and Art VII New York Convention. It is clear, therefore, that the award in this scenario is subject to four different systems of law. Furthermore, it becomes enforceable by virtue of a law other than that at the seat of the arbitration. The argument that an arbitration draws its legal legitimacy from, and is subject to effective control by, the courts at the seat of the arbitration is belied the by practical developments in the field.

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[600] *Czarnikow v Roth, Schmidt and Company* [1922] 2 KB 478, at 488, per Scrutton LJ. Alsatia was until the 17th Century a place of sanctuary in London where warrants could not be exercised.
[601] J Paulsson, 'Arbitration in three dimensions' (2011) 60(2) *ICLQ* 291 ("Paulsson, 'Three dimensions'"), 297.
[602] Van den Berg 2010, above 186.

This argument is true in as far as it goes. The possibility for enforcement of annulled arbitral awards clearly lessens the power of the courts at the seat of the arbitration over arbitration proceedings conducted within the territory of the seat. On the other hand, the seat of the arbitration nevertheless can still play a significant part in the arbitral process. The courts at the seat of the arbitration are the only ones that can meaningfully appoint or remove arbitrators and, crucially, are the only ones with valid supervisory jurisdiction to set-aside an award. Whether or not, when a court takes that set-aside jurisdiction, it is respected by the courts of other countries is another question; it does not change the fact that the seat plays a special, more significant role.

Furthermore, because the vast majority of the world's countries subscribe to the New York Convention, those countries could be said to have willingly abdicated their absolute control over arbitral awards rendered in their territories. They are signatories to the Convention and know its terms. They have decided to exercise their sovereignty in a way that allows arbitral awards rendered and set-aside in their territory to be recognised and enforced in other Convention countries. Indeed, 73 of the parties to the New York Convention have made an Art I (3) reservation, providing that only awards rendered in Convention countries shall be enforced under the Convention.[603] This underlines the importance of the sovereign act of becoming party to the Convention, further emphasising the importance of the seat of the arbitration.

Finally, leaving aside the French approach, which will be discussed below, the general approach to set-aside judgments seems to be one of respect. Courts will generally recognise a set-aside judgment (thus refusing enforcement under Art V (1) (e) New York Convention) unless there is some obvious flaw in the set-aside judgment, such as corruption.[604] This again points to the fact that the judgment of the courts of the seat of the arbitration retain special significance.

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[603] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#13 (last accessed: 21 April 2015).

[604] See for example: *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm), [2014] 2 Lloyd's Rep 435, para 20; *Malicorp Limited v Government of the Arab Republic of Egypt and Egyptian Holding Company for Aviation, Egyptian Airports Company* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423, para 22, in both of which cases, it was held that the 'preferred approach' for the English courts was to give effect to set-aside judgments which the court would normally recognise, which is to say, those judgments that do not offend 'basic principles of honesty, natural justice and domestic concepts of public policy' (see also *Dicey and Morris*, above, para 16-148); *Netherlands No*

Pluralism has not been given a great deal of attention because it does not defeat the proposals advanced in the next chapter of this thesis. Unlike delocalisation, pluralism does not say argue that the arbitral process should be detached from the supervision and support of the courts at the seat of the arbitration. Indeed, it does not argue for any particular approach at all; it is merely an observation of developments in practice.[605] In other words, it is descriptive rather than normative. It does not deny that the role of the seat is important, and it does not argue that the importance of the seat should not be increased. It is perfectly compatible with the reallocation of priorities proposed in the next chapter. It is therefore of little relevance to the broader arguments of this thesis, unlike the delocalisation theory.

In conclusion, it is submitted that pluralist theory holds to the extent that an arbitral award does not draw its only legitimacy from the municipal law of the seat of the arbitration, but also from potential enforcement forums. On the other hand, the seat of

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36 – Northern River Shipping Lines v Kompas Overseas Inc District Court, Middelburg, 3 September 2010, (2011) XXXVI YBCA 302, in which the Dutch court proceeds on the basis that, where an award has been set aside where rendered, it is for the party seeking enforcement to demonstrate some compelling reason why the award should be enforced, such as corruption in obtaining the set aside judgment, for which see: *Netherlands No 42 – Kompas Overseas Inc v OAO Severnoe Rechnoe Parokhodstvo (Northern River Shipping Company)*, District Court of Amsterdam, 482043/KG RK 11-362, 10 May 2012, (2012) XXXVII YBCA 277; *US No 621 – TermoRio SA ESP (Colombia), LeaseCo Group and others v Electranta SP (Colombia), et al,* United States Court of Appeals, District of Columbia Circuit, 25 May 2007, (2008) XXXIII YBCA 955, para 25, in which the court stated it 'must honor the judgment of the Colombia court vacating the disputed arbitration award, because there is nothing… indicating that the proceedings… were fatally flawed or that the judgment of that court is other than authentic'; *US No 288 – Baker Marine (Nig) Limited v Chevron (Nig) Limited, Chevron Corp, Inc and others v Danos and Curole Marine Contractors, Inc*, United States Court of Appeals, Second Circuit, 12 August 1999, (1999) XXIV YBCA 909, para 7, in which it was held that the part seeking enforcement must show 'adequate reason for refusing to enforce the' set-aside judgment; *Australia No 20 – Toyo Engineering Corporation v John Holland Pty Ltd*, Supreme Court of Victoria at Melbourne, 20 December 2000, (2001) XXVI YBCA 750, para 3, in which the court stayed enforcement proceedings pending the result of a set-aside action in Singapore. See also van den Berg 2010, above, 182-183, in which it is asserted that national courts 'almost unanimously' apply Art V (1) (e) New York Convention to justify refusal of the enforcement of an award simply because it has been set aside in the country in which it was made without imposing any further requirements on the way in which or reasons for which it was set aside, and 186, where it is stated that in over 1500 published decisions, courts have never exercised their residual discretionary power to enforce under the New York Convention an award that has been set aside in the country in which it was made (albeit they may have enforced such awards for other reasons); A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (2007) ('Tweeddale and Tweeddale'), para 13.91, in which it is stated that the decision of the court of the seat in set-aside will usually be respected as a matter of comity; ML Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn, 2012), 223.

[605] See Paulsson, 'Three Dimensions', above, 300: '[Pluralism] is not a theory. It is simply and observation'.

the arbitration retains special significance in terms of set-aside jurisdiction and the control and support of the arbitral process. Furthermore, the plurality of potential enforcement jurisdictions itself arises from the sovereign acts of various individual countries. Finally, pluralism is an observation rather than a theory, is descriptive rather than normative, can be viewed as a modification of territorialist theory, and does not stand in the way of the broader arguments presented in this thesis.

(5) Conclusion on territorialism

In conclusion, territorialism as originally understood – the absolute control of arbitral proceedings by the courts at the seat of the arbitration – has not wholly survived the New York Convention. An arbitral award in the world at large can draw its legitimacy from a plurality of sources. On the other hand, the arbitration remains uniquely connected with the seat, which retains special powers over the arbitration. It is therefore fair to say that, although pure territorialism no longer exists, arbitrations and arbitral awards are still to a large extent territorial in nature.

B. 'Weak' delocalisation

'Delocalisation' may in fact be a misnomer to refer to what is here called 'weak' delocalisation'. This is because these arguments do not propose complete detachment of the arbitral process from the supervision of any national court, nor do they expressly contradict territorialism. Rather they promote a use of the territorial supervisory authority in a limited way where international arbitrations are concerned. Nonetheless, as many of the authors supporting this position refer to it as 'delocalisation', this thesis shall adopt the same language.

As mentioned above, Park shows the beginnings of a weak delocalisation argument in his 1982 article, though he does not once use the word 'delocalisation' or any variant of it, nor does he actively advocate the separation of arbitration from national court supervision. He argues instead that the then Arbitration Act 1979 (England) allowed courts too broad a scope for intervention in the arbitral process,[606] leaving arbitrators caught 'between the Scylla of ill-defined autonomy and the Charybdis of unknown

[606] Park, above, 51.

judicial supervision'.[607] For him, judicial intervention should be reserved to safeguarding the arbitral process against 'enumerated procedural deficiencies', in the same fashion as French and US law, and safeguarding the rights of third parties.[608] It is this proposition – that judicial intervention to set aside an award at the seat of arbitration should only occur to protect internationally recognised standards of fairness and not parochial local concerns – that is central to the first phase of the delocalisation movement.

Others have put the case more strongly than Park. Julian Lew describes the 'ideal and expectation' that international arbitration should be 'established and conducted according to internationally accepted practices, free from the controls of parochial national laws'.[609] He argues that the court should assist and support the arbitral process, and 'not exercise its powers to review issues of substance.'[610] Nonetheless, he concedes that courts at the seat will ensure that mandatory rules of the place of arbitration are respected, and that due process is respected during the course of the arbitration.[611] In choosing this way of formulating the argument, Lew accepts that the court at the seat has – or is capable of having – extensive powers to review arbitral awards; he simply argues for a specific exercise of that power.

This theme runs throughout literature supporting weak delocalisation: an appeal to the better angels of the national court's nature to exercise its discretion in a particular, limited fashion, and not to let in the demons of judicial overreaching. Jan Paulsson in his earlier scholarship added his voice to those insisting that the courts of the seat must attempt to ensure the compliance of the arbitral process with internationally-accepted standards.[612]

As argued above, this is not a view in any way inconsistent with the territorial theory of international commercial arbitration. In fact, it is quite the opposite: it is an argument that accepts territoriality as its starting point and argues for the use of the

[607] Ibid, 52.
[608] Ibid, 51-52.
[609] Lew, Achieving the Dream, above, 178.
[610] Ibid, 180.
[611] Ibid, 195.
[612] J Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 *ICLQ* 358 ("Paulsson, 'Arbitration Unbound'"), 371.

seat's territorially-grounded authority in a particular way. It can be called denationalisation in the sense that it argues for national courts to apply international norms to the international arbitral process in recognition of its non-national character, but it cannot be considered full denationalisation, as it urges the court to do so as a matter of national law.

The idea that international arbitrations should be subject to less stringent judicial control at the place of arbitration is a relatively uncontroversial one in the modern world. As has been described in detail in the previous chapter, the New York Convention began the process of significant harmonisation, both of the process for recognition and enforcement of arbitral awards and arbitration agreements.

A second step in this process has been harmonisation of the internationally recognisable grounds for set-aside at the seat of arbitration. This has happened in two main ways. The first is at an international level, through treaties such as the European Convention,[613] which limit the grounds available for set-aside capable of international recognition amongst the contracting states.[614] The second is at a domestic level, through the development and spread of the UNCITRAL Model Law on International Commercial Arbitration. The Model Law was designed in 1985 with the purpose, as its name suggests, of acting as a model for countries creating or reforming their international arbitration law. The Model Law harmonises the substantive grounds available for set-aside, limiting them to the grounds for refusal of recognition and enforcement under Art V of the New York Convention.[615] In this way, the Model Law promotes the application of a harmonised, internationally accepted standard of recourse against international arbitral awards. The Model Law, or legislation based on the Model Law, has to date been adopted in some form in 68 states.[616] Even many of

[613] European Convention, above.
[614] Article IX European Convention expressly limits the grounds for set-aside that will be recognised under Art V (1) (e) New York Convention to those grounds given as reason for refusal of recognition and enforcement in Arts V (1) (a)-(d) New York Convention.
[615] See Arts 5 and 34 UNCITRAL Model Law 2006, as amended in 2006. Art 34 limits the grounds available for set-aside, mirroring the New York Convention. Art 5 provides that courts shall not interfere in the arbitral process, except insofar as a provided in the Model Law itself – reiterating the fact that recourse against an award is limited to those grounds included in Art 34.
[616] According to UNCITRAL's website, the model law is to some extent in force in 68 countries, as well as 8 US states, the two Chinese Special Administrative Regions, all Australian states and territories, and all Canadian provinces and territories. See:

those jurisdictions that have not adopted the Model Law have adopted similar standards on set-aside.[617] Finally, most national laws have come to distinguish between international and domestic arbitration, allowing a broader range of court intervention in wholly domestic arbitrations.[618]

These developments taken together demonstrate a forceful global movement towards the delocalisation of international commercial arbitration by promoting the application of international rather than domestic norms to the arbitral process. Yet this movement has happened in a fashion that still recognises that control over the arbitral process vests in the courts of the seat of arbitration, entirely consistently with Mann's territorial conception. Treaties are only effective insofar as they are subscribed to and ratified by states; a country's arbitration law only reflects these principles insofar as they are accepted by the legislature. So this movement towards delocalised arbitration has come on the initiative of individual seats themselves, and not by virtue of a new conception or understanding of arbitration. There is, however, another delocalisation movement, which argues that arbitration is an autonomous process, separate and independent from the municipal law of countries until recognition and enforcement. This 'strong delocalisation' forms the subject of the next section.

C. 'Strong' delocalisation

This section will examine the alternative 'strong delocalisation' argument: that delocalisation of arbitration could or should entail complete separation from the

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed: 21 April 2015).

[617] See the broadly comparable Art 190 Private International Law Act 1987 (Switzerland) and Art 1520 of the Code de procédure civile (France).

[618] See, for example, US law, 9 US Code § 202, "An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."; s 85 Arbitration Act 1996 (yet to be brought into force), '(2) For this purpose a 'domestic arbitration agreement' means an arbitration agreement to which none of the parties is—(a)an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or
(b)a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom,
and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom."

municipal legal system of any country.[619] The section will be split in two: first, laying out the proposition, what it means, and what it would look like; and second, considering some of the criticisms of this approach.

(1) The proposition

Strong delocalisation of the arbitral process is best demonstrated through the examination of case law from France, which could justifiably be called the cradle of the movement. This discussion will start in the 1980s with the *Götaverken* case (a decision since reversed by legislation, but nonetheless useful for purposes of illustration),[620] and finish with the recent *Putrabali* decision, as already discussed in chapter 3 of this thesis.[621]

In *Götaverken*, the General National Maritime Transport Company ('GMTC') of Libya refused to take delivery of three oil tankers from the Swedish shipyard, Götaverken, on the basis that they had been constructed using materials that violated the Libyan boycott of Israel. The shipyard obtained an award in ICC arbitration in Paris, signed by a majority of the arbitrators (not that appointed by GMTC), ordering GMTC to pay the final contractual instalment of around $30m US and take delivery of the vessels.[622]

The shipyard sought, and ultimately obtained, enforcement of the award in Sweden,[623] and GMTC began proceedings for set-aside before the Paris Court of Appeal. GMTC argued *inter alia* that the award violated public policy by failing to take into account

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[619] For discussion of the delocalisation of arbitration specifically, see Paulsson, 'Three Dimensions', above, 301; for discussion of the idea of delocalisation of international commercial and financial transactions more generally (and including arbitration), see JH Dalhuisen, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria' (2006) 24(1) *Berk J Intl L* 129. With the benefit of hindsight, however, one can query whether Dalhuisen's support for the autonomy and self-regulation of international financial transactions has been dulled by the 2008 global financial crisis.

[620] *France No 3 – General National Maritime Transport Company (GMTC) Libya, as legal successor of Libyan General Maritime Transport Organization (GMTO) v AB Götaverken, Cour D'Appel*, Paris Court of Appeal, 21 February 1980, (1981) VI YBCA 221 ('*Götaverken Paris Court of Appeal*').

[621] *Putrabali French Supreme Court*, above.

[622] *ICC Case Nos 2977, 2978 and 3033 AB Götaverken v General National Maritime Transport Company (GMTC), as legal successor of Libyan General Maritime Transport Organization (GMTO)*, 1978, (1981) VI YBCA 133.

[623] *Sweden No 1 – AB Götaverken v General National Maritime Transport Company (GMTC), Libya and others*, Swedish Supreme Court, SO 1462, 13 August 1979, (1979) VI YBCA 237.

the Libyan boycott of Israel. The shipyard in turn argued that the Paris court did not have jurisdiction to set aside the award, because *inter alia* the award, despite having been made in Paris, was not subject to French law.

The Parisian court refused to take jurisdiction over a set-aside action for the following reasons. The parties had agreed that '[t]he arbitration will be conducted in accordance with the Rules of Conciliation and Arbitration then in force of the international Chamber of Commerce. Where the Rules are silent, the arbitrators will settle the rules governing the proceedings.' [624] The ICC Arbitration Rules in force at the time provided that the arbitral procedure should be governed by those rules, and where the rules were silent, by any rules upon which the parties agreed, and failing such agreement, upon which the arbitrators decided.[625] The Rules expressly extended this autonomy of the parties to designate 'whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.'[626]

In this case, the parties had not expressly agreed on a municipal procedural law to govern the arbitration, and nor did the arbitrators designate one applicable.[627] Under a territorialist conception, the parties would have submitted themselves to French municipal arbitration law, including French set-aside jurisdiction, by choosing Paris as the venue for their arbitration. The Paris Court of Appeal dealt with this argument in two parts. First, it stated: 'having regard to the very clear provision of the ICC Rules… *the place of arbitration, which is chosen only for the purposes of assuring its neutrality, is of no importance and cannot be considered as an expression of the implicit will of the parties to submit themselves to French procedural law*, not even subsidiarily'.[628] Secondly, it added that 'no decisive argument can be drawn from the [New York] Convention for holding that the procedural law of the country where the arbitration takes place must be applied subsidiarily'.[629] The court therefore concluded that it lacked jurisdiction to hear the action for set aside of the award.

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[624] *Götaverken Paris Court of Appeal*, above, 222.
[625] Ibid.
[626] Ibid.
[627] Ibid.
[628] Ibid, 223. Emphasis added.
[629] Ibid.

The reasoning of the court bears further examination. The court held that seating an arbitration in a given country does not constitute implied choice of the procedural law of that country to govern the arbitration, to the extent that that court also lacks set-aside jurisdiction. This conclusion is diametrically opposed to the territorialist conception of arbitration. But how did the court reach that conclusion? There was a direct reference to the provisions of the ICC Rules, but these are clearly not capable on their own of displacing the otherwise applicable law. The force vested in the provisions of the ICC Rules comes from the choice of the parties that they should apply. Equally, the court has placed high importance on the agreement of the parties. It is therefore clear that *party autonomy* is the key delocalising factor in this case. It is by virtue of the parties' agreement that the French court's jurisdiction is ousted and the arbitration takes on a non-national character.

The second holding, that 'no decisive argument' follows from the New York Convention that the law of the country where the arbitration takes place governs the arbitral procedure is probably correct, at least insofar as the argument is not decisive. There certainly is a strong argument that Art V (1) (e) implies that only the courts at the seat of arbitration should be capable of setting aside an award. On the other hand, that does not mean that the courts of the seat of the arbitration *must* take set-aside jurisdiction – they are simply entitled to do so if national law so allows.

The territorialist response to this argument can be anticipated. The municipal law in France allows the parties to provide for freedom from that law. Other municipal laws will subject the parties to set-aside jurisdiction and other provisions of that law even if the parties expressly attempt to exclude the application of the law.[630] Ultimately, the parties' ability to delocalise arbitration in the fashion they have in the *Götaverken* case depends on the permission of the municipal law at the seat of the arbitration. For example, an arbitration taking place in England will fall under the Arbitration Act 1996 and the set-aside jurisdiction of the English courts. It is assumed that an arbitration taking place in England is juridically seated in England, unless England is expressly

[630] See, for example, Mann, *Lex Facit Arbitrum*, above, 171.

designated as the venue and another legal system as the juridical seat.[631] Even then, it is assumed that the arbitration must have a juridical seat in some country:[632] the concept is fundamental to the English understanding of arbitration. So *Götaverken* could not have been decided the same way had the arbitration taken place in England rather than Paris, and Mann's territorialist theory would hold.

The delocalised municipal approach of one country is however capable of international effect in a fashion best demonstrated by the *Putrabali* cases. This case was discussed in chapter 3, and the relevant facts can be found in full there.[633] In short, the case concerns the effect of foreign set-aside proceedings on enforcement of an award in France. In *Putrabali*, the French courts recognised an award of non-liability in favour of a French party, notwithstanding that it had been set-aside under the Arbitration Act 1996. The possibility of set-aside had been expressly provided for in the arbitral rules agreed upon by the parties. The French courts then refused to enforce a subsequent award rendered in favour of the English party.

The *Putrabali* decision extends France's delocalised conception of arbitral awards to awards rendered overseas. It does so in a fashion utterly irreconcilable with pure territorialist theory. It is worth noting that the delocalisation, which in *Götaverken* had its roots in the parties' autonomy over the arbitral process, is now stated to be rooted in the nature of arbitration itself. International arbitration is viewed in *Putrabali* as an international legal order, distinct from municipal laws.[634] In fact, properly understood, this is closer to pluralist theory: the award was enforced because French municipal law said it could be, not because the arbitral award was inherently detached from any

[631] See ss 3 and 68 Arbitration Act 1996; *Shashoua & Ors v Sharma* [2009] EWHC 957 (Comm), [2009] 1 CLC 716, 725 '…in an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London, United Kingdom does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience…'; *Dicey, Morris and Collins*, above, para 16-035.
[632] See s 3 Arbitration Act 1996.
[633] See Chapter 3.B.5 of this thesis.
[634] The court held '[a]n international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.' *Putrabali French Supreme Court*, above, para 2.

national legal order.[635] Indeed, the *Putrabali* reasoning exactly contradicts the autonomy-based reasoning underlying the *Götaverken* decision. As has been pointed out in scholarship, the parties in *Putrabali* chose IGPA arbitration, the rules of which in turn expressly subject the arbitration to appeal under the 1996 Act.[636] Yet the parties' clear intent does not tally with the new French conception of arbitration, and therefore could not be given effect.

The *Putrabali* decision can be and has been criticised on a wide range of grounds, which will be considered further below. Before doing so, it is worth considering an interesting proposal for reform, under which arbitration would be entirely denationalised. The proposal is to create a replacement for the New York Convention that mirrors the International Centre for the Settlement of Investment Disputes (ICSID) Convention.[637]

The ICSID Convention sets up a self-contained, denationalised process for the settlement of investment disputes.[638] The role of national courts is limited to the enforcement of the award, without the possibility for any review.[639] In this way, the arbitral process in investment arbitration is truly delocalised and exists beyond the control of the courts of any one state.[640]

It has been suggested that a similar new treaty and institutional system in international commercial arbitration as the only viable route to progress.[641] The lack of consistent application of the New York Convention – see *Putrabali* – between states can be seen as a deficiency in the current system, undermining the predictability of the enforcement of awards.[642] Specific proposals draw heavily on the ICSID example, for

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[635] See the comments of Lord Mance in *Dallah*, above, para 115; Paulsson, 'Three Dimensions', above, 304-306.
[636] R Hulbert, 'When the Theory Doesn't Fit the Facts', (2009) 25(2) *Arb Intl* 157, 165-166.
[637] ICSID Convention, above.
[638] Art 53 (1) ICSID Convention: 'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.' Arts 50-52 ICSID Convention provide for challenges to awards to be made to the Secretary-General of ICSID.
[639] Art 54 (1) ICSID Convention: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.'
[640] Brazil-David, above, 449.
[641] M Mangan, 'With the globalisation of arbitral disputes, is it time for a new Convention?' (2008) 11(4) *Int ALR* 133.
[642] Ibid, 134-136.

example in how the appellate body might work in practice.[643] This concept is in its infancy and subject to many potential criticisms, but is nonetheless a potential means to achieve consistency in international commercial arbitration.[644] Such a proposal may indeed be the only way to achieve delocalised international commercial arbitration without falling afoul of the many criticisms considered below, but remains at present a mere suggestion, without realistic prospects of being put into practice any time soon.

(2) Criticism

Strong delocalisation has been the subject of much criticism. The force of this criticism points to the conclusion that strong delocalisation remains a highly controversial approach to international arbitration. Criticism applies both to the delocalisation of proceedings seated in a country from the municipal law of that country, as in the *Götaverken* case, and to the refusal to recognise the potential for foreign arbitral awards to be set aside where rendered, as in the *Putrabali* cases.

One of the main reasons that it is widely accepted that some control should be retained by the courts of the seat of the arbitration is that, absent set-aside proceedings, a losing party in an obviously procedurally-flawed arbitration will be compelled to challenge the award's validity in every jurisdiction where the winning party sees fit to attempt enforcement; there will be no centralised method of resisting enforcement. Jan Paulsson first puts this argument as question, worded to leave no doubt as to where he personally stands: '…should one insist on the identification of one 'natural' judicial authority – the judge of the place of arbitration – rather than an unknown number of potential execution jurisdictions, to control the arbitral process?'[645] He goes on to be rather more express in arguing that the courts of the seat should ensure that the arbitration adheres to basic standards of procedural fairness: "Unless national courts accept this role as 'transnational' controllers at the seat of arbitration, the detachment principle may be justly criticised on the grounds that it leaves no forum where a manifestly deficient award may be set aside."[646]

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[643] Ibid, 141.
[644] Ibid, 142.
[645] Paulsson, 'Arbitration Unbound', above, 370.
[646] Ibid, 370.

Park promotes the same view, arguing: 'Wisdom dictates that the State of arbitration exercise some control over the integrity of the proceedings[…] Fairness requires that a procedurally defective arbitration be susceptible to being annulled at the place where rendered. The loser should not be forced to litigate issues such as arbitrator corruption in all States where it has assets.'[647]

This view has wide acceptance, even amongst proponents of weak delocalisation,[648] but such support is not universal. Brazil-David argues in her article that parties agreeing to arbitration have excluded court jurisdiction and must take the rough with the smooth. She places importance on the fact that the award is ultimately subject to judicial scrutiny at the place where recognition and enforcement is sought.[649] No mention is made of the point that this could entail multiple lengthy, costly relitigations of the same basic issues with an award. It is submitted that this constitutes a fundamental flaw in the argument for judicial control only at the point of recognition and enforcement.

Some practical examples bear out that this flaw is potentially fatal. One lies in the swift reversal by the French legislature of the rule in *Götaverken*.[650] This strongly suggests that the legislature was very uncomfortable with the rule, though it is almost disappointing that the decision was not given time to develop so that its effects could be tested.

A more complete and informative example can be found in the Belgian arbitration law of 1985. The law excluded the possibility of set-aside of an award rendered in Belgium where neither party was a Belgian national, resident, or legal person constituted in Belgium, and was designed to increase the popularity of Belgium as a venue for international arbitration.[651] The initial response was mixed, with some commentators

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[647] Park, above, 51.
[648] See, for example, Lew, above, 186.
[649] Brazil-David, above, 456.
[650] Hulbert, above, 164. The decision was legislatively reversed in 1981, only a year after being handed down: a reflex response in legal terms.
[651] *Ex* Art 1717 (4) Belgian Judicial Code, '…the Belgian courts can only hear an action to set an award aside if at least one of the parties to the dispute decided by the arbitral award is either an individual having Belgian nationality or residence, or a legal entity constituted in Belgium or having a subsidiary or other establishment in Belgium...', quoted in E Gaillard and J Savage (Eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), 911.

arguing that certain parties may have been enticed to hold specific arbitrations in Belgium because of the change in the law,[652] but ultimately wide agreement has been reached that on the whole parties were discouraged from seating arbitrations in Belgium.[653] At any rate, the situation has since been reversed and under modern Belgian law the parties must specifically agree to exclude recourse to the courts for set-aside jurisdiction to be ousted.[654]

It can be seen that both theory and empirical evidence speak against complete detachment of arbitration from the law of the seat. Parties generally appreciate the possibility of a court review capable of wider international effect than simply the refusal of recognition and enforcement within one jurisdiction.

Other criticisms have been made of the detachment of arbitration from the municipal law of the seat. One such criticism is that it deprives parties of the beneficial effects of the arbitral law at the seat. Not every court intervention in arbitration is an invasive overstep; sometimes courts intervene to support the arbitral process by providing interim measures such as freezing injunctions, enforcing procedural orders of the tribunal, or by assisting in the taking of evidence.[655] Furthermore, municipal arbitration laws can fill 'gaps' left in the parties' procedural agreement or selected institutional rules: a role which takes on additional importance in the case of *ad hoc* arbitration.[656] The loss of such support is described by Brazil-David as the price the parties pay to avoid the peculiarities of local procedural rules,[657] but many proponents of delocalisation still believe the court should remain willing to make such positive, supportive interventions in the arbitral process.[658] Some suggest support should be available from any national court, whether or not it is the seat, which is the case in

[652] See: *Fouchard, Gaillard, Goldman*, above, 911, citing the Chanel Tunnel arbitration as an example; J Paulsson, 'Arbitration Unbound in Belgium' (1986) 2 *Arb Intl* 86.
[653] See: *Fouchard, Gaillard, Goldman*, above, 911; J Li, 'The application of the delocalisation theory in current international commercial arbitration' (2011) 22(12) *ICCLR* 383 ('Li'), 390; R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 *Arb Intl* 1, 30.
[654] Art 1718, Belgian Judicial; Code Li, above, 388, 390.
[655] Brazil-David, above, 455-456.
[656] Ibid.
[657] Ibid.
[658] See: Lew, 'Achieving the Dream', above, 180; Li, above, 390-391.

some, but not all, countries.[659] At any rate, the criticism that detachment from national law may entail detachment from its supportive provisions is valid.

Delocalisation in the *Putrabali* style, where one country categorically refuses to give effect to the set-aside judgments of another, leads to all manner of confusion and has given rise to much justifiable criticism, some of which shall be considered here.

It should be borne in mind that there were three arbitral awards issued in the *Putrabali* saga: Award 1 (made by the arbitral tribunal as originally constituted); Award 2 (made after institutional appeal in accordance with the IGPA rules); and Award 3 (made after partial set-aside of the award under the Arbitration Act 1996, also in accordance with the IGPA Rules). All three awards were different: Award 1 ordered that the seller should be paid for the goods that were lost at sea; Award 2 ordered that the buyer was not liable for the contract price; Award 3 ordered the payment of a different sum to the seller. The French court recognised Award 2 and thereafter refused to enforce Award 3 on the basis that Award 2 had already been granted recognition in France. It did so even though the parties had agreed on the IGPA Rules, which subject the award to the scrutiny of the English courts.

The *Putrabali* decision has been criticised as leading to 'bizarre results'[660] for a number of reasons. The first concerns the adequacy of the first-in-time rule, which in effect sets up a race to enforcement.[661] Hulbert imagines jokingly a situation where:

'…after [Award 3] was issued, the parties settled amicably, so that there was nothing to enforce or resist, but counsel for the two parties, pranksters as well as interested observers of French arbitration law, decided to conduct an experiment. They boarded the same Eurostar in London, shared a cab from the Gare du Nord to the Tribunal de Grande Instance, and, arm in arm, presented to the clerk of the court at exactly the same moment duly authenticated and properly translated copies of the Second and Third Awards, requesting exequatur of each. What result? As a commercial matter, it is obvious that the final result of the arbitration, that is, the Third Award, should triumph. Would it, as a matter of French law?'[662]

[659] Li, above, 390-391.
[660] Van den Berg 2010, above, 194.
[661] Hulbert, above, 170.
[662] Ibid, 170-171.

The example is offered lightheartedly and involves a fairly extreme set of facts, but it does raise a reasonable question as to the good sense of a temporal rule.

Second, the French court recognised Award 2 despite the fact that the parties had agreed to IGPA arbitration, which provided for the oversight of the English courts. The seller waited for the final result of the contractually agreed arbitration process, whilst the buyer attempted to obtain recognition of the first favourable award it received (Award 2). An interesting question arises: what if the seller had taken the first favourable award *it* received (Award 1) for enforcement in France. It may be that the French court would treat institutional review of an award differently from review by a foreign court, but remember that both review processes are products of the parties' agreement in this case. The fact that an award has not become binding on the parties or has been set aside is not a basis for resisting enforcement of that award under the New York Convention in France. There is an argument that Award 1 has not been rendered in accordance with the parties' agreement, which provided for institutional appeal in its choice of the IGPA rules. That argument, however, equally applies to Award 2, as the parties agreed upon court oversight according the 1996 Act, also by choosing the IGPA rules. It is therefore submitted that the seller may have had the possibility to enforce Award 1 before the French courts, in spite of the pending institutional appeal. If that is the case, the seller has effectively been punished for its good faith in adhering to the parties' agreement: hardly an ideal state of affairs.

The *Putrabali* decision provides an obvious example of what Paulsson anticipated as 'troubling questions of precedence and timing in multi-jurisdictional post-award litigation'.[663] He also identifies conflicting decisions as a major potential problem with delocalisation at a national level.[664] In *Putrabali*, the French court has recognised Award 2, absolving the buyer. The English courts would presumably recognise Award 3, Award 2 having been deprived of legal effect by being set aside. Such situations, in which conflicting awards are enforced in different countries, create huge uncertainty and are obviously undesirable.[665] What if Award 2 had upheld a counterclaim, and

[663] Paulsson, 'Arbitration Unbound', above, 374.
[664] Ibid, 384: '…how to avoid conflicting decisions (particularly the unsatisfactory result of having an award executed in one country only to be set aside *afterwards* in its country of origin)'.
[665] See, for example, comments in Holmes, above, 245; Ahmed, above, 410-412; Berger, above, N71.

Award 3 the original claim, when enforcement of each would cancel the other out? What, in that scenario, was the point of coming to arbitration?

One of the main arguments advanced in favour of delocalisation is to point out that the 'seat' of arbitration is often selected by the parties simply as a neutral, convenient venue, and has little or no real connection to the dispute.[666] The issue then is what interest the courts of that venue have in supervising the conduct of the arbitration and scrutinising the award. Mann would point to the fact that every sovereign has an interest in regulating conduct that takes place within the borders of its territory. This argument, however, shows the basis on which the sovereign may take supervisory jurisdiction over arbitrations conducted within his borders, but does not really speak as to whether and on what basis he *should* exercise that jurisdiction. Where, critics might ask, is the interest in supervising the fairness of an arbitral proceeding involving parties with no connection to the venue, when the award will at any rate be subject to judicial scrutiny when it is taken for recognition and enforcement in a country with a presumably more significant nexus to the dispute, in that one of the parties will at least have assets there? Arguments can go back and forth about the desirability of one controlling judicial authority, as discussed above.

This line of thinking, however, raises an equally valid question: what is the French interest in being able to enforce an arbitral award set aside where rendered? Is the fact that a party has assets in France a sufficient connection to the dispute to justify French law unilaterally enforcing an award viewed as flawed where rendered? Is the presence of assets a better connection than the agreement of the parties to resolve a dispute within a given jurisdiction? It is submitted that, in an increasingly globalised commercial world, many of the parties to international arbitration will at some point have some kind of assets against which an award may be enforced in any number of countries; this fact should not provide those countries with a better right to decide on the validity of an arbitral award than the country where that award was rendered. Indeed, parties drafting a contract in the modern world certainly should be aware that the choice of venue for their arbitration has a potential legal significance going far beyond simply designating a convenient place for hearings to take place. The exercise

[666] See, for example, comments in *Götaverken*, above, 223.

of party autonomy – so important in so many contexts in international private law, as discussed in previous chapters – in choosing a seat for the arbitration creates a far better connecting factor for the exercise of supervisory jurisdiction that the coincidental location of assets.[667]

The French courts in *Putrabali*, in an attempt to promote pro-arbitration values, may in fact have done the opposite. As outlined above, the decision creates considerable uncertainty and confusion – anathema to parties to commercial dealings – and may hinder the progress of arbitration far more than it helps it.

D. Preliminary conclusions

When strong delocalisation is done by countries unilaterally, it gives rise to considerable scope for confusion and uncertainty; especially as regards the enforceability of awards. The movement clearly has at its heart an arbitration-friendly theory: that arbitration should not be subject to the parochial provisions of national law, especially because of the uncertainty of outcome this creates. It is ironic, then, that the inconsistent application of this theory creates another kind of uncertainty.

If strong delocalisation could be universally agreed upon, for example by the creation of a new, ICSID-style commercial arbitration convention, this scope for confusion would be greatly reduced and the arbitration-friendly effects of delocalisation could be realised. It is, however, submitted that there is no real appetite for this kind of delocalisation on a wide scale; it is at present so far from being a realistic and realisable goal as to render it practically irrelevant to any contemporary discussion.

[667] For the counter-argument, see Paulson, 'Three Dimensions', above, 297. He argues that enforcement jurisdictions have 'a far more tangible interest' in the enforcement of the arbitral award than the courts at the seat of the arbitration, 'which is often chosen fortuitously'. It is submitted that, in fact, 1) the interest of the enforcing state may be purely coincidental; 2) the seat has an interest in regulating, for example, respect for due process in proceedings taking place within its bounds; and 3) that in any event, the parties to disputes understand that there is a legal significance to their choice of venue for arbitration: hence the popularity of 'arbitration friendly' jurisdictions such as London and Paris as seats for arbitrations. One might otherwise expect that arbitrations would take place at random, wherever happened to be neutral and convenient. In this context, it is submitted that the seat of the arbitration has a far greater interest in regulating the conduct of an arbitration than does the court of a country where the defendant in the arbitration happens to have assets.

Weak delocalisation is the argument for a particular application of states' territorially-based control over arbitration, using internationalised rather than purely municipal standards of control. It is therefore a movement based on a territorial conception of arbitration. Parallels can perhaps be drawn with the *favor arbitrandum* and home-country control principles, discussed in the previous chapter. In the hierarchy of norms in both cases, the liberal, supposedly pro-arbitration theories are constrained by state sovereignty.

The relevance of the delocalisation debate to this thesis is very clear. The inclusion of arbitration in jurisdiction regimes like the Brussels I Regulation would clearly localise arbitral awards at the seat of the arbitration and potentially give effect throughout Europe to set-aside judgments of courts at that seat. If delocalisation theory, especially strong delocalisation theory, is correct, this approach would be undesirable and a backwards step in the delocalisation process.

As shown above, however, weak delocalisation is not inconsistent with a broadly territorialist approach; it simply urges the use of territorially-based jurisdiction over arbitral proceedings in a particular fashion, consistent with international norms. The inclusion of arbitration in jurisdictional instruments therefore does not contradict weak delocalisation. It is important to note that nothing in the proposals advanced by this thesis would stop the EU member states from agreeing to restrict the bases on which set-aside could be granted, for example by way of a protocol to the New York Convention or a separate European Convention. This would allay the concerns of weak delocalisation proponents that it would be anti-arbitration to require reciprocal enforcement of set-aside on parochial bases by countries that are not arbitration friendly.

Strong delocalisation has been shown to be undesirable on a piecemeal, inconsistent, or unilateral basis, and extremely unlikely in the near future on any broader basis. Furthermore, in the European example, the Brussels Regime has created a single enforcement area for commercial decisions within Europe. The Regime promotes a high degree of consistency and predictability of enforceability in the EU, founded on principles of mutual trust. Harmonising the process of enforcement of arbitral awards within Europe seems like a logical next step.

It may be useful in this context to consider how we think about enforcement of judgments within Europe and the wider world. Imagine an arbitral award rendered in Edinburgh and set aside by a court in Edinburgh, then taken for recognition and enforcement by a court in London. In this situation, it seems patently obvious that the court should refuse recognition and enforcement on the basis of the relationship between the constituent countries of the UK and their legal systems (leaving aside the technical law of enforcement of the Civil Jurisdiction and Judgments Act 1982). No one could reasonably argue that the London court had made an arbitration-unfriendly decision by respecting a judgment made by another court within the same state. Then imagine an award rendered and set aside in Russia, taken for recognition and enforcement in Peru. It is far less obvious that the Peruvian court should defer to the Russian court's decision on the validity of the award, given the lack of any special relationship between the two states. It is submitted that the situation where an arbitral award is rendered and set-aside in one EU member state and taken for recognition and enforcement in another EU member state intuitively has more in common with the former situation than the latter. The legal systems of the member states of the EU are increasingly closely interrelated, and in civil and commercial matters, there exists something approaching a single enforcement area. It seems strange that court decisions on arbitration matters should be excluded from this arrangement.

In conclusion, nothing in weak delocalisation theory prevents the inclusion of arbitration in a jurisdictional regime like the Brussels I Regulation, though it may call for a separate rethinking of the bases on which set-aside would be granted. Strong delocalisation theory would stand opposed to such inclusion, but could not itself provide a fair, efficient, workable system of control of the arbitral process without the creation of a supranational supervisory authority. In the absence of such an authority, control at the national level by the seat of the arbitration seems the most efficient way of regulating the arbitral process. Within the EU, it seems right that member states respect one another's ability to effectively supervise the arbitral process, under a trust-based regime like the Brussels Regulation. If strong delocalisation were to take place with the formation of a supranational supervisory body, there would no longer be any pressing reason to have rules concerning arbitration contained in jurisdictional conventions. This eventuality seems highly unlikely to materialise in the near – or even

the distant – future, and so should not stand in the way of consideration of the best approach for jurisdictional instruments to take to arbitration in the short term. Furthermore, if such an approach were to be adopted, rules for national courts taking jurisdiction in proceedings relating to arbitration under the Brussels Regime would simply become irrelevant and would not interfere with the new system. It is submitted that there is therefore no reason for this potential approach to stand in the way of the proposals advanced in the next chapter.

8. PROPOSAL FOR REFORM

This chapter will draw together the various strands of this thesis by presenting a proposal for the inclusion of arbitration within the Brussels I Regulation. It has been argued in previous chapters that the justification for the exclusion of arbitration was weak and that the exclusion has caused significant problems, which the Brussels I Recast has failed to address. The chapter will therefore begin by proposing a scheme for the partial inclusion of arbitration in the Brussels I Regulation that addresses existing problems to the greatest extent possible.

A number of scenarios that may arise at the interface between the Brussels I Regulation and arbitration will then be considered, to see how this proposal contrasts with the status quo. The proposal will then be assessed for its compatibility with the principles outlined in previous chapters. Next, some potential objections will be considered. Finally, it will be asked whether this proposal could have any application in the world at large, coming to the conclusion that the proposal is better suited to Europe than to the international community as a whole.

This chapter is intended to constitute the major part of this thesis's contribution to knowledge, drawing together all the strands of the previous chapters in a concrete recommendation. The contribution principally lies in the holistic approach taken to the question of the appropriate relationship between jurisdiction conventions and arbitration.

A. Proposal

This section presents a short discussion on each component recommendation of the proposal for amendment of the Brussels I Regulation. Deeper consideration of the proposal as a whole will follow in sections B and C.

(1) Amended scope

It is recommended to retain the exclusion of arbitration at Art 1 (2) (d), but with the addition of the words 'except insofar as provided for in the rest of this Regulation' after 'arbitration'. The reason for retaining the exclusion is that the Regulation should

regulate matters relating to arbitration only in certain well-defined circumstances. The aim is to address the problems outlined throughout this thesis, but not to interfere with the status quo in other circumstances, where such interference would be unnecessary on inappropriate. This would include situations when there is already an adequate rule in the New York Convention, such as when a court is seised of a matter in respect of which the parties have made an arbitration agreement and one party challenges the jurisdiction of that court, in which case the New York Convention would apply as it does today.

(2) Exclusive jurisdiction and *lis pendens*

It is recommended to insert a five-part, bespoke jurisdictional rule into the Brussels I Regulation. The letters in square brackets refer to headings below, under which the reasons for the provisions will be explained. The new article would provide:

Article X

1. If the parties, regardless of their domicile, have agreed that an arbitral tribunal is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship [a], and have taken steps to commence an arbitration with its seat in a Member State [b], the courts of that Member State shall have exclusive jurisdiction over the enforcement of the arbitration agreement [c]. 'Enforcement of the arbitration agreement' shall include assessing the validity of that agreement and whether the subject matter of the dispute is capable of settlement by arbitration [c]. This rule in no way affects the competence of the court to defer these matters to the arbitral tribunal or an arbitral institution [d].
2. When steps have been taken to commence an arbitration with its seat in a Member State, the courts of any other Member State shall stay or dismiss proceedings on the substance of the dispute when one party claims the existence of an arbitration agreement, until such time as the courts of the seat of the arbitration or the arbitral tribunal have declared that the tribunal has no jurisdiction under the agreement [e]. This rule does not affect the jurisdiction

of any court to provide interim relief or evidential assistance with the arbitration, in accordance with its own rules [f].

3. The rules in the preceding paragraphs shall not apply if the said arbitration agreement is manifestly null and void, inoperative, or incapable of being performed [g]. These rules shall not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II, except insofar as an insurance contract within the meaning of Section 3 falls within the categories of risk included in Article 16 [h].
4. The seat of the arbitration is the country in which or under the law of which the arbitration takes place or is to take place [i]. Steps to commence arbitration shall include the submission of a request for arbitration to an arbitral institution, or beginning the arbitrator appointment process, with or without the assistance of a court [j].
5. Nothing in this Article shall affect the application of the New York Convention to questions concerning the jurisdiction of courts where no action has been taken to commence arbitration. The effects of a valid arbitration clause on jurisdiction over the substantive dispute remain governed by the New York Convention [j].

It is recommended that the request for a stay would be made by a simple standard form, to which would be attached the arbitration agreement and the evidence that arbitral proceedings had been commenced.

Each of the constituent parts of this proposal shall now be introduced in more detail.

(a) If the parties, regardless of their domicile, have agreed that an arbitral tribunal is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship

This is based on the language used in Art 25 (1) Brussels I Recast on choice of court agreements, slightly modified to refer to arbitration agreements. If the wording 'an arbitral tribunal is to have jurisdiction' seems awkward, it is because it is included for consistency's sake. At any rate, the provision could easily be reworded to state '…have

agreed that any disputes which have arisen or which may arise in connection with a particular legal relationship are to be decided by arbitration'.

(b) and have taken steps to commence an arbitration with its seat in a Member State

As will become evident below, it is important to limit the application of these rules to situations where arbitration and court proceedings are pending at the same time in different member states. The New York Convention already provides a rule of negative court jurisdiction where an arbitration agreement exists between the parties,[668] which does not need to be complicated in situations where there are not parallel proceedings.

Furthermore, requiring that arbitration with its seat in a member state has been commenced means that there should be less controversy over where the seat of an arbitration is. Either the seat of arbitration will be obvious, whether from the parties' agreement or the fact of where proceedings have been commenced, or it will not be possible to say that the arbitration has its seat in a member state, in which case the Brussels Regulation will not apply, and the New York Convention will be applicable by default. This is important because the definition of the seat was a contentious point of the Commission's proposal for reform, where it was pointed out that an inconsistent approach to the definition of the 'seat' could lead to conflicts of jurisdiction.[669] This proposal as a whole is designed to ease that concern, by providing a definition of the seat, below, and by limiting the application of the rules to situations where there are parallel proceedings. Even if the definition cannot be standardised and some cases slip through the cracks, leading to conflicts of jurisdiction, the situation is no worse than that which already exists, outlined in Chapter 3 of this thesis.

(c) the courts of that Member State shall have exclusive jurisdiction over the enforcement of the arbitration agreement

When parallel proceedings are pending, exclusive jurisdiction over the enforcement of the arbitration agreement will be given to the courts at the seat of the arbitration. This

[668] Art II (3) New York Convention.
[669] *Commission Report*, above, 10.

will mean the conclusion of that court on the validity of the arbitration agreement will have to be recognised across Europe, reducing the uncertainty created by parallel proceedings. The choice to give that authority to the court at the seat of the arbitration is in line with the broadly territorialist perspective outlined in the previous chapter.

(d) This rule in no way affects the competence of the court to defer these matters to the arbitral tribunal or an arbitral institution

This enshrines the arbitral competence-competence principle, which the Commission's original proposal was criticised for failing to do.[670] This is because the original Commission suggestions concerned only court proceedings relating to arbitration and not proceedings before the tribunal itself.[671] This criticism was reflected in the scaled-back proposal eventually made, which was structured in a similar, but not identical, fashion to the rule proposed here.[672] The party seeking to establish the validity of the arbitration agreement will not be forced to go to court to enforce the agreement because this sentence makes clear that the court of the seat is not *required* to take jurisdiction over the enforcement of the agreement; it is simply *permitted* to if its national law so allows. The rule will still serve its main purpose by excluding the parallel jurisdiction of other member state national courts provided proceedings have been commenced before the arbitral tribunal.

(e) When steps have been taken to commence an arbitration with its seat in a Member State, the courts of any other Member State shall stay or dismiss proceedings on the substance of the dispute when one party claims the existence of an arbitration agreement, until such time as the courts of the seat of the arbitration or the arbitral tribunal have declared that the tribunal has no jurisdiction under the agreement

This is a mandatory stay rule, similar to that included in the Commission Proposal,[673] and structured to align with the exclusive jurisdiction rule introduced above. The

[670] Radicati, 'Seeds of Home Country Control', above, 433. See also Chapter 4.B.5, above.
[671] *Commission Green Paper*, above, 9.
[672] *Commission Proposal*, above, Art 29 (4), at 36. See also the discussion of the Commission Proposal in Chapter 4.B.2, above.
[673] *Commission Proposal*, above, 36. See also Chapter 4.B.5, above.

requirement that arbitration proceedings have been started is intended to discourage tactical litigation or the use of the *lis pendens* rules to torpedo legitimate court actions.

(f) This rule does not affect the jurisdiction of any court to provide interim relief or evidential assistance with the arbitration, in accordance with its own rules

This is intended to make clear that the mandatory stay provision only applies to actions on the merits, even though this is mentioned in the preceding line. It should be clear beyond doubt that the courts of member states other than the seat of the arbitration should be free to provide support and interim relief in the arbitration.

(g) These rules shall not apply if the said arbitration agreement is manifestly null and void, inoperative, or incapable of being performed

This standard is borrowed from French rules on the 'negative effect' of the competence-competence principle. Competence-competence is the principle that an arbitral tribunal is able to rule on its own jurisdiction. The 'negative effect' of that rule is the extent to which competence-competence excludes the ability of the relevant national court to rule on the same question.[674] The doctrine of competence-competence has negative effect in French law unless the arbitral tribunal has not been seised and the arbitration agreement is manifestly null or clearly inapplicable.[675]

Having a similar rule in this proposal, combined with the requirement that steps have been taken to commence arbitration, is intended to ensure that an unwilling litigant cannot 'torpedo' legitimate court actions simply by alleging the existence of an arbitration clause.

The language 'null and void, inoperative, or incapable of being performed' is taken directly from Art II (3) New York Convention. The word 'manifest' limits the discretion of the court addressed to assess the existence, validity, and scope of the arbitration agreement. This rule, and particularly the discretion afforded to courts of

[674] See Born, above, 1068-1069.
[675] Art 1448 French Code de procedure civile; G Carducci, 'The Arbitration Reform in France: Domestic and International Arbitration Law' (2012) 28 *Arb Intl* 125, 133.

countries other than the seat of the arbitration, will be discussed in more detail below.[676]

(h) These rules shall not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II, except insofar as an insurance contract within the meaning of Section 3 falls within the categories of risk included in Article 16

This prevents these rules interfering with protective jurisdiction under the Regulation, or with national rules to deal with the arbitration of these issues, which will continue to operate as they do under the current regime. The same basic scheme was proposed in the Commission Proposal,[677] and is in line with this thesis's aim to address only true international commercial arbitration. The exception making reference to Art 16 is an addition to the Commission Proposal. It refers to certain types of insurance contract, which are not subject to the rules of protective jurisdiction and in respect of which the parties are entitled to make a pre-dispute agreement conferring jurisdiction on any given court. These include contracts such as those for marine insurance and goods in transit, which, it is submitted, are true commercial contracts. If these matters can be subject to a pre-dispute prorogation agreement, they should surely also qualify for the protection of pre-dispute arbitration agreements.

(i) The seat of the arbitration is the country in which or under the law of which the arbitration takes place or is to take place

This definition is included to reduce the scope for confusion and debate about the meaning of the term 'seat'. The language is taken from the New York Convention, although the Convention does not actually refer to an arbitration's 'seat'.[678]

This contrasts with the proposal by the Commission, which listed the seat as the place designated by the parties or the tribunal as the seat.[679] The Commission's rule does not make it clear whether the choice of the parties to hold an arbitration in a country

[676] See below, Chapter 8.B.2.
[677] *Commission Proposal*, above, 36.
[678] Art V (1) (e) New York Convention.
[679] *Commission Proposal*, above, 21, 36.

constitutes the designation of a seat, or whether this is merely a designation of venue. Parties do not always agree on a seat, or even a venue, for their arbitration.[680] If the parties do not agree in advance to a seat, it is unlikely they will agree after a dispute emerges, especially if it is to one party's strategic disadvantage to do so. The parties will then rely on the arbitral tribunal to fix a seat, which it may not do, or may not do publicly, given arbitration is often confidential. It is therefore submitted that the Commission's Proposal could have left a large number of arbitrations in which the modified *lis pendens* rule did not apply.

This proposal makes clear that the place of the arbitration can be considered the seat, but that the parties may instead designate the law of another place to govern. It could even be clarified in a recital that the venue of an arbitration will also be considered to be the seat in the absence of party agreement to the contrary. This may, however, provoke criticism that the Regulation infringes too much on the domestic arbitration law of member states by seeking to define the New York Convention's provisions,[681] which simply adopting the New York Convention's language should not do. It has therefore not been formally advanced as a recommendation in this proposal. Nonetheless, this slight difference should increase the effectiveness of the rule by ensuring it applies more widely.

(j) Steps to commence arbitration shall include the submission of a request for arbitration to an arbitral institution, or beginning the arbitrator appointment process, with or without the assistance of a court

This definition is included in order to clarify what will constitute commencement of arbitration for the purposes of the Regulation. The first step in an institutional arbitration tends to be the submission of a request for arbitration, whilst the first step in *ad hoc* arbitration is usually the appointment of arbitrators, either under the parties'

[680] See, for example, the International Chamber of Commerce standard clause, which does not contain space for provision for the venue or the seat of the arbitration: 'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.' Available from the ICC website at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/ (last accessed: 21 April 2015).

[681] For similar criticism of early Commission suggestions, see Radicati, 'Seeds of Home Country Control', above, 343-344.

agreement or the law of the seat of the *ad hoc* arbitration, which sometimes requires the support of a court. This definition therefore should encompass the appropriate first step in the arbitral process, and reduce the potential that the meaning of the phrase 'steps to commence arbitration' becomes controversial.

(3) Set-aside and recognition and enforcement of arbitral awards

It is proposed to add two new rules to the existing provisions on exclusive jurisdiction, as follows.

'Article 24

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

…

(6) In proceedings to set aside arbitral awards, the courts of the Member State of the seat of the arbitration.

(7) In proceedings concerning the recognition and enforcement of arbitral awards, the courts of the Member State in which the award has been or is to be enforced.'

As will be discussed in more detail below, the rationale for the former rule is to promote legal certainty, within a scheme based on mutual trust, by requiring member states to recognise the set-aside judgments of other member states, thereby reducing the chance for *Putrabali*-style scenarios to arise. The rationale for the latter rule is to make clear that the decision to recognise and enforce an arbitral award is a matter exclusively for the court requested to enforce the award; the result of other recognition and enforcement proceedings in one member state do not affect the result in another. The language is similar to that used for exclusive jurisdiction over the recognition and enforcement of judgments.[682]

[682] Art 24 (5) Brussels I Regulation: 'in proceedings concerned with the recognition and enforcement of judgments, the courts of the member state in which the judgment has been or is to be enforced'.

(4) Conflict between arbitral awards and judgments

It is recommended to add to Art 45 (1) (d) Brussels I Recast the following (insertion in italics):

'(1) On the application of any interested party, the recognition of a judgment shall be refused…

(d) if the judgment is irreconcilable with an earlier judgment *or arbitral award* given *or made* in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment*/award* fulfils the conditions necessary for its recognition in the Member State addressed. *The existence of an earlier arbitral award shall not prevent recognition of a judgment setting aside that award*'.

This allows a party that has obtained an arbitral award to resist enforcement of a subsequent Regulation judgment on the same issue. This addresses the potential conflict between an arbitral award and judgment in favour of the arbitral award, provided that the arbitral award meets the conditions for enforcement in the member state addressed. It would also extend this rule to awards in arbitrations not seated in the EU, in the same way it does judgments. On the other hand, the new second sentence will prevent this exception being used to circumvent a set-aside judgment by the member-state court of the seat of arbitration.

This cannot be seen as a radical extension of the scope of the Brussels I Regulation to cover arbitral awards; the rule simply provides for the effect of a pre-existing arbitral award on the recognition of a Regulation judgment. Similarly, the Regulation could not and does not purport to regulate jurisdiction or recognition and enforcement of judgments given in third states; it simply provides for the effect of such judgments on enforcement of a Regulation judgment.

This rule addresses the scenario where a member state court disregards the recommended *lis pendens* rule and continues to render a judgment, by making absolutely clear that the judgment could be refused recognition and enforcement,

provided the arbitral award itself fulfils the conditions for recognition and enforcement under the New York Convention.

B. Scenarios and analysis

This proposal shall now be assessed by analysing its effects in some simple and foreseeable scenarios concerning the enforcement of an arbitration agreement or award.

The scenarios use parties P1 and P2, where P1 is in favour of arbitration and P2 is against. The examples will also use two forums, F1 and F2, which are both European Union member states. F1 will be the proposed seat of arbitration, whilst F2 will be the forum in which P2 would prefer to have the dispute resolved by the national court. The scenarios will cover instances of both good and bad faith disagreement by each party.

The jurisdiction scenarios that will be discussed are: when a party resisting arbitration brings a court action in violation of an arbitration agreement (the *Marc Rich* scenario); when a party resisting court proceedings alleges the existence of an arbitration agreement in the hope of 'torpedoing' the court proceedings; when there is genuine doubt as to the validity of an arbitration agreement; and when a party brings court proceedings in violation of an arbitration agreement that does not specify a seat. Finally, the scenario where an award set aside in one member state is taken for recognition and enforcement in another will be considered (the *Putrabali* scenario).

(1) The *Marc Rich* scenario

The first scenario is one in which two parties, P1 and P2, have made an arbitration agreement which is clearly valid and concerns a subject matter clearly capable of settlement by arbitration. The arbitration agreement provides for institutional arbitration in F1. Anticipating that P1 intends to take a claim to arbitration, P2 brings an action before the courts of F2, which are notoriously slow moving and untrusting of arbitration. The F2 courts tend to require a full argument on the validity of an arbitration agreement before declining jurisdiction, if indeed they do so. P2 hopes that this potential added expense and the prospect of fighting a battle on two fronts will

cause P1 to settle for far less than he intends to claim.[683] P1 commences institutional arbitration in F1, as per the arbitration agreement. This is essentially the *Marc Rich* scenario, with the addition of bad faith on the part of P2.

Under the above recommended special *lis pendens* rule, the court in F2 will be required to stay proceedings without hearing arguments on the validity of the arbitration agreement as soon as P1 alleges the existence of the arbitration agreement and provides evidence that it has submitted a request for arbitration to the designated arbitral institution. If the court does otherwise, it will be in breach of European Union law. P2 may still challenge the validity of the arbitration agreement before the courts of F1 and/or the arbitral tribunal, but this is unlikely if its original recourse to the F2 court was purely tactical. The arbitration can proceed and result in an award, which can be taken for recognition and enforcement under the New York Convention, free of the potential for any conflicting judgment.

Under the Brussels Regulation and the Recast, the court in F2 would be entitled to assess its own jurisdiction, which would include making a full review of the existence, validity, and scope of the arbitration agreement.[684] Proceedings in the F2 court could therefore be protracted and expensive. Furthermore, there will be a looming uncertainty over the outcome of the F2 court's assessment of its jurisdiction. These factors will make P1 more likely to settle without its claim being fully heard. Even after arbitration has run its course, assuming P1 wins, it may still face an ongoing battle to satisfy the F2 court that it lacks jurisdiction. If the F2 court ultimately assumes jurisdiction, holding the arbitration agreement invalid, it may go on to render a judgment which could conflict with the original award. The new Recital 12 in the Brussels I Recast provides that the F2 court's judgment on the merits would be enforceable under the Regulation, but 'without prejudice to the competence of the courts… to decide on the recognition and enforcement of arbitral awards in accordance with the [New York Convention], which takes precedence over this Regulation.' As argued above, this seems to provide that both the award and judgment would be

[683] See Force, above, for the likelihood that P2 can successfully frustrate P1 by doing so, which is potentially quite high.
[684] See *West Tankers*, above, para 29.

considered enforceable, which goes no way to alleviate the confusion or potential worry to P1 in this scenario.

In this scenario, the advantages of the new approach are obvious. Tactical litigation is made much more difficult, which in turn should serve to discourage its use. The process of defending a claim on the basis that there is an arbitration agreement is streamlined, and the possibility for parallel proceedings and conflicting judgments eliminated, increasing legal certainty and predictability. Finally, it should reduce the amount of time and money spent arguing the same matters in different forums, which increases the efficiency of the administration of justice. All of these are clear advantages of this thesis's proposal over the existing provisions of the Brussels I Regulation and Recast.

(2) Torpedoing court proceedings by alleging the existence of an arbitration agreement

The second scenario is where there is blatantly no arbitration agreement between P1 and P2. P2 sues P1 in the courts of F2, which he believes to have jurisdiction over the substantive dispute under the Brussels I Regulation. P1 nonetheless alleges the existence of an agreement to arbitrate disputes in F1, in the hope of obstructing P2's court action. It is important that this situation is addressed because, just as it was feared in the *Marc Rich* case that a *lis pendens* rule with an imbalance towards court proceedings could lead to the use of court actions to 'torpedo' arbitration, so a *lis pendens* rule overly focussed on enforcing arbitration agreements could lead to arbitration being used to 'torpedo' court proceedings.

Under the proposed approach, this scenario plays out as follows. If P1 has not taken action to commence his vexatious arbitration in F1, he will be unable to meet the standard required to request a stay: alleging the existence of an arbitration agreement *and* demonstrating that action has been taken to commence arbitration. The F2 court will be able to continue to hear the action, decide on any objection to its jurisdiction based solely on the New York Convention, and, if appropriate, render judgment. If, on the other hand, P1 has attempted to begin arbitration in F1 under the non-existent arbitration agreement, the F2 court would still have the opportunity to consider

whether the arbitration agreement provided was 'manifestly null and void, inoperative, or incapable of being performed'. Presuming this indeed is a case in which there is obviously no agreement to arbitrate, and P1 has not extended himself to perjury or fraud to try to obstruct the F2 proceedings, the F2 court should be able to arrive at the conclusion that the arbitration agreement is manifestly null and a stay is unnecessary. The proceedings in which P1 has commenced the vexatious arbitration would presumably fairly quickly come to the same conclusion. The proceedings in the F2 court would continue and, if appropriate, a judgment could be rendered.

Under the Brussels I Regulation and Recast, the situation would be roughly the same. It is true that P1 would have less incentive to begin a vexatious arbitration because, under the combined effect of *Marc Rich* and *West Tankers*, there would be no possibility that such an action could 'torpedo' the F2 court proceedings. That aside, the only other significantly different detail is the scope of review of the arbitration agreement by the F2 court. Under the Brussels I Regulation, the court would be entitled to make a full review of the validity of the agreement; under the proposal, it would only assess whether the requirements for stay were met and, if they were, whether the agreement was manifestly null. This means that only in obvious cases will the F2 court be able to proceed, and not in borderline cases, as discussed below. The minor changes in the Brussels I Recast do not alter the existing approach to this scenario, unless Advocate General Wathelet's interpretation is adopted, in which case the allegation of the existence of an arbitration agreement would immediately remove the proceedings from the scope of the Regulation, allowing torpedoing parallel proceedings to be commenced.[685] This recommendation is, however, unlikely to be adopted, as argued above.

It is true that there is some leeway in the word 'manifestly', which could mean that different courts in different contracting states could adopt different standards of review. Too wide an interpretation of 'manifestly' could undermine the effectiveness of the *lis pendens* rule, allowing too invasive a review of the validity of the agreement by courts other than those at the seat of the arbitration. A narrower meaning of 'manifestly' may be clarified in a recital, explaining that it means 'on its face' or

[685] Addressed above at Chapter 4.C.7.

'immediately obviously', and that it does not permit a lengthy hearing into the validity or applicability of the arbitration agreement. At any rate, the Court of Justice will be on hand to ensure consistent interpretation.

It is submitted that, in this scenario, the proposal provides the same result as would the Brussels I Regulation or Recast. There is very little difference, save that it might be slightly more tempting for a party resisting a court action to begin a vexatious arbitration because of the chance that this could torpedo the court action. This would, however, seem to be an expensive tactic which is unlikely to succeed given the structure of the rule. It is therefore submitted that the new rule provides no significant downside as compared to the existing system in this scenario, whilst making significant improvements in other scenarios.

(3) In cases of doubt as to the validity of the arbitration agreement

The third scenario is where P1 and P2 have arguably entered into an arbitration agreement, which clearly identifies F1 as the seat. P2, genuinely not believing himself to be bound by the arbitration agreement, begins an action in the courts of F2. P1 believes the dispute should properly be resolved by arbitration in F1, so objects to the jurisdiction of the court and begins arbitration proceedings in F1. The courts of F2 would have jurisdiction over the substance of the dispute under the Brussels I Regulation but for the arbitration agreement. A real-world example of this situation can be seen in the *West Tankers* case.[686]

Under the proposal in this chapter, the scenario would develop as follows. P1 would initiate arbitration proceedings in F1 and allege the existence of the arbitration agreement before the courts of F2. The F2 court would then stay proceedings, as there is an arbitration agreement which is not obviously void or inapplicable. If P2 believes the dispute should properly be resolved before the F2 courts, he will be free to

[686] In *West Tankers*, as described above, an insurer was subrogated into a claim against the insured's contracting partner. The original contract contained a clause for arbitration in London. The question was whether the insurer also subrogated into the arbitration clause. Under English law, it is clear that an insurer pursuing a subrogated action is bound by the original arbitration clause, but other legal systems may take a different approach to the same question. The insurer began an action before the Italian courts, which would have had jurisdiction over the delict proceedings under the Brussels I Regulation but for the arbitration clause.

challenge the jurisdiction of the arbitral tribunal, whether before the courts of F1 or the arbitral tribunal itself. If the arbitration agreement is held to be valid, the arbitration will proceed and an award will be rendered. If, on the other hand, the agreement is held not to be valid, the arbitral process will cease, and the courts of F2 will be free to resume proceedings, taking jurisdiction and rendering a judgment if appropriate.

This approach has obvious advantages compared to the situation currently prevailing under the Brussels I Regulation after *West Tankers* or the Brussels Recast. There is no possible reason to invoke the protection of an anti-suit injunction, whose use has been effectively outlawed in Europe by the Court of Justice in *Turner* and *West Tankers*. This approach however addresses the reason that parties might choose to seek an anti-suit injunction – parallel proceedings – but does not simply remove access to the remedy without providing a suitable alternative solution.[687] Indeed, parallel proceedings are virtually eliminated as a possibility. The law as it currently stands allows the possibility of parallel proceedings in these cases, at least on the validity of the arbitration agreement, as in *West Tankers*, and potentially also on the merits, as pointed out in the Heidelberg Report and the Commission Proposal.[688]

It is true that this proposal, in addressing the borderline cases such as this, supports arbitration more strongly than court proceedings, insofar as correctly pursued court proceedings may be delayed by the allegation of the existence of a not obviously invalid or inapplicable arbitration agreement. It is submitted that this is an acceptable outcome. Given the commitment to eliminating parallel proceedings in European international private law, it is surely better that the possibility of parallel proceedings is removed than allowed to continue. This being true, it is inevitable that a rule to eliminate parallel proceedings will have to favour one type of proceedings over the other – arbitration or court. It is submitted that the decision to favour arbitration in the borderline cases is justifiable, especially because it supports the parties' exercise of autonomy. Indeed, this mirrors the new provisions on choice of court agreements in

[687] See Dowers, 'The anti-suit injunction and the EU', above, 972-973.
[688] *Heidelberg Report*, above, para 121; *Commission Proposal*, above, 4.

the Brussels I Recast.[689] It is therefore submitted that this approach is appropriate in the circumstances.

(4) Court proceedings brought in violation of an arbitration agreement that does not specify a seat

This scenario is where there is a clear agreement to arbitrate disputes which fails to identify a seat, whether expressly or by reference to institutional rules designating a default seat. An example would be a clause saying simply: 'All disputes to be settled by arbitration'. P2 begins court proceedings in F2. P1 believes the claim belongs in arbitration.

This scenario is important, because a significant element of the criticisms aimed at the Commission Proposal focussed on the fact that proposed Art 29 (4) refers to the seat of the arbitration, but the seat will not necessarily be known in advance, nor necessarily when a court is seised.[690] Lazić's criticism centres on the fact that the proposal is unclear what would happen where a court is seised and the respondent in that action has no counterclaim, so arbitration is never actually commenced.[691] Harris's criticism reflects the fact that this may encourage the unnecessary commencement of arbitrations.[692] This section shall seek to address both these criticisms, and shall address in turn what will happen in this scenario when P1 does have a claim to be resolved in arbitration, and when P1 does not.

(a) Where P1 has already commenced arbitration

If P1 has commenced arbitration before P2 commences court proceedings in F2, the situation is simple. P1 has commenced arbitration by beginning the arbitrator appointment process by applying to a court to appoint arbitrators, which would be the only option open to it under the clause described above. P1 can point to the arbitration agreement before the F2 court, which will have to stay proceedings, either under the

[689] Brussels I Recast, above, Art 31 (2) and (3), Recital 22.
[690] *Commission Proposal*, above, Art 29 (4). See comments in: V Lazić, "The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How 'Much Ado about Nothing' can End Up in a 'Comedy of Errors' and in Anti-suit Injunctions Brussels-style" (2012) 29(1) *J Intl Arb* 19, 43-44; Harris, '*Commission Proposal*', above, 391.
[691] Lazić, above, 44.
[692] Harris, '*Commission Proposal*', above, 391.

rules proposed in this chapter in accordance with the analysis above under B (1), or, if the seat of the arbitration is not yet clear, under the New York Convention. The seat of the arbitration could be determined by the court to which the application for assistance was made.

(b) Where P1 has not commenced arbitration and has a counterclaim

Where P1 has not yet commenced arbitration, but wishes to assert a counterclaim, P1 can simply take action to commence arbitration, and the outcome will be the same as described above.

(c) Where P1 has not commenced arbitration and has no counterclaim

Where P1 has not commenced arbitration and does not wish to raise a counterclaim, the scenario becomes more difficult. This is the scenario described by Lazić as problematic. This problem is perhaps overstated, given parties are often willing to begin arbitration to obtain a declaration of non-liability.[693] It is therefore submitted that this is a minor problem.

This proposal is nonetheless capable of coping with the situation where the defendant in the court proceedings is absolutely unwilling to commence arbitration. This is because the proposal provides for the application of the New York Convention where the proposal's rules have not been engaged, for example because no action has been taken to commence arbitration. This means that the P1 is free to assert the existence of the arbitration agreement before the F2 court, and require referral to arbitration under Art II New York Convention or F2 national law. The F2 court may simply decline jurisdiction, or may indeed take a more active role in the commencement of arbitral proceedings, for example by determining a seat[694] and/or assisting with the appointment of arbitrators. In the latter case, it could be said that action has at that point been taken to commence arbitration. Either way, P2 is left with no option but to go to arbitration should he wish to pursue his claim.

[693] See, for example, the arbitration in *The Prestige*, above.
[694] See, for example, s 3 Arbitration Act 1996.

It may fairly be pointed out that this leaves P1 reliant on the F2 court's conception of an arbitration agreement. Whilst this is true, this is the same situation that faces any party looking to resist court jurisdiction on the basis of an arbitration agreement without raising a counterclaim, and Art II New York Convention is addressed to the courts of every signatory state. Furthermore, it remains open to the parties to specify a seat or venue for their arbitration at the time of making the agreement. Although, in the scenario where they fail to do so, the exact outcome on the question of validity of the arbitration agreement depends to some degree on the court in which the original action is raised, the system still operates effectively to prevent parallel court and arbitral proceedings, which must be viewed as a positive development. It will also mean that member state courts have the potential to fail to find a harmonious approach to the validity of an arbitration agreement only in this specific scenario, which is currently the case every time an arbitration agreement is in question. Furthermore, under this proposal, the defendant always retains the possibility to begin an arbitration for a declaration of non-liability if he does not like its chances of contesting jurisdiction before the F2 courts.

Harris argued that the system proposed by the Commission might encourage the commencement of unnecessary arbitrations. It is submitted that this should not be seen as a major concern. If P1 feels moved to commence arbitration proceedings for a declaration of non-liability in order to ensure that the case is heard in arbitration – as was the case in *West Tankers* and in *The Prestige* under the current regime – this will simply expedite the process by which the parties arrive in the correct forum. This cannot truly be called 'unnecessary'; rather it is necessary for the defendant to ensure that he can resist the claim in the correct forum.

It is therefore submitted that the proposed system gives significant advantages over the *status quo*, without any significant down side.

(5) The *Putrabali* scenario

Turning from the enforcement of the arbitration agreement to the recognition and enforcement of arbitral awards, scenario five is when an arbitral award is set aside by

the courts at the seat of the arbitration, then taken for recognition and enforcement in another member state. This was the situation in the infamous *Putrabali* saga.

Under this proposal, because the court at the seat of the arbitration has exclusive jurisdiction over set-aside actions, the court asked to recognise and enforce the arbitral award will also be bound to recognise the set-aside judgment. This means that, in the absence of exceptional grounds for refusal of recognition of the set-aside judgment under the Brussels I Regulation (such as violation of European public policy) the second court will not be able to recognise and enforce the arbitral award. The arbitral tribunal can be reconvened to issue a further award, if appropriate, which can then be taken for recognition and enforcement.

By contrast, under the current law, the *Putrabali* approach prevails. The effect is that the court asked to recognise and enforce the arbitral award may do so, notwithstanding that the award has been set aside in another member state, and that the arbitral tribunal may have been reconvened and issued a contradictory award (as was the case in *Putrabali*). This situation presents all the potential problems discussed in chapters 3 and 7 of this thesis.

This new rule on set aside may be the most controversial aspect of the proposal in this thesis. It will be assessed for its compatibility with relevant principles below. It is, however, submitted, that the two possible approaches rely on different fundamental conceptions of the relationship between the courts and arbitration. The approach of this thesis puts emphasis on the responsibility of the courts at the seat to oversee and, where necessary, control arbitration. The previous approach relies on the control of all the various possible enforcement jurisdictions at the recognition and enforcement stage. Furthermore, if one of those potential enforcement jurisdictions takes the French approach of simply enforcing awards set aside where rendered, the whole system boils down to a race to court, as has been pointed out in literature and discussed previously in this thesis. It is not necessarily true that one of these approaches is inherently 'better', but the values implicit in these approaches should be borne in mind when considering the context and relevant principles against which the approach is taken. It is submitted that the latter approach is inappropriate within the EU, for reasons that will be discussed below.

C. Problems identified in Chapter 3

Chapter 3 of this thesis identified a number of problems at the interface between the Brussels Regulation and arbitration. These were: the scope of the exclusion; the potential for parallel proceedings; the ineffectiveness of declaratory judgments; the treatment of judgments rendered in spite of an arbitration agreement; the treatment of judgments setting aside arbitral awards; and award and judgment conflict problems. This section shall briefly address each of these in turn, although the solution to most of these problems has already been made clear above.

(1) The scope of the exclusion

The persistent confusion about the scope of the arbitration exclusion is to an extent clarified by the inclusion of certain court proceedings related to arbitration in the scope of the Regulation. At any rate, in addressing the most controversial issue – parallel proceedings, which were the centre of the disputes in *Marc Rich* and *West Tankers* – the likelihood that court intervention will be required to determine the scope of the exclusion has been reduced.

(2) Parallel proceedings

One of the central aims of this proposal is to eliminate parallel proceedings, as has been demonstrated above.

(3) Declaratory judgments

Declaratory judgments on the validity of an arbitration agreement are now included in the Brussels I Regulation, as long as they are delivered by the court at the seat of the arbitration in an arbitration that has already been commenced. This is an improvement on the previous situation, in which declaratory judgments never had meaningful effect.

(4) Treatment of judgments rendered in spite of an arbitration agreement

Regulation judgments rendered in spite of arbitration agreements are enforceable under the Regulation. This is not expressly stated, but is implied by the decision to include a contradictory arbitral award in the grounds for non-enforcement of a

Regulation judgment, whilst making no mention of judgments rendered in spite of an arbitration agreement. It is hoped that the inconsistent approaches of member state courts to this question will not continue after the relationship between the Brussels Regulation and arbitration has been clarified under the proposal advanced here. This should especially be the case because the defendant in court proceedings has opportunities that did not previously exist to resist those proceedings on the basis of an arbitration agreement, especially under the *lis pendens* rule proposed here. Failure to use these may to an extent justify the enforceability of a judgment ultimately rendered in the dispute.

(5) Treatment of set-aside judgments

The proposal in this chapter makes clear how set-aside judgments should be treated under the Regulation, resolving this problem.

(6) Award and judgment conflict problems

This problem is an extension of the parallel proceedings problem, which is now effectively dealt with by the proposed *lis pendens* rule. Furthermore, the existence of a contradictory arbitral award would justify non-recognition and enforcement of a Regulation judgment in the event one was rendered.

(7) Conclusion on identified problems

The proposal in this thesis either solves or significantly ameliorates every one of the problems identified in Chapter 3.

D. Relevant principles

Chapters 5-7 of this thesis considered relevant principles in both the European law of jurisdiction and international commercial arbitration that should be borne in mind when considering the relationship between the Brussels Regime and arbitration. This section shall consider this proposal for its compatibility with each of these principles. Each of the two main recommendations of this proposal shall be considered in turn: first, the recommendation concerning jurisdiction and *lis pendens*, and secondly, the recommendation concerning set aside.

(1) Mutual trust

Mutual trust was identified as a fundamental principle of the European law of jurisdiction, and indeed of the European Union more generally. In the European law of jurisdiction, it means that the courts of member states must respect one another's ability to reach decisions as to their own jurisdiction and the result they ultimately reach.[695]

The recommendation of this thesis concerning the enforcement of arbitration agreements is a *lis pendens* rule in favour of the courts of the seat of the arbitration or of the arbitral tribunal. It may be suggested that this is not the operation of mutual trust in its purest form, which is exhibited by the strict first-in-time *lis pendens* rule that is generally applied under the Brussels Regulation.[696] Under that approach, every court blindly trusts every other court to reach an appropriate conclusion, to the extent that the rule may be criticised as a blunt instrument, albeit one that is probably necessary in the circumstances to ensure a reliable and predictable system, which will not be undermined by constant second-guessing. Nevertheless, this pure trust-based approach is not appropriate in all circumstances. Sometimes the operation of the general *lis pendens* rule is altered, for example where the parties have concluded a choice of court agreement or where a court's exclusive jurisdiction is violated.[697] *Lis pendens* in cases concerning an arbitration agreement is just such a case, in which the general trust-based rule should be modified to take account of the circumstances. These altered *lis pendens* rules still promote a trust-based approach; simply one where trust must be placed in a specific court rather than any court. This is a more trust-based approach than the status quo, under which each country simply does as it pleases with respect to arbitration agreements, without any trust in one another's approaches whatsoever. It is therefore submitted that the recommendation of this thesis concerning the enforcement of arbitration agreements respects and promotes mutual trust.

As regards set aside and the enforcement of arbitral awards, the approach taken by the French courts in *Putrabali* self-evidently runs contrary to mutual trust. Indeed, the

[695] See above, Chapter 5.B.
[696] See Art 27 Brussels I Regulation.
[697] See Art 31 (2) Brussels I Recast; *Weber v Weber*, above.

French court refused to place any trust in the abilities of the English court to supervise arbitrations carried out within its jurisdiction. Leaving aside for the time being any discussion of the appropriate degree of judicial control of arbitration, it is clear that the recommendation in this thesis that set-aside decisions in one member state be recognised in every other member state promotes a far more trust-centric approach. It is therefore submitted that this proposal aligns far better with the fundamentally important principle of mutual trust than does the status quo.

(2) Legal certainty and predictability

It has been established that the promotion of legal certainty and predictability for litigants is a vitally important principle underlying the European law of jurisdiction. This is demonstrated especially by the Brussels Regulation's strict approach to *lis pendens* and the emphasis it places on the elimination of parallel proceedings.[698]

The recommendations of this thesis concerning the enforcement of arbitral agreements promote legal certainty and predictability by substantially reducing the possibility for parallel proceedings. The *lis pendens* rule proposed by this thesis has the express purpose of eliminating parallel proceedings so far as possible, minimising the attendant uncertainty for litigants.

In turn, the proposal concerning set-aside is intended to promote legal certainty and predictability. It does so by reducing the possibility of multiple awards becoming enforceable in the same dispute, as in *Putrabali*. One of the main reasons for parallel proceedings' being viewed as anathema within the Brussels Regime is the possibility of irreconcilable judgments being rendered in the same case, which in turn undermines legal certainty and predictability for litigants.[699] It is submitted that the possibility of irreconcilable awards being rendered in the same dispute is equally offensive to legal certainty and predictability. To the extent that this proposal would eliminate this possibility, it must be said to promote legal certainty and predictability. Equally, by providing for the strengthened judicial control of the award by one forum, this proposal

[698] See above, Chapter 5.C.
[699] See *Gubisch Maschinenfabrik*, above, para 8; *Overseas Union*, *above*, para 16; *Gasser*, above, paras 41, 51; Jenard Report, above, 41; R Fentiman, 'Article 27', in Magnus and Mankowski, above, 582-584.

promotes predictability as compared to the status quo, where a litigant may face repeated protracted battles against enforcement proceedings concerning an annulled award.

It is therefore submitted that the adoption of this proposal would aid legal certainty and predictability.

(3) Party autonomy

Party autonomy is a fundamental principle upheld by both the Brussels Regulation and the New York Convention.[700] It is therefore crucial that the proposal advanced in this thesis sufficiently respects party autonomy.

It is submitted that the recommendation concerning jurisdiction supports party autonomy because it ensures effective enforcement of agreements, or, in other words, the parties' exercise of their autonomy. This can be analogised with the effective protection for choice of court agreements that has been introduced in the Brussels I Recast by the reversal of *Gasser*, which, as argued above, can only be seen as a move designed to protect and support party autonomy.

The provisions reversing the Court of Justice decision in *Gasser* create a new *lis pendens* rule that gives priority to the court designated in an exclusive choice of court agreement over the courts of any other member state court, in order to protect the parties' exercise of autonomy in concluding a choice of court agreement from abusive tactical litigation.[701] It is unclear why arbitration should warrant different treatment or any less protection.

It is true that the reversal of *Gasser* was more urgent, the court having ruled in that case that the general *lis pendens* rule applied even where the parties had entered an exclusive choice of court agreement, meaning proceedings before the designated court could not continue when the courts of another member state were earlier seised. The effect was to give the tactical litigant a much-criticised 'torpedo' power in respect of

[700] See above, Chapters 5.D and 6.B.3.
[701] Brussels I Recast, Recital 22.

choice of court agreements;[702] one which has definitely not existed in respect of arbitration since the *Marc Rich* decision. Nonetheless, as argued above, the decision to reverse *Gasser* and protect choice of court agreements reflects values that would urge equal protection of arbitration agreements, including most notably the promotion of party autonomy. Both choice of court agreements and arbitration agreements are exercises of parties' well-established autonomy over their contractual relations and disputes. Therefore, the effective protection of arbitration agreements in this proposal is in itself a promotion of party autonomy.

Regarding the recommendations for set aside, this proposal promotes party autonomy by vesting the strongest judicial control in the only forum that may be chosen by the parties: the seat of the arbitration. As argued above, the eventual enforcement forum does not necessarily have any greater connection to the dispute than the fact that a party has – perhaps coincidentally – assets located there.[703] The exercise of party autonomy in choosing a seat for the arbitration creates a far stronger connecting factor for the exercise of judicial control. Indeed, by placing this power in the hands of the courts at the seat of the arbitration, these rules would encourage parties to exercise their autonomy to find an agreeable, supportive seat.

It is therefore submitted that the proposal of this thesis supports party autonomy far better than the current Brussels Regulation.

(4) Home-country control

Home-country control – the idea that each member state retains broad discretion to enforce or refuse to enforce arbitration agreements and arbitral awards – has been identified as a centrally-important principle of the New York Convention.[704] It is therefore necessary to assess to what extent this principle would be affected by the proposal in this thesis.

The recommendations in this thesis concerning jurisdiction over the enforcement of the arbitration agreement localise a significant part of that discretion at the seat of the

[702] See, for example: Briza, above; Roodt, above, 271; Forner Delaygua, above, 295; Veron, above.
[703] See above, Chapter 7.D.2.
[704] See above, Chapter 6.B.1 and 6.C.

arbitration, limiting the extent to which any other EU member state retains any control over the arbitration agreement. This proposal therefore limits the absolute home-country control allowed by the New York Convention, realigning the balance of power in favour of one particular country. It is submitted that this realignment is appropriate within the EU and does not overly undermine the principle of home-country control for the following reasons.

Under the New York Convention regime, each country has broad discretion to enforce or to refuse to enforce an arbitration agreement. Each of these possibilities shall be considered in turn. The possibility to enforce an arbitration agreement irrespective of the approach that will be taken at the seat may be appropriate outside an economic and political union such as the EU, but is manifestly inappropriate within its bounds. In the world at large, it may be argued that there is a compelling public policy in holding parties to their agreements; in saying that, for better or worse, the parties have excluded the jurisdiction of the courts and therefore one party will be unable to obtain relief from a court that would be contrary to its agreement.[705] The same cannot be said within Europe. This is because, if one member state enforces an arbitration agreement and so declines jurisdiction under the Brussels I Regulation, when the courts at the seat of the arbitration will be unlikely to enforce that agreement, this could ultimately lead to a denial of access to justice. If the first member state is the only state with good jurisdiction under the Regulation, and the second member state refuses to allow the parties to arbitrate within its territory, the claimant could be left with no forum in which to pursue his claim. This is undesirable in the world at large, but especially so within a political union such as the EU, where access to effective justice underpins the common market and which has the possibility to rectify the situation. The court of the first member state has no real incentive to pursue this course of action other than to stand by a point of principle, while the EU, on the other hand, has a clear interest in ensuring access to justice for its litigants.

It is manifestly more appropriate, therefore, that a consistent approach be reached to arbitration agreements within the EU. It is submitted that the approach should be that

[705] See, for example, the discussion of enforcing arbitration agreements as an element of public policy in the *Heidelberg Report*, above, para 119.

of the seat of the arbitration. As stated above, the justification for a country other than the seat to enforce an arbitration agreement not viewed as valid at the seat is essentially a point of principle. The seat, on the other hand, is the more appropriate forum to make the determination. First, it is determined by the agreement of the parties, which is a very strong connecting factor to the dispute. Second, if territorialist theory is broadly correct, and this thesis maintains that it is, the seat has a direct interest and responsibility to regulate arbitration conducted within its boundaries. These factors render the seat of the arbitration the more appropriate forum to determine the validity of the arbitration agreement. Furthermore, this approach avoids the possibility of a stalemate developing. It is therefore submitted that, although this proposal reduces the level of discretion of countries to enforce arbitration agreements, it does so in a way that is wholly appropriate, especially because it promotes access to justice and aligns with other relevant principles such as legal certainty and party autonomy.

On the other hand, this proposal also reduces the discretion of member states other than the seat to refuse to enforce the arbitration agreement. This was an important element of the New York Convention's commitment to respecting state sovereignty. It is submitted that the arguments above relating to the appropriate forum for deciding on the validity of the arbitration agreement apply equally to this question. Furthermore, the very state sovereignty that is being protected has, in international private law matters, been conferred on the EU, which may impose new policies in its implementation, such as the promotion of arbitration. Finally, the discretion of the anti-arbitration state to refuse enforcement will be retained to a large extent at the award enforcement stage, discussed below. For all these reasons, it is submitted that the restriction of home-country control in respect of the enforcement of arbitration agreements is appropriate.

With regard to the enforcement of awards, this proposal limits discretion to enforce annulled awards by requiring set-aside judgments of other member states to be recognised across the EU. Discretion to refuse to enforce an award remains unaffected.

As argued above, the seat of the arbitration is the best venue for effective judicial control of arbitration proceedings and arbitral awards. Furthermore, the requirement that the set-aside judgment be recognised is not absolute; if one of the restrictive

grounds for refusal of recognition and enforcement of a judgment under the Brussels Regime is met, such as public policy, the set-aside judgment may be refused recognition.

At any rate, leaving aside the French approach, discussed in detail above, the broad international practice seems to be to give deference to foreign set-aside decisions. This is true especially when that set-aside is based on New York Convention Art V (1) (a)-(d) grounds, unless there is some obvious flaw in the set-aside judgment, such as corruption.[706] The New York Convention does not specify on what grounds an award may be set aside, and mutual trust between EU member states precludes the examination by one member state court of the substance of judgments rendered by another.[707] Indeed, with many courts only ignoring set-aside judgments where that judgment is flawed due to corruption or fraud, and given EU member states implicitly trust one another's judgments to be free from such contamination, one might reasonably ask on what basis the set-aside judgment of another member state court should ever be ignored. Indeed, it has even been suggested in scholarship that the recognition of set-aside judgments is effectively a matter of comity,[708] which should automatically be accorded by member states to judgments rendered in other member states as a matter of mutual trust.[709] It is therefore submitted that it is quite in line with international practice relating to set-aside to require the set-aside judgment to be recognised within the EU, where mutual trust eliminates the possibility that the judgment could be considered tainted. As argued above, nothing prevents the member states from making further agreements amongst themselves as to appropriate grounds for set aside.[710]

In conclusion, although the proposal in this thesis undermines home-country control, it does so in a fashion that promotes other key principles, is manifestly appropriate within a supranational political union such as the EU, and aligns with prevailing

[706] See above, Chapter 7.A.4.
[707] This is a centrally important rule of the Brussels I Regulation, rooted in mutual trust. See Art 52 Brussels I Recast (*ex* Art 36 Brussels I Regulation).
[708] Tweeddale and Tweeddale, above, 13.91.
[709] 'Comity' and 'mutual trust' are often mentioned together, and without a clear distinction between the two concepts. See R Hennigan and D Kenny, 'Choice-of-court agreements, the Italian torpedo, and the recast of the Brussels I Regulation' (2015) 64(1) *ICLQ* 197, 199.
[710] See Chapter 7.D.

international practice. The proposal should therefore not be considered to be an unreasonable encroachment on the principle of home-country control.

(5) Maximising enforceability

The principle known as *favor arbitrandum* – that arbitral awards and agreements should be enforced to the extent possible – has been identified as an important tenet of the New York Convention.[711] This proposal does not promote enforcement of agreements and awards in all situations, and the reasons for this shall now be examined.

As regards the enforcement of arbitration agreements, the recommendations in this proposal may at times reduce enforceability in a theoretical sense, because arbitration agreements viewed as unenforceable at the seat of the arbitration will not be capable of being enforced elsewhere. On the other hand, a second member state court will be incapable of taking jurisdiction in spite of an arbitration agreement considered valid at the seat of the arbitration. To this extent, the enforceability of arbitration agreements is improved by this proposal. Furthermore, it is submitted that the increase in enforceability is of far greater practical significance than the corresponding decrease in enforceability. This is because, when the seat views the agreement as enforceable, parallel proceedings will be eliminated as a possibility, which reduces delay and expense, in turn decreasing the likelihood that the parties will settle, and thus ensuring the arbitration agreement is *effectively* enforced.[712] In contrast, when the arbitration agreement is viewed as unenforceable at the seat, the enforcement of that agreement by another member state court – i.e. declining jurisdiction – is of relatively little practical benefit. An arbitration is extremely unlikely to proceed in spite of the objection of the courts of the seat. It is submitted that the latter form of enforceability is no great loss, while the former form of enforceability is a significant gain for the enforcement of arbitration agreements in practical terms. This proposal therefore, on the whole, improves the enforceability of arbitration agreements.

[711] See above, Chapter 6.B.2.
[712] See Force, above.

The enforcement of arbitral awards will be reduced to the extent that an award that has been set aside in one member state will not be enforceable in any other member state under normal circumstances. Again, the impact of this change is blunted by the fact that it is only France that routinely enforces awards that have been set-aside in circumstances other than those such as corruption, which should not arise within the EU. It is submitted that this minor change is justifiable, even if it runs against the pure, theoretical *favor arbitrandum* principle, because on a holistic view, these recommendations should help arbitration be a more efficient, effective, attractive process.

Furthermore, in commercial matters, the Brussels Regime has moved Europe steadily closer to becoming a judicial common market, especially in enforcement terms. Under such circumstances there is a very valid argument not to re-litigate set-aside orders based on flaws in the arbitral procedure (i.e. based on the grounds listed in New York Convention Art V (1) (a)-(d)).[713] The question is: why not all bases of set-aside? The New York Convention does not specify on what grounds an award may be set aside, and mutual trust between EU member states tends to preclude the examination by one member state court of the motivation or substance of judgments rendered by another. As argued above, there is also no room for member state courts to second guess one another's judgments on the basis that the judgment may in some way be tainted, which is a common ground for courts to ignore other courts' set-aside judgments. Furthermore, the New York Convention clearly allocates a special supervisory jurisdiction to the courts at the seat of the arbitration,[714] which are the only courts

[713] Holloway, 'Avoiding duplicative litigation', above.
[714] See for example comments in *Yusuf Ahmed Alghanim & Sons WLL v Toys 'R' Us, Inc*, United States Court of Appeals, Second Circuit, 1997, 126 F.3d 15, 22: 'There is no indication in the [New York] Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law', quoted in Born, above, 3165. See also: *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647, 661: 'In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration'.

competent to set aside an award.[715] What should give any EU member state the right to second-guess any other's decision under that jurisdiction?

Finally, the New York Convention sanctions non-recognition of an arbitral award which has been set aside where rendered. Art V (1) (e) provides that, in such circumstances, 'enforcement of the award *may be refused*'.[716] Indeed, as discussed above, such eminent scholars in the field as Sanders and van den Berg would argue that Art V (1) (e) *requires* non-recognition and enforcement.[717] In any event, in undertaking to recognise unconditionally one another's set-aside judgments, the EU member states would simply be agreeing to exercise their discretion to refuse enforcement of awards in a particular manner. This approach is therefore manifestly consistent with the language of the New York Convention, notwithstanding the latter's promotion of the enforceability of awards.

It is therefore submitted that this scheme of inclusion of arbitration in the Brussels I Regulation does not run contrary to the principle of maximising the enforceability of arbitral awards under the New York Convention. Rather, it merely rearranges the system of enforcement within Europe, making that system more appropriate to its context.

(6) The role of the seat

The seat of the arbitration was identified as playing a crucial role in arbitration proceedings under the New York Convention.[718] This has been a major contributing factor in the decision to increase the importance of the role of the seat in this proposals. The importance of the role of the seat of the arbitration in this proposal is obvious and does not require detailed discussion. It is, however, submitted that the fact that the seat plays an important role in the New York Convention regime helps justify the decision

[715] See Art V (1) (e); J Paulsson, 'Comment, the New York Convention's Misadventures in India', (1992) 7(6) *Mealey's International Arbitration Report* 1821, reproduced in Barceló *et al*, above, 765; Barceló *et al*, above, 740-742.
[716] Emphasis added.
[717] See above, Chapter 7.A.3.
[718] See above, Chapter 6 (B) (4).

to enhance the importance of the seat of the arbitration within the Brussels Regulation, keeping it broadly in-line with New York Convention principles.

(7) Harmonisation and autonomous interpretation

An important goal of the New York Convention was to bring a degree of harmonisation to the approach to arbitration amongst the contracting states.[719] Of perhaps more significance, however, is the extent to which the New York Convention has encouraged harmonisation on a far wider scale, by serving as the basis for further bi- and multi-lateral treaties, national arbitration statutes, and court decisions.[720] The positive effects of a harmonious, consistent approach to arbitration agreements and awards also underlie van den Berg's seminal commentary calling for an autonomous interpretation of the New York Convention.[721]

Overlapping bilateral and regional agreements are obviously contemplated as an expected and welcome development by the New York Convention, as evinced by Art VII (1). This provides that the New York Convention shall not deprive parties of their rights under such instruments to avail themselves of arbitral awards and by extension, as discussed above, arbitration agreements. This highlights an important weakness in the arguments that incorporation of arbitration in the Brussels I Regulation would encroach on the territory of the New York Convention: that the New York Convention itself encourages such encroachment, to the extent that it improves enforceability. The notion of improving enforceability has already been considered above, but, its having been established that regional agreements are not contrary to the New York Convention, let it next be considered what benefits these agreements can offer.

Common jurisdictional rules concerning the enforcement of arbitration agreements and the recognition of set-aside judgments within Europe would provide far greater harmony on a European level. They provide a clearer and more stable system for enforcement of arbitral awards within the world's largest single market. A well thought

[719] See above, Chapter 6 (B) (5).
[720] Sanders, *Quo Vadis*, above, 70-71.
[721] van den Berg, above.

out scheme of inclusion therefore serves the New York Convention's principle of harmonisation well, by bringing harmony where once discord reigned.

It is further submitted that inclusion of arbitration in the Brussels I Regulation would neither harm nor hinder the quest for an autonomous approach to the New York Convention. The approach would simply see the interpretation reached by national courts in one member state given broader recognition in others; it would not recommend a particular interpretative approach. It is therefore submitted that inclusion of arbitration in the Brussels I Regulation would harmonise on a regional level, whilst not affecting the quest for an autonomous interpretation.

E. Addressing possible objections

Some potential objections to this proposal may be anticipated, including that it is incompatible with strong delocalisation theory, that the EU may lack legislative competence for the reforms, and that the proposal may stifle arbitral competition. Each of these potential criticisms shall be addressed in turn.

(1) Delocalisation

As mentioned in the previous chapter, this proposal may be criticised for not conforming with strong delocalisation theory: in other words, the concept that arbitration agreements and awards exist in a transnational legal order, independent of the municipal law of any one state.[722] It does so because it clearly localises the arbitration at the seat, if a seat can be identified. This in turn has the effect that set-aside judgments rendered by one member state must be recognised in all others, vastly reducing the possibility that an annulled award might be enforced.

It has been argued at length above that this is an appropriate approach within Europe, with only the current French approach really standing to be changed. But there is a broader theoretical question that should be addressed: is this departure from delocalisation justifiable, or should the principles mentioned above yield to

[722] For similar criticism of another proposal, see Radicati, 'Seeds of Home-Country Control', above, 433.

delocalisation? Is delocalisation the way of the future, and any rules that stand in its way a bar to progress?

The last chapter offered a critique of 'strong delocalisation' theory, arguing that, disparately applied, it leads to undesirable consequences and is not, contrary to what its proponents would suggest, arbitration friendly at all. If, one day, delocalisation can be achieved by agreement on a truly global scale, it may prove to be a positive development for international arbitration. But, as has been argued above, that day remains far away.

But if this thesis concedes that strong delocalisation has the potential to be a force for positive change, surely this proposal to localise arbitral awards is regressive and a backward step? It is submitted that it is not so for two main reasons. First, as has been argued above, we live in a world where the broadly territorialist conception of arbitration dominates. Weak delocalisation is prevalent, but is a theory conceptually rooted in territoriality. It is therefore manifestly appropriate to propose a system of regulation for the world we live in, not the world we wish we lived in. Second, and crucially, nothing in this proposal stands in the way of progress for strong delocalisation. It has already been argued that nothing prevents agreement being reached between member states to limit the substantive grounds for set aside of an arbitral award. And if wider delocalisation is agreed on a global scale, with the creation of an ICSID-style supranational body to regulate international arbitration, this proposal would not obstruct that process either; set-aside court actions would simply become irrelevant because of other, external treaty obligations. This proposal would thus become irrelevant, but would not and could not stand in the way of progress.

It is therefore submitted that this proposal cannot face major objection on the basis that they do not conform with delocalisation theory, because territorialist theory remains predominantly applicable, and because the proposal presented here does not stand in the way of any future, more radical delocalisation.

(2) Legislative competence

Questions may be raised as to the internal and external competence of the EU in matters relating to arbitration.[723] Specifically, it has been suggested that the Brussels I Regulation may be used to bring arbitration into the EU's sphere of competence by the back door.[724] This concern was more relevant to the Commission's original sweeping proposal for reform, which went beyond the simple regulation of jurisdiction and the recognition and enforcement of judgments, with wider implications for substantive rules such as, *inter alia*, competence-competence.[725] This concern is of less relevance for the proposal in this thesis, which confines itself to jurisdiction in court proceedings relating to arbitration, for which competence can clearly be found in Art 81 TEU.[726] In other areas where this proposal must use definitions, such as of the seat of arbitration, every effort has been made to keep to general, uncontroversial rules based in the New York Convention, to which all EU member states are party.

Any residual legislative competence arguments can be analogised with, for example, contract law. The Brussels I Regulation provides jurisdictional rules for contracts, and, in so doing, has to provide for some definitions, such as the principal obligations in certain types of contracts.[727] No one could seriously argue that this could be used to bring contract law within the competence of the EU; likewise, similar rules would not do so for arbitration. It is therefore submitted that this proposal raises no concerns about legislative competence.

(3) Arbitral competition

It has been suggested that some proposals for reform of the Brussels I Regulation could stifle the 'healthy competition' between member states for arbitration business.[728] This

[723] See comments in Radicati, 'Seeds of Home-Country Control', above, 435, 458; Benedettelli, above.
[724] Radicati, 'Seeds of Home-Country Control', above, 458.
[725] *Heidelberg Report*, above, para 134; Radicati, 'Seeds of Home-Country Control', above, 433.
[726] *Ex* Art 65 TEC. This article provides for the development of judicial co-operation in civil matters. See also Benedettelli, above, 599.
[727] Art 5 (1) (b) Brussels I Regulation.
[728] Radicati, 'Seeds of Home Country Control', above, 434.

is a fair criticism of proposals that would, for example, harmonise the definition of an arbitration agreement across the member states.[729]

This proposal does not raise such concerns because, by placing importance on the role of the seat of the arbitration, competition between possible arbitral seats is encouraged. The parties' incentive to choose a seat with a pro-arbitration law and court system is increased, because the seat's rules will have broader effect. This proposal therefore cannot be criticised for stifling arbitral competition.

F. Appropriateness in a non-European context

In the early days of this project, it was intended that the recommendations here could be relatively easily transported in substantially similar form to a convention similar to the Brussels Regulation on a global scale. As research for the project progressed, it became clear that such a recommendation could not be supported.

This is clearly reflected in the Europe-centric nature of the thesis, which has barely mentioned the world beyond the European example since the second chapter. The reason for this should be clear to any reader: the recommendations of this thesis find their strongest support in the principles that underpin the European law of jurisdiction and the ongoing project of European unification more generally. Mutual trust, the promotion of legal certainty for businesspeople and other litigants in the EU, and support for party autonomy all speak strongly for the proposal in this thesis. And whilst it is uncontroversial to say that in the world at large legal certainty and support for party autonomy are desirable, it is also absolutely clear that mutual trust simply does not exist, and is not likely to materialise any time soon.

That said, the recommendation for a *lis pendens* rule in favour of arbitration is perfectly capable of being transposed to a global instrument without causing too much controversy. That rule has a pro-arbitration bias that could perhaps be replicated in the world at large, albeit lack of mutual trust may undermine its operation. On the other hand, the rules of this proposal on set aside could not possibly work in a world in which some courts believe the judgments of the courts of other countries can be obtained

[729] See also Chapter 4.B.4, above.

through corruption or with procedural deficiencies. Mutual trust is an absolutely fundamental prerequisite of this rule.

For these reasons, this thesis does not propose this scheme of inclusion of arbitration in jurisdiction conventions in the world beyond Europe.

G. Summary of proposal

It is therefore concluded that the proposal in this chapter can solve or ameliorate the majority of the problems outlined in Chapter 3 of this thesis, whilst broadly aligning with the key principles of the European law of jurisdiction and international commercial arbitration more generally, as outlined in Chapters 5 to 7. The proposal cannot be extended beyond Europe in their current form because it is underpinned by European principles, including, crucially, mutual trust.

9. CONCLUSIONS

This central conclusion of this thesis is that arbitration could and should be included in the Brussels Regime. This argument has been laid out as follows.

Chapter 2 examined the reasons for the exclusion of arbitration from the Brussels Convention, which has served as a model for the later Brussels Regulations, and the Draft Hague Convention 2000. It concluded that the reason for the exclusion was the number of other conventions that dealt with arbitration, and specifically the New York Convention and, in the case of the Brussels Convention, the European Uniform Law Convention. In the modern world, only the New York Convention remains directly relevant. It was then argued that the New York Convention could not justify the exclusion of arbitration from jurisdictional instruments because there is at most a tiny area of substantive overlap between an international arbitration convention on the one hand and an instrument dealing with court jurisdiction on the other. It then examined the other exclusions from the Brussels Convention, discovering that each of these had been subject to separate, bespoke regulation at a European level. A separate instrument, however, is not required for the creation of bespoke jurisdictional rules. It was therefore concluded that the justification for exclusion of arbitration from jurisdiction instruments in the first place is weak.

Chapter 3 then investigated whether the exclusion of arbitration from the Brussels Regime has caused, exacerbated, or simply left unaddressed any problems, there being no pressing reason to correct an unjustified exclusion that does not give rise to any problems in practice. The chapter first set out the scope that has been given to the exclusion through the case law of the Court of Justice. It then went on to consider, in light of this scope, what issues arise at the interface between the Brussels Regime and arbitration. It identified the uncertainty as to the scope of the exclusion, the availability of parallel proceedings, the ineffectiveness of declaratory judgments, the treatment of judgments rendered in spite of an arbitration agreement, the treatment of set-aside judgments, and the potential for an award-judgment conflict as the main problems. These problems may mostly exist in the world at large, but are exacerbated within Europe by the existence of competing jurisdiction and enforcement regimes: the New

York Convention for arbitral tribunals and awards and the Brussels Regime for court proceedings and judgments.

Chapter 4 addressed the process of recasting the Brussels I Regulation. It first introduced the procedure for the recasting, followed by the various ideas that had been proposed to address (or not) some of the problems identified in the previous chapter and in wider scholarship. This chapter then analysed the changes made by the Brussels I Recast itself, concluding that they are minor and are likely to be inconsequential. This chapter specifically rejected the notion that the Recast has reinstated the anti-suit injunction. It concluded that the Recast approach can be criticised for failing to solve or significantly improve any of the problems identified in the previous chapter, likely because of time pressure, different priorities, and the difficulty in reaching a proposal for reform acceptable to the various member states.

It having been established that reform of the Brussels Regime's relationship with arbitration is justified and necessary, this thesis then turned to address the legal context in which that reform would be proposed. This is seen as necessary to ensure the proposed system of rules broadly accords with theory and practice in both the European law of jurisdiction and the world of international commercial arbitration.

Chapter 5 introduced the principles that have taken on significant importance in the European law of jurisdiction. These include, mutual trust, the promotion of legal certainty and predictability, and upholding party autonomy. Mutual trust in particular can be seen as a fundamentally important principle of the European law of jurisdiction and the law of the European Union more generally; it is what makes Europe different, and without it, the common market would grind to a halt. It is therefore given special emphasis in this thesis.

Chapter 6 identified the crucial principles underlying the quasi-constitutional New York Convention. This chapter drew on a sizeable literature to identify home-country control, maximising the enforceability of arbitration agreements and awards, party autonomy, the special role of the seat of the arbitration, harmonisation of arbitration law internationally, and maintaining fairness and due process as key principles. These principles can be arranged in hierarchy in broadly the order given, with the exception

of the principle of maintaining due process, which has been left out as irrelevant to the scope of enquiry of this thesis.

Finally in terms of principles, Chapter 7 considered the ongoing delocalisation debate. This is because delocalisation theory, in its challenge to the traditional territorialist narrative, would stand opposed to some of the proposals advanced in this thesis. By contrast, territorialist theory would support them, and pluralist theory, which is in no way normative, would neither support nor challenge these proposals. This chapter concludes that delocalisation theory does not apply in the world beyond France, and even there could be considered just a particular application of territorial authority. Delocalisation achieved internationally through an ICSID-style commercial arbitration convention could potentially work, but is not a realistic likelihood in the near future, and at any rate would not face any obstacle in the form of the propositions in this thesis if it were to develop.

Chapter 8 tied together the various strands of this thesis into a proposal for reform. This proposal included recommendations for the partial inclusion of arbitration in the Brussels Regulation. It recommended giving exclusive jurisdiction over the enforcement of an arbitration agreement in an arbitration that has already been commenced to the courts at the seat of that arbitration. It further recommended to give exclusive jurisdiction over set-aside actions to the courts at the seat of an arbitration. Finally, it recommended the inclusion of the existence of any arbitral award between the same parties in the same dispute as a ground for non-recognition and enforcement of a Regulation judgment. It was argued that adoption of these recommendations would significantly improve upon the problems identified at the interface between the Regulation and arbitration. This argument was supported with reference to certain foreseeable scenarios, as well as with reference to the problems identified in Chapter 3 of this thesis, each of which the proposal would solve or at least ameliorate. Furthermore, the proposal broadly accords with the guiding principles identified in Chapters 5 and 6 of the thesis. It is therefore submitted that this proposal would make a significant improvement on the status quo.

This thesis as a whole is intended to provide a contribution to knowledge, thereby satisfying the requirements for the award of a doctoral degree. The contribution lies in

the holistic approach to the question of the appropriate relationship between jurisdiction conventions and arbitration, bringing together the strands of modern thought in European international private law, international commercial arbitration, and the practical experience of the European Union with the arbitration exclusion.

Original insights are also contained in various chapters of this thesis. These include Chapter 2's detailed analysis of the history of the arbitration exclusion from the Brussels Regime and Hague instruments; the identification of mutual trust as a fundamentally important tenet of European international private law and European Union law more generally in Chapter 5; Chapter 7's engagement with the ongoing delocalisation debate in the context of this topic; Chapter 8's proposal and justification of a novel scheme of inclusion of court proceedings related to arbitration in jurisdiction conventions; and the thesis's outward-looking approach to lessons for global jurisdiction conventions arising from the European example.