RECENT DEVELOPMENTS IN ARBITRATION AND EU LAW

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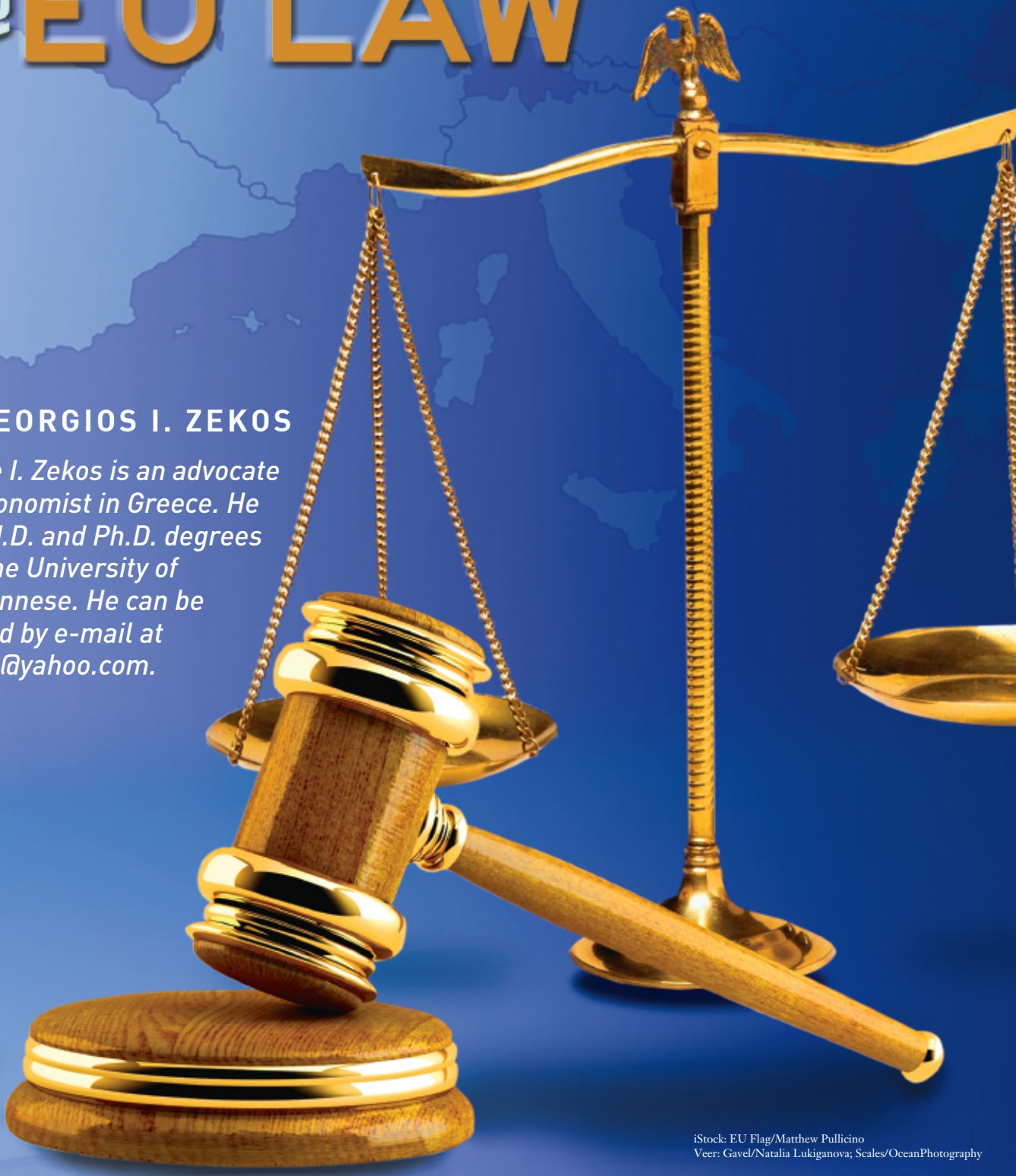

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The intersection of arbitration and European Union law in cross-border disputes involving a member of the EU.

In earlier times arbitration was viewed by the courts with suspicion because it was regarded as a competitor of judicial trials.[1] Today, judicial and arbitration proceedings coexist, complement and compete with each other. As a result, commercial arbitration has become quite important in the cross-border context. This raises the question of how arbitration interacts with European Union law when Member States become involved in cross-border disputes. This article examines the intersection of arbitration and EU law.

The Arbitration Exclusion in EU Treaties and Regulations

European Union treaties and regulations do not deal with international arbitration,[2] which is a self-sufficient system of dispute resolution. One of the founding EU treaties, the Treaty on the Functioning of the European Union (TFEU), lists the competences of the EU. However, arbitration is not among the exclusive or shared competences of the EU.

In addition, the EU laws relating to judicial matters in the EU either do not mention arbitration or exclude it specifically. These laws are known collectively as the Brussels Regime. There are three documents: (1) the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, (2) the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[3] and (3) the 2002 Brussels I Regulation.

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The Brussels Convention (1968) had several objectives: to avoid parallel legal proceedings within the Community, to simplify the recognition and enforcement of judgments, and to strengthen the legal protection afforded to citizens of Member States. Article 1, second paragraph, subsection (4) of the Brussels Convention explicitly states that it "does not apply to arbitration."

The Lugano Convention (1988) extended the range of the Brussels Regime to "create common rules regarding jurisdiction and judgments across a single legal space consisting of the Member States … and the three European Free Trade Association states of Iceland, Norway, and Switzerland." It expressly superseded two conventions on the enforcement of judgments and arbitration awards. Otherwise it contained no arbitration provisions.

The Brussels I Regulation (2002) replaced the Brussels Convention. It was designed to contribute to the continued development of freedom, security and justice in the EU and to the "sound operation of the internal market." Like the Brussels Convention it excludes arbitration, stating in Article 1(2)(d), "[t]he Regulation shall not apply to […] arbitration."[4]

A more recent EU law known as Rome I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008) on the law applicable to contractual obligations, also excludes arbitration.[5] Article 1(2)(e) of Rome I states, "The following shall be excluded from the scope of this Regulation: […] arbitration agreements and agreements on the choice of court."

The exclusion of arbitration from the substantive scope of the Brussels Convention and subsequent EU law appears to have been motivated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention) and the European Convention on International Commercial Arbitration, of which Member States are signatories. As a result, it probably was not considered necessary to have EU laws apply to arbitration-related state court proceedings, court proceedings to recognize or enforce foreign arbitral awards, or proceedings to set aside a foreign arbitral award.

These proceedings are not governed by EU law but by the New York Convention. Article IV states what must be provided for enforcement and recognition and Article V lists the grounds when recognition and enforcement may be refused by the court.

Similarly, the issue of the existence of a valid arbitration agreement is governed by the New York Convention and is not subject to EU laws when the requirements of Article II(3) of that convention are met. Under this provision, a national court is directed to consign the case to arbitration if: (1) the subject matter of the dispute is capable of being resolved in arbitration, (2) the arbitration agreement satisfies the agreement in writing requirement, and (3) the court does not find the arbitration agreement to be null and void, inoperative, or incapable of being performed.

In light of the recognition of the New York Convention, and the individual arbitration laws of Member States, the arbitration exclusion from the Brussels Regime makes eminent sense. Nevertheless, the EU regime does have an impact on arbitration through the authority of the European Court of Justice (ECJ), based in Luxemburg, to issue preliminary rulings pursuant to Article 272 of the TFEU.

The ECJ and Preliminary Rulings

There is no EU judicial system. Instead of creating such a system, the EU has made use of the pre-existing ECJ.[6] Article 272 of the TFEU gives the ECJ jurisdiction over arbitration only where the EU is a party to a contract with an arbitration clause, "whether that contract be governed by public or private law." So how does the ECJ come to play a role in private international arbitration?

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The answer is through its jurisdiction to issue "preliminary rulings" concerning the interpretation of the Treaties and the validity and interpretation of acts of EU institutions, bodies, offices or agencies. This jurisdiction is conferred in Article 267, one of the most interesting provisions involving the ECJ.

The same provision also authorizes national courts or tribunals to seek a preliminary ruling from the ECJ concerning the foregoing issues if they consider that "a decision on the question is necessary to enable it to give judgment." Moreover, EU national courts must request a preliminary ruling from the ECJ "when there is no judicial remedy against that decision under national law."

Effect of ECJ Preliminary Rulings

Consequently, Article 267 has greatly influenced the development of EU law. For example, it shaped the concepts of "direct effect"[7] and the "supremacy of EU law." The ECJ has constantly ruled that EU law has supremacy not only over national legal systems, but also over bilateral agreements concluded between EU Member States.[8] Commentators have noted that the relationship between the ECJ and national courts of EU Member States was once horizontal but has become much more hierarchical. As a result, ECJ preliminary rulings are said to have either a *de facto* or *de jure* impact on all EU national courts, not just the one that asked for a preliminary ruling.[9]

Arbitration and Preliminary Rulings Involving EU Law

There are several issues involving EU law and arbitration that may come before the ECJ via the Article 267's preliminary ruling procedure. One issue is whether a body is a "court or tribunal" for purposes of Article 267.[10] In the *Nordsee* case, the ECJ held that it could not entertain a referral from an arbitral panel because it was "not a court or tribunal of a Member State" within the meaning of Article 234 of the EC Treaty.[11]

Another issue is the propriety of a party seeking an anti-suit injunction under EU law. Anti-suit injunctions seek to prevent an adversary from beginning or continuing to initiate a legal proceeding in another forum that will deliver a more favorable decision.[12] In the framework of the EU, anti-suit injunctions are regulated by the Brussels Regime because they relate to the jurisdiction over enforcement of judgments of a civil or commercial nature concerning residents of a Member State.

The ECJ may also rule on these issues: the way in which the arbitration exception is to be construed[13]; whether an arbitral award may be annulled by a national court according to a provision of EU law; and whether the appointment of arbitrators and the grant of provisional measures concerning a dispute are matters within the scope of the Brussels I Regulation.[14]

The ECJ has issued two authoritative decisions concerning the scope of the arbitration exception in the Brussels I Regulation, but they are not completely clear. One is the *Marc Rich* case, which involved a request to a Dutch court to appoint an arbitrator, and the other is *Van Uden Maritime*, which involved an application to a national court for interim relief in support of arbitration.

The ECJ concluded in the *Marc Rich* case:

> If, by virtue of its subject-matter, a dispute falls outside the scope of the [Brussels I] Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot justify application of the Brussels I Convention. Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue.[15]

In *Van Uden Maritime*,[16] the ECJ considered the arguments on each side. The arguments supporting the Dutch court's jurisdiction under the Convention were: (1) the existence of an arbitration clause does not have the effect of excluding an application for interim measures from the scope of the Convention, " and (2) the subject-matter of the dispute underlying the interim proceeding is decisive; that subject matter concerns the performance of a contractual obligation—a matter within the scope of the Convention. The argument against the Dutch court's jurisdiction was based on the parties' arbitration agreement—and the fact that the interim measures sought "are intrinsically bound up with the subject-matter of an arbitration procedure." The ECJ also noted that the UK Government views the interim measures sought in this case "as ancillary to the arbitration procedure" and thus excluded from the scope of the Convention.

The ECJ focused on the significance of the arbitration clause, finding that where the parties entered into an arbitration agreement, "there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. Consequently, a party to such a contract is not in a position to make an application for provisional or protective measures to a court that would have jurisdiction under the Convention as to the substance of the case."[16]

However, the ECJ suggested that Article 24

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may empower a court to order provisional or protective measures.[17] It also cited the *Marc Rich* case for the proposition that the arbitration clause demonstrates the parties' intent "to exclude arbitration in its entirety, including proceedings brought before national courts."

The ECJ listed a number of arbitration-related court proceedings and orders that are outside the scope of the convention, among them "judgments determining whether an arbitration agreement is valid or not," judgments ordering the parties to an invalid agreement not to continue the arbitration proceedings, proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards, and "proceedings ancillary to arbitration proceedings."

Somewhat surprisingly, it then distinguished provisional measures from an ancillary proceeding::

> Interim 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. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.

The EU regime has an impact on arbitration through the authority of the European Court of Justice, based in Luxemburg, to issue preliminary rulings pursuant to Article 272 of the TFEU.

Accordingly, the ECJ concluded: "[W]here the subject-matter of an application for provisional measures relates to a question falling within the scope *ratione materiae* of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators." Thus, the ECJ found that the Brussels I Regulation applies when a provisional measure refers to the operation of a contractual obligation and not to the arbitration proceedings. Accordingly, court proceedings that are parallel to arbitration fall within the scope of the Brussels I Regulation. But it is not entirely clear what the distinction is between ancillary and parallel proceedings.

In the 2007 *West Tankers* case, the House of Lords[18] asked the ECJ to issue a preliminary ruling on whether a United Kingdom court could issue an anti-suit injunction to protect arbitral proceedings in London against a parallel court proceeding commenced in another EU Member State (Italy). Customarily, English courts have granted an anti-suit injunction where proceedings are initiated in a foreign jurisdiction in violation of an existing arbitration agreement.[19] But in the 2004 *Turner* case,[20] the ECJ ruled that anti-suit injunctions to restrain foreign court proceedings in the European Community are incompatible with the Brussels I Regulation, but the English courts continued to issue those injunctions.

In *West Tankers*, Advocate General Kokott, relying on *Turner*, said that the English court did not have the authority to award the anti-suit injunction for the reason that it infringed the autonomy of the Italian courts. The ECJ accepted this reasoning.[21] It ruled that the practice of issuing anti-suit injunctions related to arbitration violates the Brussels I Regulation,[22] which excludes arbitration from its scope. "Proceedings … which lead to the making of an anti-suit injunction," the ECJ said, "cannot, therefore, come within the scope of Regulation No 44/2001." But then the ECJ went on to find a reason why arbitration proceedings could be so considered. It said:

> However, even though proceedings do not come within the scope of Regulation No. 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, *inter alia*, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

The ECJ then determined that the proceedings in Italy came within the scope of Brussels I, and that "the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling ... on the very applicability of the regulation

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to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction" under Brussels I.

The ECJ also relied on the doctrine of mutual trust, saying, "[S]uch an anti-suit injunction also 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...." Consequently, an anti-suit injunction proceeding in the London court is not compatible with Brussels I Regulation.

Case law has supported the mutual trust doctrine to harmonize all European courts. However, there is concern that *West Tankers* will induce a boost in the filing of bad faith torpedo actions.[23] It could be argued that the prohibition against an EU court entertaining a request for an anti-suit injunction affecting a proceeding in the court of another Member State would lead parties to seek arbitration in countries outside of the EU.

The Future of the Arbitration Exception

The *Turner* judgment has brought to the forefront the ambiguities in the arbitration exception in the Brussels I Regulation. The 2007 Heidelberg Report,[24] which is the result of empirical research on the application of Brussels I in 24 Member States, noted that the Member States seem to want to change the arbitration exception (they "show a tendency not to extend the Judgment Regulation to arbitration"). However, the report concluded that there are practical problems relating to the exclusion that should be addressed: "[A]s has been demonstrated, the present situation is not satisfactory and the interfaces between the Judgment Regulation and arbitration should be addressed in a more sophisticated way than by the all embracing exclusion of arbitration...." The report advocated two possible ways forward, one of which would eliminate the exception. The other would address the interface between Brussels I and arbitration in a positive way.

In September 2010, the European Parliament, in a resolution on the implementation and review of the Brussels I Regulation,[25] unwaveringly rejected even a partial deletion of the arbitration exclusion. It stated in Paragraph I: "[A]rbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place."

Just months later, in December 2010, the European Commission presented its final proposal to reform the Brussels I Regulation.[26] This document proposed a special *lis pendens* mechanism in Article 29(4) CP to address the situation in which a court proceeding is commenced in an EU Member State relating to an arbitration proceeding seated in another Member State.

Under Article 29(4), once an arbitral tribunal or a state court at the seat are seized of proceedings to ascertain the validity of an arbitration agreement, whether "as their main object or as an incidental question," the courts of any other Member State, whose jurisdiction is challenged on the basis of this arbitration agreement must stay proceedings or, if their national law so dictates, decline jurisdiction.

The European Commission offered its proposed reform of the Brussels I Regulation in order to avoid jurisdictional conflicts. The EC proposal would solve some of these problems insofar as they involve courts of EU Member States. But it would not affect the problem of parallel proceedings involving an arbitral tribunal and a court due to the doctrine of *Kompetenz-Kompetenz*.

Conclusion

Arbitrators are expected to apply EU law to the merit of a dispute, but they are not permitted to ask the ECJ to issue a preliminary ruling interpreting EU law because the ECJ has ruled that an arbitral tribunal is not "a court or tribunal of a Member State" under Article 267 TFEU."[27] This ruling indicates that the ECJ does not regard contractual arbitration as an alternative method of dispute resolution, despite the fact that arbitration is recognized as a means of resolving disputes arising from a contract involving the EU as a party.

This situation perpetuates the ability to circumvent both arbitration and choice of court agreements, thereby increasing the risk of parallel proceedings. In short, it reduces the quality of justice.

The Heidelberg Report is right in suggesting the removal of the arbitration exception. But that is not enough. The ECJ should give arbitral tribunals the same status as courts, treating them as courts or tribunals of Member States. The present situation does a disservice to both arbitration and courts and harms the commercial community. ■

ENDNOTES

[1] G. Zekos, *International Commercial and Marine Arbitration* (Rout-ledge-Cavendish 2008).

[2] Pekka Pohjankoski, "Can International Arbitration Remain Unaffected by EU Law?–Anti-Suit Injunctions and the Scope of the Arbitration Exception," 2010(2) *Helsinki L. Rev.* 81–115.

[3] This convention superseded a num-

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ber of bilateral and multilateral treaties between European nations on the enforcement of judgments in civil matters (and sometimes arbitral awards). The preamble indicates that by extending the principles of the Brussels Convention to the States that are parties to this instrument, legal and economic cooperation in Europe will be strengthened.

[4] Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ No L 12/1, 16.1.2001.

[5] OJ L 177, 4.7.2008, p. 6–16.

[6] The ECJ predated the formation of the EU.

[7] The ECJ stated in *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 [1963]. (5 Feb. 1963) that European law not only triggers obligations for Member States, but also rights of individuals. One of these rights is the ability of citizens of EU countries to seek to enforce EU treaty provisions, regulations, directives, and decisions of EU institutions, in their national courts.

[8] Paul P. Craig & Gráinne De Búrca, *EU Law, Text, Cases and Materials* (4th ed. Oxford Univ. Press 2008). See Decision of the ECJ, *Simmenthal SpA v. Commission of the European Communities*, Case C-106/77 [9 March 1978] ¶ 17; Decision of the ECJ, *Exportur SA v. LOR SA*, and *Confiserie du Tech SA*, Case C-3/91 [10 Nov. 1992] at ¶ 8. See Dariusz Kloza, "E-commerce and the Recognition and Enforcement of Judgments in the Latest EU Developments," 21(4) *Masaryk Univ. J. L. & Tech.* (2010).

[9] Craig & De Búrca, *supra* n. 8.

[10] *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co.*, Case 102/81, KG [1982] ECR 01095 [23 March 1982]. The judgment of the ECJ in *Denuit and Cordenier* (C-125/04) of 27 January 2005 authorizes the established case law of the ECJ under which arbitration courts will not be able to refer to the ECJ for a preliminary ruling.

[11] *Nordsee supra* n. 10. *Allianz SpA v. West Tankers Inc.*, Case C-185/07, *Allianz SpA v. West Tankers Inc.*, 3 W.L.R. 696 (2009). H. Seriki, "Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin," 23(1) *J. Int'l Arb.* 25 (2006).

[12] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* 504–11 (Oxford Univ. Press, 2008).

[13] *Eco Swiss China Time Ltd v. Benetton International NV*, Case C-126/97 [1999] ECR I-03055; G. Zekos, *Eco Swiss v. Benetton: Court's Intervention in Arbitration*, 17 *J. Int'l Arb.* 91 (2000).

[14] *March Rich & Co. AG v. Societá Italiana Impianti PA*, Case C-190/89 [25.7.1991], points 8–11; *Accentuate Ltd. v. Asigra Inc.* [2009] EWHC 2655 (QB), held that a Canadian arbitration and jurisdiction clause was not enforceable because the clause would result in EU Regulations not being taken into account.

[15] *Van Uden Maritime BV v. Kommanditgesellschaft* in *Firma Deco Line and Another*, [17.11.1998], point 18.

[16] *Id.* at ¶ 24.

[17] *Id.* at ¶ 25.

[18] *West Tankers v. RAS Riunione Adriatica di Sicurta SpA and others* [2007] UKHL 4.

[19] Audley Sheppard, "Anti-Suit Injunctions in Support of Arbitration," [2005] 8(2) *Int'l Arb. L. Rev.*, 20-212 (2005).

[20] *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd. and Changepoint SA*, Case C-159/02 [2004] ECR I-03565; *Through Transport Mutual Ins. Ass'n (Eurasia) Ltd v. New India Assurance Co. Ltd.*, [2004] EWCA Civ 1598.

[21] *West Tankers*, 3 W.L.R. at 715. "[A] claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, [which] also comes within its scope of application." The court relied on *Turner v. Grovit*, Case C-159/02, 3 W.L.R. 1193 (2005) (upholding the Regulation in a breach of an exclusive jurisdiction clause, even though the first set of proceedings was brought by a party in bad faith).

[22] *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.*, Case C-185/07 [2009].

[23] *Erich Gasser GmbH v. MISAT Srl.*, Case C-116/02, 2003, E.C.R. I-14693, *Gregory Paul Turner*, *supra* n. 20. *Pierre Véron, ECJ Restores Torpedo Power*, 35 *Int'l Rev. Intell. Prop. & Competition L.* 638 (2004).

[24] B. Hess *et al.*, *Report on the Application of Regulation Brussels I in the Member States*, ¶¶ 115, 131 (Ruprecht-Karls-Universität Heidelberg, 2007).

[25] European Parliament resolution of 7 Sept. 2010, on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)) ¶ 8, available at www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0304.

[26] COM(2010) 748 final.

[27] See Zekos, *supra* n. 1.

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Swiss Federal Statute on Private International Law; and Article 46 of the Vienna Convention on the Law of Treaties. Further, some States have embodied similar concepts in their national law: see, for example, Article 2(2) of the Peruvian Arbitration Law.

[50] See, for example, *TermoRio S.A. and another v. Electranta S.P. et al.*, 487 F. 3d 928 (D.C. Cir. 2007), in which the Colombian Consejo de Estado nullified an arbitration clause with a State-owned public utility because the clause violated Colombian law.

[51] For further discussion, see Mantilla-Serrano, "The Effect of Bolivia's Withdrawal from the Washington Convention: Is BIT-Based ICSID Jurisdiction Foreclosed?" 22(8) *Mealey's Int'l Arbitration. Rep.* 1 (2007).

[52] Although there is considerable debate as to the extent of this requirement, and indeed whether it exists: see, for example, Andrew Tweeddale, "Confidentiality in Arbitration and the Public Interest Exception," 20 *Arbitration Int'l* 59 (2004). See also Samuel Estreicher & Stephen Bennett, "The Confidentiality of Arbitration Proceedings," *NYLJ* Aug. 13, 2008, p. 3; N. Rawding & K. Seeger, "*Aegis v. European Re* and the Confidentiality of Arbitration Awards," 19 *Arbitration Int'l* 483 (2003); Leon Trakman, "Confidentiality in International Commercial Arbitration," 18 *Arbitration Int'l* 1 (2002); Edward Leahy & Carlos Bianchi, "The Changing Face of International Arbitration," 17 *J. Int'l Arbitration* 19, 36-42 (2000); Yves Fortier, "The Occasionally Unwarranted Assumption of Confidentiality," 15 *Arbitration Int'l* 131 (1999).

[53] See, for example, "NAFTA's powerful little secret," *N.Y. Times*, March 11, 2001, Section 3, p. 1.

[54] See, for example, Article 29 of the U.S. 2012 Model BIT.

[55] There are many more subjects that could be explored; for example, anti-arbitration injunctions, provisional measures, and who is deemed to be a national of a particular State.

[56] For example, the ICC Arbitration Rules as revised in 2012 include provisions designed to be attractive to State parties (e.g., under Article 13(4)(a) the ICC Court can appoint a suitable arbitrator where a State or a State entity is a party to the arbitration).

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