SENSE AND SENSIBILITY: REVIEWING *WEST TANKERS*
AND DEALING WITH ITS IMPLICATIONS IN THE
WAKE OF THE REFORM OF EC REGULATION 44/2001

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A. Introduction

Roughly one year ago, with its ruling in the case *Allianz SpA & Anor v West Tankers Inc*, the European Court of Justice (ECJ) wrote the latest chapter in what great part of English commentators might call the drama of the anti-suit injunction in Europe.¹ The first anniversary of the ruling is a good occasion to reopen the discussion on the issues that were involved and the implications which still follow from the decision (if that discussion was ever closed). Up to now, many problems remain unsolved. *West Tankers* has left contracting parties with the question of how to react. In addition, the ECJ's decision has influenced the Commission's proposals for the reform of the Regulation No 44/2001,² which provoked very mixed reactions.

The purpose of this article is twofold. First, to critically analyse the use and necessity of anti-suit injunctions, using the ECJ’s *West Tankers* ruling as a starting point. In this context, German contributions to the issue will be taken into account as representative of Continental-European legal traditions. Secondly, to give an overview of how all those concerned did, or could, react, in order to deal with the new situation, as well as what might be the next steps taken in Brussels.

This article will briefly recall why the judgment – in this author's view – makes sense and is consistent with the law as well as the needs of justice. It will then be argued that the consequent loss of the anti-suit injunction as a procedural means in Europe is not a loss to fear, as it will be possible nonetheless to

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¹ *Allianz SpA (formerly Riunione Adriatica Di Sicurita SpA) & Anor v West Tankers Inc* (Case C-185/07) [2009] 1 CLC 116 (ECJ).

² Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Hereafter referred to as the Regulation or JR.
show the appropriate sensibility towards the sanctity of bargains. Afterwards, the focus will turn on the implications that follow from the ruling. Lastly, all results will be summarised in a short conclusion.

**B. THE USE OF ANTI-SUIT INJUNCTIONS TO PROTECT ARBITRATION AGREEMENTS BEFORE WEST TANKERS**

1. **The Use of Anti-suit Injunctions in English Courts**

Common law systems have a long tradition of protecting the substantive interests of contracting parties through the use of anti-suit injunctions. In the context of arbitration agreements the substantive interest in that sense is the right not to invoke a jurisdiction under the Regulation but instead to have all disputes determined by arbitration – for reasons of efficacy, eg in regard to time and costs, of enhancing the flexibility and finality in finding a solution that is fair to both parties, of confidentiality and of subsequent enforcement under the New York Convention.

Under section 37(1) Senior Courts Act 1981 and section 44(1), (2)(e) Arbitration Act 1996 the High Court has power to grant injunctions supporting arbitration agreements. An injunction may be granted if the following prerequisites are met: (i) the court must have personal jurisdiction over the respondent; (ii) the applicant must demonstrate a valid right not to be sued abroad, which can derive inter alia from an arbitration agreement; (iii) the ends of justice require an injunction to enforce this right; (iv) there are no other grounds for refusal.

3 See infra Section D.
4 See infra Section E.
5 See *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 864.
8 This support has a long tradition: see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 864.
11 The last point essentially describes a balancing of interests. An injunction is granted “in all cases where it appears just and convenient” (s 37(1) Senior Courts Act 1981).
12 An application may be refused on grounds of delay in applying for the anti-suit injunction, the danger of parallel proceedings, or if the respondent cannot be blamed for the breach of the
Comity or the foreign state’s interests are usually not considered relevant, at least when it comes to protecting agreements. On the contrary, in the interest of enforcing promises made, the respondent must prove a good reason why an injunction should not be granted. Another emphasised fact is that the anti-suit injunction is granted only in personam and therefore cannot interfere with a foreign court’s jurisdiction.

The common law view on anti-suit injunctions is best captured in the words of Millett LJ in *The Angelic Grace*. However, some cases indicate a more cautious approach than the one taken there and recognise the likelihood of foreign courts perceiving an interference and a lack of trust.

Once an anti-suit injunction is granted, breaching it amounts to contempt of court, which allows English courts to seize the respondent’s assets, deny entertaining any future application from him and even imprison him. Moreover, judgments obtained in breach of anti-suit injunctions are likely not to be recognised or enforced in England.

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13 See Donoghue, supra n 9. See also Millett LJ in *The Angelic Grace*, supra n 10, 96: “The time has come to lay aside the ritual incantation that this is a jurisdiction which should be exercised sparingly and with great caution. . . . I cannot accept the fact that any Court would be offended by the grant of an injunction.”

14 See Heinze and Dutta, supra n 10, 423 with a list of cases; *The Angelic Grace*, supra n 10, per Millett LJ and Neill LJ, 96, 97. See also Navigation Maritime Bulgare v Rustal Trading Inc (*The Ivan Zagubanski*) [2002] Lloyd’s Rep 106, 124: An injunction will be granted if (i) the claimant can prove the existence of an arbitration clause and (ii) there are no exceptional circumstances inviting a refusal of the relief. See also Continental Bank, supra n 10, where it is argued that everything else would mean proposing that the defendant should be allowed not only to break a contract by bringing proceedings abroad but also to break it further by opposing a stay of the proceedings. It would be contrary to the principle of party autonomy if he were allowed to use the first-seized rule to do so.


16 See *The Angelic Grace*, supra n 10, 96: “If an injunction is granted it is not granted for fear that the foreign court may wrongly assume jurisdiction . . . but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that court at all. . . . a jurisdiction which he had promised not to invoke and which was his own duty to decline. The justification of the grant is that . . . without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy . . . . Moreover, if there should be any reluctance . . . far less offence is likely to be caused if an injunction is granted before that court has assumed jurisdiction. . . . In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution.”

17 See Tracomin SA v Sudan Oil Seeds Co Ltd (No 2) [1983] 2 Lloyd’s Rep 624; Phillip Alexander Futures & Securities Ltd v Bambergers, Thiele, Kiefer, Riedel, Franz and Gillhaus [1997] ILPr 73; Toftyer, supra n 10, where a preliminary ruling from the ECJ on the range of applicability of the exception in Art 1(2)(4), now Art 1(2)(d) JR, was requested, but the parties settled before it reached the ECJ.
In Germany, too, there are commentators who support the use of anti-suit injunctions for reasons of efficacy and sustaining competition between law systems. Generally, however, there does not seem to be a positive attitude and courts have actually denied the service of an anti-suit injunction. In particular, the prevailing opinion is that arbitration agreements cannot establish an obligation not to sue abroad.

2. Relevant Decisions by the ECJ and Reactions from the English Courts

The possibility for English courts to use anti-suit injunctions to protect private agreements had already suffered substantial blows before West Tankers. How-
ever, hope was still left regarding arbitration agreements. The scope of the exception in Article 1(2)(d) JR had not been clearly settled. What the ECJ had decided was that: (i) solely the subject-matter of the proceedings is decisive for the question as to whether proceedings fall under the exception, regardless of preliminary issues; (ii) the nature of the rights protected by an interim measure determine if the measure is covered by the arbitration exception; (iii) the arbitration exception intends to exclude arbitration in its entirety, including proceedings brought before national courts of a nature ancillary to arbitration.

The use of anti-suit injunctions to protect arbitration agreements, even under the “worsened conditions”, is best represented by two cases, *The Ivan Zagubanski* and *Through Transport*.

In *The Ivan Zagubanski*, Aikens J took a broad view of the arbitration exception. He deduced that the Regulation does not apply where the principal focus of the matter is arbitration, including the issue of who examines the existence of an arbitration agreement. The objective of granting an anti-suit injunction, he explained, is to make the defendants adhere to their agreement, to refer the dispute to arbitration, and thereby enforce it. Thus he held that the focus was arbitration and the exception applied.

In *Through Transport*, the court decided that it was entitled to determine whether proceedings that were brought to protect a London arbitration clause fell within the scope of the Regulation, even though it was the court second seised. The principles in *Gasser* were held not to apply. Whereas in *Gasser* the


See *Van Uden Maritime BV (t/a Van Uden Africa Line) v Kommanditgesellschaft in Firma Deo-Line* (C-391/95) [1999] 2 WLR 1181 (ECJ), para 33.

Ibid., paras 13, 18, 20.

See *Navigation Maritime Bulgare*, supra n 14, paras 71, 72, 80, 100. In this case proceedings were brought in Marseilles in breach of a London arbitration clause. In his interpretation at paras 70–72 Aikens J drew on Advocate General Darmon’s view in *Rich*. However, he recognised at para 74 that the decision of the ECJ “may have been narrowly confined to the question of whether an appointment of an arbitrator was excluded”.

Ibid., paras 65, 72, 100.

Aikens J dismissed the concerns in *Philip Alexander*, supra n 17, and *Toffler*, supra n 9, because they contained no new principles: see ibid., paras 110, 112.

See *Through Transport*, supra n 12. In this case, a shipper and its insurer New India (NI) had settled a claim after goods had been lost under a shipping contract, whereby NI had become entitled to exercise the shipper’s rights against the carrier. The latter then became insolvent, so
parties had accepted that both proceedings fell within the Regulation, *Through Transport* was not concerned with the question of how the regime applied, but whether it applied at all. The case was also held to be different from *Turner* as the target proceedings were not vexatious, but in breach of an agreement. The court granted the injunction.

In both cases granting an anti-suit injunction was held to be outside of the scope of the Regulation, as the latter contains no rules intending to unify arbitration. This “scope-based-interpretation” of the Regulation, which allows a broad application of national law to be compatible with the Regulation’s aims, is not uncommon in English case-law. Before *West Tankers*, the principle of mutual trust, which had been used in *Turner* to hold that the use of anti-suit injunctions within the regime of the Regulation impaired its effectiveness, was considered only in case the Regulation applied at all. The Regulation, however, did not apply to the injunctive proceedings.

**C. WEST TANKERS: A QUESTION OF FOCUS**

As the facts of the case are well known and the decision has been discussed excellently in many articles, this article will just very briefly recall the main arguments that are relevant for the following discussion.

That NI issued proceedings in Finland against the carrier’s insurer, *Through Transport*, under a Finnish third parties’ rights statute. The dispute arose whether instead the parties were bound by a clause providing for arbitration in London, with the action based on the insurance contract between E and the carrier rather than the statutory right. E issued proceedings in England and applied for an injunction, which was granted. NI then appealed.

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30 Ibid, paras 82, 83, 84, 89.
31 Ibid, paras 82, 90, 91.
32 He followed *The Angelic Grace* and *The Ivan Zagubanski*. But see Sir Anthony Clarke, “The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales” [2007] European Business Law Review 101, at 128, where he says: “I recognise that there is scope for argument as to whether that is correct or not.”
33 See *West Tankers* (HL), supra n 6, paras 12, 14.
34 See *In Re Harrods (Buenos Aires) Ltd* [1991] 3 WLR 397; *West Tankers* (HL), supra n 6, paras 12, 14. See also E Peel, “Forum Non Conveniens and European Ideals” [2003] Lloyd’s Maritime and Commercial Law Quarterly 363; Clark, supra n 32, 110.
35 See *Turner*, supra n 21, paras 24 and 25.
36 For a different view in Germany, see J Kropholler, *Kommentar zur EuGVO* (Frankfurt/Main, Verlag Recht und Wirtschaft, 8th edn, 2005), Art 2 JR, para 2, Art 1 JR, para 45; T Rauscher (ed), *Europäisches Zivilprozeßrecht Band I* (Munich, Sellier European Law Publishers, 2nd edn, 2006), Art 1, para 29b.
1. The Decision

Following the Advocate General’s opinion that “the decisive question is not whether the application for an anti-suit injunction . . . falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed . . . do so”, the ECJ held that although the English proceedings before the House of Lords (the injunctive proceedings) could not come within the scope of the Regulation, they nevertheless had consequences which undermine its effectiveness. The ECJ then reconfirmed the principles established in Gasser and Turner.

Then, in a strict application of the subject-matter test, the ECJ held that the foreign proceedings, against which the anti-suit injunction was directed, were within the Regulation, as compared to the subject-matter the existence of an arbitration agreement is only a preliminary issue of an incidental nature. Thus, any objection of lack of jurisdiction based on such an agreement had to be within the scope of the Regulation too. Otherwise an applicant who considers the agreement void would be barred from access to a national court and thus denied judicial protection. Therefore, it was exclusively for the court which initially had that jurisdiction to rule on that objection.

The ECJ found support in Article II (3) New York Convention, which empowers a national court to assess if an agreement is void or otherwise incapable of being performed before it is obliged to refer the dispute to arbitration.

2. Sense and Sensibility

West Tankers contains a sensible and comprehensive legal argumentation and demonstrates par excellence the difficulties created by the clash of two different legal traditions when interpreting the term “arbitration” in Article 1(2)(d) JR. The ECJ used a “double even-if-argumentation” to resolve the clash. Its first part concerns deciding in relation to which proceedings the scope of the Regulation needs to be determined. It shifts the focus away from the injunctive proceedings in England to the allegedly abusive proceedings affected by the anti-suit injunction. This allowed the ECJ to discharge a great part of Lord
Hoffmann’s well-founded and significant arguments, as they concerned only the injunctive proceedings.

The second part concerns how the fact that an arbitration agreement is alleged might affect the classification of the abusive proceedings and the question of who (else) is entitled to examine the existence of the agreement.

In both parts, fundamentally different legal traditions clash with each other. The Anglo-American, which takes a private law perspective and the Continental-European, which takes a public law perspective.

(a) The First “Even-if”: Shifting the Focus Away from the Injunctive Proceedings

The latter view is represented by the ECJ’s rightful consideration that in the case of a valid anti-suit injunction, the applicant would be barred from judicial protection. One of the fundamental aims of the Regulation is to guarantee judicial protection, which requires free access to Member State courts and is opened through the jurisdictional heads in the Regulation.

There are voices who dismiss this judicial protection as a “general ideological postulate”. This is not the case at all. All jurisdictional heads grant a right to access a forum that is legitimate under the Regulation.


See Dutta and Heinze, supra n 19, 453, 454; Kropholler, supra n 36, Art 27, para 20 JR.

See Treaty on European Union, Art 6: “(2) The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” See European Convention for the Protection of the Human Rights Convention, Art 13 – Right to an effective remedy: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” See also U Magnus and P Mankowski (eds), European Commentaries on Private International Law Brussels I Regulation (Munich, Sellier European Law Publishers, 2007), Brussels I, Introduction to Arts 27–30 JR, para 39 for the right of access to justice in civil proceedings in the context of the Regulation.

which are binding for the interpretation of the Regulation. The importance of access to the legitimate forum is recognised by both the Heidelberg Report and the German courts.51

On the other hand, there is an agreement through which the parties, freely and willfully, agree not to use these jurisdictional rules. This has to be duly considered. The question is to what extent parties can waive their right to access the courts.

Within the Regulation, jurisdiction originates at the very moment the pre-requisites of the jurisdictional head in question are fulfilled. The jurisdiction and the power to rule on it "already exist" and are activated the moment a party decides to use them.52 Therefore, although both courts and tribunals may be entrusted to decide on the existence of an agreement, surely the tribunal (or, for that matter, the courts supporting it) is not in any better position than the court whose default jurisdiction "has been taken away" – on the contrary. This does not mean that the court with default jurisdiction should decide on the existence of an arbitration agreement in every case, but definitely always then when a party wants to use this court as he is entitled to. Otherwise, a party could avoid court proceedings just by alleging that there is an arbitration agreement.53 If anti-suit injunctions can basically impede a party to act in court, then the other party would have no means by which to defend himself against that allegation before a national court as he is entitled to by his right to judicial protection – the right to object to the tribunal’s alleged jurisdiction by bringing court proceedings where the default jurisdiction lies.

Nevertheless, one could argue that ex post legal protection through a court after an award is adequate.54 This is not the case. It is often too late to bring

51 See Report on the Application of Regulation Brussels I 2007 (The Heidelberg Report – hereinafter referred to as “the Report”), para 890: “However, a major drawback would be that in case of the nullity of the agreement a party seeking to establish this nullity needs to seize first the court designated by the void agreement before proceedings can be instituted with other courts. Therefore, such a far reaching modification of Article 27 JR, ie the reversal of its priority rule in favour of the designated court, does not appear to balance the jurisdictional interests of the parties adequately”. See also Oberlandesgericht Düsseldorf, supra n 19, 261: a fair and constitutional procedure is only guaranteed where everyone involved is able participate without limitations and it is the courts’ duty to enforce this right to participate (“Ein rechtstaatlich ordnungsgemäßes Gerichtsverfahren ist – was keiner näheren Erläuterung bedarf – nur gewährleistet wenn die Beteiligten ohne jede Beschränkung alle ihrer Ansicht nach notwendigen Fakten unterbreiten und alle notwendigen Anträge stellen können. Die Gerichte sind verpflichtet diesen Rechten Geltung zu verschaffen.”).

52 I allow myself to use a metaphor: the jurisdiction is a pre-existing road leading to one town, which equals the decision on the merits by a national court, and the arbitration agreement is a road sign, set up to divert traffic towards another town. Whoever wants to drive on that road has to follow that sign only if it is set up properly. It should be the town where the sign stands that is rightly entitled to decide if the sign is set up properly.


54 An example may be Art 1458 I of the Nouveau Code Procedure Civile, under which the tribunal is granted the first right to examine the arbitration agreement, subject to court supervision:
a dispute to court after arbitration. Furthermore, the party opposing arbitration will be faced with an enforceable award while the court proceedings take place. Furthermore, it is not often clear if a valid agreement exists should the sueing party indeed breach the agreement. Thus, in cases where the existence of an arbitration clause is disputed as a jurisdictional issue it can hardly be guaranteed that the parties have indeed reached a consensus as to whether they want to waive their right to access the courts. A court second seised (for an anti-suit injunction) should not anticipate this decision.

Arbitration agreements should be subject to the same limits as every contract. If an obligation from a contract of sale — to deliver goods — is allegedly not fulfilled, the party cannot simply take the goods. He must bring an action before a court with jurisdiction in order to allow the other party to defend himself. Access to court has a protective function. If an obligation from an arbitration agreement — to invoke a private tribunal — is allegedly not fulfilled, the party typically "takes the goods" as he will bring an action before that tribunal. Nonetheless, the other party’s right to defend himself before the court that would have jurisdiction without the agreement must remain.

The entitlement to legal protection before a national court is one level. The determination as to whether that action constitutes a breach of the agreement is another, substantive, level. It might lead to compensation, as in every contract, but should be strictly distinguished from ensuring the legal protection.

On a procedural level, legal protection must prevail over private autonomy and, thus, an objection to the jurisdiction of a tribunal before a national court over the application for the anti-suit injunction. That is what justifies the single focus and why it is not necessary that both proceedings are within the scope of the Regulation, but just the one that ensures judicial protection.

There has been criticism towards the “ban of effects” imposed on proceedings that the ECJ itself holds as being outside the scope of the Regulation, which flows from this extensive interpretation.


55 See Steinbrück, supra n 19, 370 from an economic point of view.
56 See Henze and Dutta, supra n 10, 435. See also Schlosser, supra n 18, 491. This is also exemplified, eg, by the Through Transport case, supra n 12.
57 See West Tankers (AG’s opinion), supra n 38, para 67. Advocate General Kokott explains that this is a reason why this solution indeed respects party autonomy.
58 Thus, ensuring legal protection may be added to the conditions the creation of primary obligations through an arbitration agreement is subject to, as pointed out by Lord Diplock in The Hannah Blumenhaft [1983] Lloyd’s Rep 103 117, 118.
59 Lehmann, supra n 54, 1647.
61 However, this concept is not new, as it was mentioned in Turner and there is no reason why proceedings outside the scope of the Regulation should prevail over proceedings inside the scope,
(b) The Second “Even-if”: No Effect of the Arbitration Agreement on Conferred Jurisdiction

The same two schools of legal reasoning collide when determining whether the Regulation applies to the abusive proceedings and how this may be influenced by the arbitration agreement.62

One view is to take a broad approach and regard all arising disputes as completely removed from national courts at the outset, including the dispute on the jurisdiction to examine the agreement.63 The other view takes account primarily of the substantive subject-matter of the dispute and separates the question of the existence of the agreement.64

It is the distinction drawn by the ECJ in Rich that is decisive. The court held that when determining the scope, reference must be made solely to the subject-matter of the dispute. The subject-matter may concern only arbitration65 — but it may as well not. “A preliminary issue which the court must resolve (first)66 in order to determine the dispute cannot, whatever that issue may be, justify the application.”67 Thus, what in Rich could not have the effect of making the Regulation applicable, cannot coherently be used in the mirror case to make the basically applicable Regulation unapplicable.68

While this distinction has been criticised as artificial and impractical, some critics themselves admit that it is probably the only workable approach.69

As a preliminary issue might be raised at any time, it would be contrary to legal certainty if the classification of the proceedings would change every time...
according to the nature of the preliminary issue.\textsuperscript{70} As a result, the broad view must be dismissed.

The protection of party autonomy constitutes a weaker counter-argument in this context than it did above. If the parties bargained in order to be outside any national court system whatsoever, the examination of the existence of an arbitration agreement and the grant of an anti-suit injunction through a national court must consequently constitute a violation of the agreement as well.

The chosen interpretation also respects the principle of \textit{Kompetenz-Kompetenz} of the court, especially in those cases where the tribunal is not yet formed and the principle cannot apply. The jurisdiction to examine the existence of an arbitration agreement should not depend on such a coincidental fact, as it would lead to uncertainty, especially considering the fact that the formation of the tribunal might already cause problems and delays, as exemplified in \textit{Rich}.\textsuperscript{71}

This does not mean that a tribunal is degraded to some kind of second-class institution or that there is no trust in arbitrators – on the contrary: the private tribunal has a better position than any second-seised court in a Member State. Its (relative) \textit{Kompetenz-Kompetenz} remains unaffected.\textsuperscript{72} The arbitral proceedings fall under Article 1(2)(d) JR and cannot impair any effectiveness, as the tribunal as a private institution is not bound by the Regulation.

Finally, according to Article II(3) New York Convention a court is entitled to examine an arbitration agreement before referring it.\textsuperscript{73} Thus, it is obvious that tribunals are not exclusively entitled to that examination. According to the rationale of Article 1(2)(d) JR, which is to comply with international conventions, the powers under the Regulation cannot be more limited than those under the Convention.\textsuperscript{74}


\textsuperscript{71} See \textit{Rich, supra} n 23, where the appointment of arbitrators was disputed.

\textsuperscript{72} The \textit{Kompetenz-Kompetenz} of tribunals is only relative, as, although they can go on with their proceedings and render an award, their award may be set aside or not recognised, eg under Art V NYC or § 1040 para 3 ZPO (German Code of Civil Procedure).

\textsuperscript{73} Art II NYC provides: “(1) Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration. . . . (3) The court of a Contracting State, when seised 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”.

\textsuperscript{74} See \textit{West Tankers (AG’s opinion), supra} n 38, para 56.
(c) The Anti-suit Injunction: Indirect Interference Undermining the Effectiveness of the Regulation

Lastly, there is no doubt that an anti-suit injunction constitutes an indirect interference in foreign proceedings. Lord Hoffmann’s argument that this was “divorced from reality” is, respectfully, simply not sufficiently legally founded to counter what was decided in Turner and, moreover, a misquote from Peter Schlosser. Although the anti-suit injunction is aimed at a person it takes effect, intended or not, on the court proceedings. Court proceedings need a plaintiff in order to take place. If the plaintiff is restrained from doing his bit a court cannot rule. Thus, even where the plaintiff agreed not to do anything in national courts, this cannot matter at the point where the court has the right to rule on its jurisdiction.

This interference undermines the effectiveness of the Regulation in reaching its goal of developing a unified internal market where the free movement of decisions ensures both legal protection and certainty. The base for free movement are the principles of mutual trust and mutual recognition, as shown in Gasser and Turner.

The fact that there are no uniform rules for arbitration matters does not mean that the principles cannot be affected. Although there is no such thing as a general trust outside the Regulation, there is force in the argument that the principles go beyond mere jurisdictional concerns, as they derive from the goal of recognition rather than from unification. Consequently, they apply regardless of jurisdiction rules as long as the decision to be recognised is within the scope of the Regulation. The decision to be made in Syracuse was within this scope. Instead, the English court indirectly impeded a ruling on that jurisdiction although it was not better placed, as every court is empowered, and

75 Agreeing: West Tankers (AG’s opinion), supra n 38, para 26; Heinz and Dutta, supra n 10, 428; Illmer and Aumann, supra n 19, 156; Peel, supra n 47, 366; C Ambrose, “Can Anti-suit Injunctions Survive European Community Law?” (2003) 52 International and Comparative Law Quarterly 401, 408; A Briggs and P Rees (eds), Civil Jurisdiction and Judgments (London/Singapore, Norton Rose LLP, 4th edn, 2005), 439; Oberlandesgericht Düsseldorf, supra n 19. Dissenting: Clifford and Browne, supra n 37, 21; Fentiman, supra n 60, 279.

76 See West Tankers (HL), supra n 6, para 17.

77 Peter Schlosser’s expression “lebensfremd” (which Lord Hoffmann translates as “divorced from reality”) is his counterargument to an argument brought forth against the qualification of a proceeding brought for the grant of an anti-suit injunction as being ancillary to arbitration. See Schlosser, supra n 18, 489: “Eine Anti-Suit injunction zu dem Zweck . . . ist aber sicherlich schwerpunktmäßig ein Nebenverfahren. . . . Dagegen ist eingewandt worden. . . . Dieses Argument ist aber lebensfremd.”

78 Or: ensure judicial protection, see: Oberlandesgericht Düsseldorf, supra n 19. See also General Star International Indemnity Ltd v Sterling Cooke Reuin Reinsurance Brokers Ltd [2003] IBLR 328.

79 Clark, supra n 32, 115, 119.

80 Fentiman, supra n 60, 279, who claims differently.

81 Dutta and Heinz, supra n 19, 460.

82 Heinz and Dutta, supra n 10, 430.
must be trusted, to determine it itself. For the same reason the grant of anti-suit injunctions also impedes the effectiveness of Article 35(3) JR as it amounts to a revision of the jurisdiction ex ante.83

Also, there can be no free circulation of judgments where there is the risk that judgments may not be recognised because they are reached in breach of an anti-suit injunction.

As already noted, it is not even clear in all cases if a valid agreement exists. Thus, the effectiveness of the system of jurisdictional heads is also undermined where an anti-suit injunction is granted. This system has a protective function. The right of access to a national court can only be effective where the court which has jurisdiction as a default has the power to examine the existence of the arbitration agreement, ie to rule on that right to access.

Therefore, the sensible conclusion reached by the ECJ was that anti-suit injunctions are no good for Europe.

D. Europe after West Tankers

1. Implications Following from West Tankers and the Anti-suit Injunction Debate

(a) Implications Following from West Tankers

After West Tankers, the reasoning in The Ivan Zagubanski and Through Transport was no longer sustainable. However, the Kompetenz-Kompetenz of tribunals remains untouched. This means that tribunals may decide on their jurisdiction and the merits, irrespective of court proceedings. Once constituted, they may also grant anti-suit injunctions themselves. According to sections 38(1) and 48(1) Arbitration Act 1996, parties may confer upon the tribunal powers that may be even greater than those available to courts.84

This has two consequences: (i) there is an imbalance between the powers of the tribunal and the supervising courts, as tribunals now de facto have more powers; (ii) there is a, maybe underestimated, risk of irreconcilable decisions.85

While the court may reach the conclusion that the agreement is not valid, and consequently deliver a judgment that has to be recognised under the Regulation, the tribunal might decide the opposite and issue an award which has also to be recognised under the Convention, as most Member States are subject to

83 See Briggs and Rees, supra n 75, 438, who reach the same conclusion.
84 Courts, however, will presumably not be able to enforce tribunal’s order under s 42 (1) Arbitration Act 1996; see Clifford and Browne, supra n 37, 21.
85 Peel, supra n 47, 368 says that the Advocate General, though recognising the risk, described it short of the chaos that it potentially is.
the latter. Consequently, the Regulation and the Convention clash with each other whenever both decisions are to be enforced.

Several solutions are discussed to solve this clash. For some, the Regulation simply does not apply to those judgments. Some commentators rely on Article 71 JR and solve the problem using Article II(3) New York Convention as an overriding rule. This seems to run counter to the Advocate General’s statement that the Regulation, in fact, has got no mechanism to deal with this consequence. Furthermore, the Convention is not able to solve the problem. It contains no jurisdictional rules, no procedural framework whatsoever and no provision regarding which law governs the validity of the arbitration agreement, neither in Article II(3) nor in Article V. Others rely on the possibility of non-recognition of the judgment on grounds of public policy. Finally, it is proposed to include arbitration into the Regulation. This issue will be addressed further infra.

Although not expressed by the ECJ in the judgment, the narrow interpretation of the arbitration exception might also influence a future practice of non-recognition of judgments that are perceived to be delivered in breach of an arbitration agreement by the recognising court in another Member State. The jurisdiction over the existence of the agreement and the non-recognition of resulting decisions are two sides of the same coin. Treating the latter as not impairing the Regulation’s effectiveness could seem inconsistent.

However, if the parties do not agree to confer certain powers to the tribunal, it has the same powers as the courts to order a party to do or refrain from doing things (section 48(5) Arbitration Act 1996). As the wording suggests that the powers are merely derived from the courts’ powers, it would be inconsistent.

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86 See National Navigation Co v Endesa Generacion SA (The “Wadi Sudr”) [2009] 1 Lloyd’s Rep 666 (Comm). On the other hand, Ambrose, supra n 53, 17 says there is “consensus” that a judgment falls under the Regulation if its subject-matter is covered by the Regulation. This is supported by Phillip Alexander, supra n 17, para 106 and Oberlandesgericht Celle [1997] RIW 131.
87 See Beraudo, supra n 70, 22, 26; Magnus and Mankowski, supra n 50, Art 35 JR, para 49.
88 See West Tankers (AG’s opinion), supra n 38, para 71, at 20 reaches the same conclusion.
89 See van Haersolte-van Hof, supra n 69, 33, 37; H van Houtte, “Why Not Include Arbitration in the Brussels Jurisdiction Regulation?” [2005] Arbitration International 509, 511, who remarks that there also is no institution comparable to the ECJ to control the application of the Convention; Ambrose, supra n 53, 13, 17, 18; Lehmann, supra n 54, 1647.
90 See Waller J in Phillip Alexander, supra n 17, paras 112–14; L Collins (ed), Dicey, Morris and Collins on the Conflict of Laws, Vol 1 (London, Sweet and Maxwell, 14th edn, 2006), 656; National Navigation, supra n 86. While this may have the advantage of more clarity, one wonders why the ECJ bothered to protect the proceedings in Syracuse at all, if the judgment would be unenforceable.
91 See West Tankers (AG’s opinion), supra n 38, para 73; van Houtte, supra n 89, 518; Heidelberg Report, supra n 51, para 131.
92 See especially Sections D.4 and D.5 as well as E infra.
if in these particular cases the ECJ’s ruling in *West Tankers* did not also stop the tribunal from granting an anti-suit injunction.93

Furthermore, the Regulation now risks being open to exploitation. Parties might be dragged into litigation that exhausts their resources and thus impedes arbitration,94 or feel pressured to compromise by the loss of confidentiality. The first-seised rule without doubt encourages tactical litigation.95 However, unlike Member State courts, tribunals keep their *Kompetenz-Kompetenz*. In addition, the overall danger is softened by the fact that the anti-suit injunction remains available to court proceedings brought outside the European Community.96 Here, it will need to be decided if the anti-suit injunction as a procedural means is to be preserved as long as possible. It may very well be that the ECJ’s ruling is an expression of the more general view that anti-suit injunctions are no good at all.

(b) Anti-suit Injunctions: Do We Need them At All?

The classic argument in favour of the anti-suit injunction is its effectiveness in promoting legal certainty and preventing conflicting judgments. Effective as it undeniably is, critics rightly remark that it is so only as long as it is imposed one-sidedly.97 Moreover, the inherent risk in allowing flexibility through broad discretionary tools is that the court using discretion may eventually “arrogate”98 to itself a competence that deliberately has not been created.99 It does not seem at all likely that English courts would recognise anti-suit injunctions which, for a change, are targeted at them.100 Also, the alleged certainty resulting from the use of anti-suit injunctions exists only *prima facie*. The fact that non-English courts will not recognise anti-suit injunctions in cases where the respondent decides to continue the proceedings disregarding the anti-suit injunction nec-

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94 See Clifford and Browne, *supra* n 37, 22; Fentiman, *supra* n 60, 281; Mankowski, *supra* n 61, 28.
95 There is no consent on how often frustrating tactics are used. For example, Lehmann, *supra* n 54, claims it is not seldom, while Mankowski, *supra* n 61, alleges it does not happen frequently.
96 See Clifford and Browne, *supra* n 37, 22. N Sharp, “Compatibility of Anti-suit Injunction with the Brussels Regulation” [2008] *International Arbitration Law Review* N77, N79 has “no doubt” anti-suit injunctions will be continued to be granted outside Europe.
97 See Heinze and Dutta, *supra* n 10, 437, 438; Steinbruck, *supra* n 19, 372. See also Briggs and Rees, *supra* n 75, 426.
99 Ibid para 31, 33.
100 See Heinze and Dutta, *supra* n 10, 437; Steinbruck, *supra* n 19, 366; Illner and Aumann, *supra* n 19, 156; General Star, *supra* n 78; Tonicstar Ltd v American Home Insurance Co [2005] 1 Lloyd’s Rep IR 32. Whereas in *Through Transport*, *supra* n 12, para 92 the court claimed that an “English Court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state.”
necessarily leads to conflicting judgments,\(^{101}\) as English courts, in turn, will not recognise the judgment delivered in disregard of the anti-suit injunction. Moreover, the latter benefit can take effect only in England,\(^{102}\) so that certainty is promoted only in cases in which the enforcement will be sought in England.

The proposed use of anti-suit injunctions by other courts\(^{103}\) would cause chaos in terms of certainty once conflicting anti-suit injunctions are granted.\(^{104}\) The step to the anti-anti-anti-suit injunction and so forth would be only a matter of time. Where will that lead when English courts are already reluctant to recognise a judgment delivered in breach of an anti-suit injunction or foreign anti-suit injunctions targeted at them? The procedural skirmishing whilst “torpedoing” the agreement would only be substituted through skirmishing with anti-suit injunctions. Jurisdiction would depend on which party is more likely to be scared by an anti-suit injunction. All certainty would be lost.

At this point it should be remembered that in the European Community the development of an internal market is still a goal that has yet to be reached.\(^{105}\)

The alleged competitive disadvantage is, in the worst case, pure protectionism for the business which arbitration brings to London,\(^{106}\) as anti-suit injunctions are regularly only granted to protect English courts.\(^{107}\) At best, it is not backed up by any evidence that could prove why London should be worse off than other frequently used arbitration centres within Europe, which do not use anti-suit injunctions.\(^{108}\)

Indeed, it is true that the dangers for London “which still has a myriad of features to commend it to those selecting it”\(^{109}\) are overestimated, considering that the availability of anti-suit injunctions is only one, rarely decisive, reason to choose the seat of arbitration, as well as the remaining availability of the anti-suit injunction for non-EU proceedings.\(^{110}\) In addition, the fact that London is

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\(^{101}\) See Oberlandesgericht Düsseldorf, supra n 19. Schmidt, supra n 18, 495, though, rightly remarks that denial of service would not occur anymore today under the EC Service Regulation.

\(^{102}\) Briggs and Rees, supra n 75, 452.

\(^{103}\) West Tankers (HL), supra n 6, para 22; Schlosser, supra n 18, 490.

\(^{104}\) Steinbrück, supra n 19, 566; Illner and Aumann, supra n 19, 156.

\(^{105}\) Dutta and Heinze, supra n 10, 456.

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\(^{106}\) See, for the allegation of a disadvantage: P Gross, “Antisuit Injunctions and Arbitration” [2005] Lloyd’s Maritime and Commercial Law Quarterly 10, 25 who thinks it is a “legitimate national interest”. For the rest see Illner and Aumann, supra n 19, 156. See also Mankowski, supra n 61, 25; Rassche, supra n 36, Art 1 JR, para 29.

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\(^{107}\) See Heinze and Dutta, supra n 10, 424, 437. On the other hand, Longmore LJ in OT Africa Line Ltd v Magic Sportswear [2005] 2 Lloyd’s Rep 170, 179 said: “It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy not to uphold the courts of any particular country.”

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\(^{108}\) Like Geneva or Paris: see Steinbruck, supra n 19, 366, 372; Heinze and Dutta, supra n 10, 438; Ambrose, supra n 75, 414.

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\(^{109}\) Clifford and Browne, supra n 37, 21.

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\(^{110}\) See Kesseler and Hope, supra n 93, 333; Illner and Aumann, supra n 19, 156.
chosen as the seat of arbitration does not mean that the anti-suit injunction will be automatically sought here.\textsuperscript{111} Furthermore, the costs of an application for an anti-suit injunction may be underestimated.\textsuperscript{112} Thus, it is questionable whether the use of anti-suit injunctions is something worth preserving at all costs or a beloved tradition that has to be let go. The last view seems preferable.

In any case, within Europe one must look to the future and to the pragmatic question: how else can party autonomy be protected and how can the remaining (or: caused) uncertainties be resolved?

2. Reactions of English Courts

There have been several reactions to the ECJ’s ruling by English courts. They generally show the readiness to apply the ECJ’s reasoning.

In \textit{Youell v La Reunion Aerienne} the court relied on the ECJ’s confirmation in \textit{West Tankers} that the applicability of the Regulation is determined by the nature of the rights which the proceedings serve to protect.\textsuperscript{113} It held that the mere fact that a claim is the subject of an arbitration agreement does not deprive a court, which could otherwise determine the substance of the claim, of its jurisdiction.\textsuperscript{114} The protected right was held to be the claimant’s right not to be sued on a claim he denied. The court decided that it was not covered by the arbitration exclusion.\textsuperscript{115} The court also applied \textit{West Tankers} in holding the defendant’s reliance on the agreement as “merely incidentally raised”.\textsuperscript{116}

In \textit{Shashoua v Sharma} the court held that English law in relation to proceedings which did not take part in the European Community was not inconsistent with the Regulation or the Convention, although it had been submitted that the reasoning in \textit{West Tankers} should apply to countries which were parties to any convention.\textsuperscript{117} Thus, it seems, the courts are prepared to preserve the use

\textsuperscript{111} See P Mitchard, “Anti-suit Relief – An Imperfect World” [2007] \textit{Global Arbitration Review} 33, 34; Kesseler and Hope, supra n 95, 333.

\textsuperscript{112} Kesseler and Hope, \textit{ibid}, 334; Illmer and Aumann, supra n 19, 158.

\textsuperscript{113} See \textit{Youell and Others v La Reunion Aerienne and Others} [2009] 1 Lloyd’s Rep 586. In this case an appeal of French insurers against a judgment in which the judge had applied the Regulation although the contract in question contained a – contested – Paris arbitration clause and arbitral proceedings had been brought there, was dismissed. See especially para 34: “The remedy for the party which claims that the proceedings are brought in breach of the arbitration agreement is to seek a stay under the Arbitration Act 1996, section 9.”

\textsuperscript{114} See \textit{ibid}, paras 31, 33, 34.

\textsuperscript{115} See \textit{ibid}, paras 41, 36, where the court also decided that the fact that it was the mirror claim of what the defendant pursued by arbitration in France in disregard of the claimant’s allegations that he had not agreed to it could not change this outcome. See also para 40: “The English market is not guilty of a distortion simply because it does not rely on an arbitration agreement, the existence of which it also denies.”

\textsuperscript{116} See \textit{ibid}, para 40

\textsuperscript{117} See Roger Shashoua, Rodemadan Holdings Limited, Stancroft Trust Limited v Mukesh Sharma [2009] EWHC 957, esp para 35. In this case an anti-suit injunction had been sought against proceedings brought in India.
of anti-suit injunctions where possible. This position is confirmed by a recent High Court decision in *Skype Technologies v Joltid Ltd.*\(^{118}\)

In *DHL v Finmatica* the court held that, as the ECJ had approved that determining the existence of an arbitration agreement in cases where jurisdiction under the Regulation is contested must be considered an incidental question within its scope, arguing this case otherwise would be difficult.\(^{119}\) Regarding public policy, the court noted how the ECJ’s ruling reflects Article 35 JR and how “this may have implications for the court’s approach to the review of a decision of the court of a Member State on the applicability of an arbitration agreement”.\(^{120}\) In combination with Articles 36 and 45(2) JR, the court saw little scope for examining the Italian court’s application of its own law.\(^{121}\) But, Tomlinson J also mentioned that a court might in principle consider to what extent it is permitted to examine the substance of the conclusions of another Member State court regarding its own jurisdiction.\(^{122}\)

The most interesting case in terms of legal reasoning is *National Navigation Co v Endesa.*\(^{123}\) In this case, a Spanish court held that arbitration clauses had not been incorporated into a charter for the transport of coal and that N had waived its right to arbitrate by bringing English proceedings.\(^{124}\) N then alternatively applied to the English court for a declaration that the clauses had been validly incorporated, as well as for an anti-suit injunction.

The court held that it only had jurisdiction to hear the claim for declaration regarding the incorporation of the arbitration clauses. Concerning the

\(^{118}\) *Skype Technologies v Joltid Ltd & others* [2009] EWHC 2783. This decision shows the willingness to grant anti-suit injunctions in cases where an exclusive jurisdiction clause has been breached by bringing court proceedings in the US.

\(^{119}\) See *DHL GBS (UK) Ltd v Fallimento Finmatica SpA* [2009] 1 Lloyd’s Rep 430, para 20. In this case DHL appealed an order from an English court for an Italian judgment to be registered in England, alleging that it was outside the scope of the Regulation because it had been obtained in breach of an arbitration agreement, alternatively because registration was contrary to public policy.

\(^{120}\) *Ibid*, n 119, para 21.

\(^{121}\) *Ibid*, para 22. See also *ibid*, para 23: “Moreover I see no reason why, at any rate in the first instance, the court should need to reach its own conclusion on matters of Italian law . . . relating to the question whether the Bankruptcy Receiver was bound by the arbitration agreement contained in the contract on which he sued. . . . In my judgment this question can be addressed firstly on the assumption that the Italian court was correct in its conclusions. . . . If the point arises, the court can consider whether the ambit of English public policy on these matters is or is not informed by the court’s conclusion as to the correctness or otherwise of the Italian court’s application of Italian law.”

\(^{122}\) *Ibid*, para 23.

\(^{123}\) See *National Navigation*, supra n 86. In this case the Spanish defendant had suffered a loss during the transport of coal by the claimant, an English shipowner. Both relevant charters contained a London arbitration clause and proceedings were brought by both parties in Spain and in England. E brought court proceedings against N in Spain. On the same day, N sought a declaration of non-liability before the Commercial Court. N challenged the jurisdiction in the Spanish proceedings. E challenged vice versa. Later, N also brought arbitration proceedings in London.

\(^{124}\) The judgment was appealed and later stayed pending on the English court’s decision on its jurisdiction.
other claims, none of the relevant charters submitted disputes to the jurisdiction of the English courts and, following *West Tankers*, Article 5(1) JR could not be applied because the claims fell within the arbitration exception. The court held that an English court was not required to recognise the judgment of the Spanish court as binding because the English declaratory proceedings were outside the scope of the Regulation and, alternatively, it would be manifestly contrary to public policy.

The appeal against this decision has been allowed and the arbitration proceedings have been dismissed. The Spanish judgment has to be recognised under Article 33 JR and can give rise to an issue estoppel as much in arbitration proceedings excluded from the Regulation as in any other proceedings in an English court. The decision on whether an arbitration clause was incorporated into a contract is in most instances closely tied up with the merits of a contractual dispute and not separable. Finally, giving effect to a judgment which has failed to give effect to an arbitration agreement does not amount to a manifest breach of a fundamental principle of English law and thus would not be against public policy.

3. Alternative Remedies for Protecting Party Autonomy

Even without anti-suit injunctions, the party which intends to stick to the agreement has several tactical options left. These can and should already be prepared during the drafting stage of the contract.

(a) Trust the Foreign Court

The first option is to object to the jurisdiction of the court in the abusive proceedings and trust the court to decline it. The risk that the dispute is not referred to arbitration is minimised by the obligation under Article II(3) New York Convention. Moreover, bringing arbitration proceedings remains possible anyway.

Some argue that objecting may be even less costly and more certain than applying for an anti-suit injunction. However, and this should be stressed by

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126 *Hdb* paras 91 et seq.
128 *Hdb* para 59.
129 *Hdb* paras 46, 81, 93, 100.
130 *Hdb* paras 63, 125, 131.
131 Hereinafter referred to as: “the party”.
132 See *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd’s Rep 663, where declaratory and injunctive proceedings brought in England were stayed until German courts, which had been first seised, had determined their own jurisdiction, although there was evidence that the proceedings in Germany were brought for frustrating purposes.
133 See Illner and Aumann, *supra* n 19, 150; Kesseler and Hope, *supra* n 93, 334.
any advising lawyer, engaging the opponent in the abusive proceedings is vital and always necessary. Otherwise it might be held that the party waived his right from the arbitration agreement according to the principle of *venire contra factum proprium*, which would preclude all alternative remedies.134

Thus, seen as the party must engage in court proceedings anyway, he is best advised to influence these.

(b) Take Part in the Race

The ECJ’s interpretation of the Regulation seems to encourage a race to seising a court first.135 The party should therefore take part in the race and assure himself of a good tactical position.136 If the conduct of the other party leads to suspicion that he is considering breaching the arbitration agreement and bringing court proceedings, the party should bring court proceedings first, eg seeking a declaration. Thereby, he can ensure the choice of a forum with a fast civil procedure for deciding whether its courts have jurisdiction or Article II(3) New York Convention applies or, even better, a forum with a special preliminary procedure.137 In addition, how the existence of the agreement will be judged may be more predictable in some fora.

It is necessary, however, to make sure that the chosen court has jurisdiction under the Regulation and that by bringing the action the party does not waive his right to arbitration.138 The claim, as such, is not a renouncement.139

This strategy can be prepared when negotiating the contract. A notification requirement for potential actions, backed up by liquidated damages clauses in case of breach, will make sure that the party has enough time to be the first in the race.140

Two remarks are necessary: (i) the notification requirement must not apply to a party who has already received a notification, because otherwise any tactical advantage vanishes; (ii) the party has to consider whether the contract contains clauses which stop him bringing court actions, in order to avoid breaching the contract himself. However, such tactical backup positions *per se* may discour-

134 See Mankowski, supra n 61, 25; Briggs and Rees, supra n 75, 497, n 74.
135 See also Magnus and Mankowski, supra n 50, Introduction to Arts 27–30 JR, para 18.
137 See Arts 1466 and 1456 Code de Procedure Civile; § 1032(2) Zivilprozessordnung. See generally for both parties’ interest in a preliminary decision: Steinbrück, supra n 19, 370.
138 This was an issue in *National Navigation*, supra n 86.
139 See Byford and Sarwar, supra n 136, 31.
140 Ibid. They also propose a provision asserting that only one party might issue proceedings. This seems incompatible with the significance of judicial protection as promoted by the ECJ in *West Tankers*. 
age the other party from employing delaying tactics and in any case provide essential evidence.\footnote{141}

The author is aware that lawyers in their everyday business do not devote as much energy to dispute resolution clauses as to the substantive contract clauses. However, the consequences that may arise in cases where arbitration is an issue show that a little more attention to the drafting of the clauses may be a good way to minimise the risk of subsequent problems.\footnote{142}

In this context, it might be helpful, \textit{de lege ferenda}, if more national legal systems enacted a fast preliminary procedure in order to impede frustrating tactics.\footnote{143} Likewise, a protocol for the uniform interpretation of the Convention is a thoughtful proposal,\footnote{144} as it would foster uniformity and certainty regarding the validity of arbitration agreements.

\textbf{(c) Apply for an Anti-suit Injunction to the Arbitral Tribunal}

Alternatively, the party may apply to a tribunal for an anti-suit injunction, if it is already constituted.\footnote{145} At the contracting stage, parties should be advised to put in express provisions giving the tribunal wide powers to grant injunctions.\footnote{146} As a minimum, they need to agree to confer powers upon the tribunal, as otherwise an anti-suit injunction is probably not going to be granted due to section 48(5) Arbitration Act 1996.\footnote{147}

However, as the need for anti-suit injunctions regularly arises before the tribunal is constituted and the enforcement of the arbitral anti-suit injunction can be problematic,\footnote{148} this remedy is as yet rarely chosen.\footnote{149}

\textbf{(d) Rely on the Non-enforceability of the Foreign Judgment}

The availability of this tactical option is intertwined with the issue of resolving the above-mentioned clash between the Regulation and the Convention because this clash is usually the ground cited for non-recognition.

\footnote{141}{That is why Byford and Sarwar, supra n 136, 31 also propose to insert a special acknowledgement that the agreement has been checked legally whilst being drafted and that the parties agree that it is valid.}

\footnote{142}{For the importance of the parties’ conduct, see also infra Section D.5(b).}

\footnote{143}{See Steinbruck, supra n 19, 374.}

\footnote{144}{See van Houtte, supra n 89, 516, 517. He also proposes a procedure of preliminary decision through the ECJ.}

\footnote{145}{This remains possible, as the private tribunal is not bound by the Regulation, see Section C.2(b) supra.}

\footnote{146}{Kesseler and Hope, supra n 93, 334.}

\footnote{147}{Ibid.}

\footnote{148}{Ibid. There is no reason why a foreign court should perceive an anti-suit injunction granted by a tribunal as less an interference than one granted by another court.}

\footnote{149}{See Mitchard, supra n 112, 33. However, he also remarks \textit{ibid} that “on the other hand a party is usually ill-advised to act in breach of an order from sitting arbitrators for fear of the impact that such behaviour may have upon the tribunal’s perception of the merits of the case”.}
Judgments delivered in Member States are entitled to recognition under Chapter III of the Regulation. English case-law has adopted a broad view of the arbitration exclusion not only in relation to jurisdiction and anti-suit injunctions but also to the recognition of judgments. Indeed, The Heidberg seems to be the only case in which recognition was held to be required, even though the judgment was delivered in breach of an arbitration agreement. Generally, those judgments are considered to be outside the scope of the Regulation or their recognition contrary to public policy.

Commentators distinguish between judgments on the merits delivered on a subject-matter within the scope of the Regulation, and those in which the existence of the agreement is the subject-matter. While the latter are outside the scope of the Regulation, things become “less straightforward” where the existence of the arbitration agreement is decided merely as a preliminary issue.

Some suggest, mainly following the reasoning in Phillip Alexander v Bamberger, that a judgment rendered despite an arbitration agreement deemed valid by the recognising court should not have to be recognised, at least where rendered “in blatant disregard”. Others argue that if the main subject-matter is covered by the Regulation, its Article 35 applies and the judgment has to be recognised.

There are considerable arguments against recognition. From the beseeched court’s point of view, this would equal disregarding party autonomy and further contributing to the conflict between the Regulation and the Convention. This would run counter to recital 25 of the Regulation. Furthermore, the decision to stay court proceedings due to the Convention does not qualify as a Regulation judgment: why should it be otherwise, if the court chooses the other alternative?

Nonetheless, it seems that Ambrose is right when she says that any approach to non-recognition is “probably unworkable under the Regulation” as under its

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150 See Phillip Alexander, supra n 17; CMA CGM SA v Hyundai MIPO Dockyard Co Ltd [2009] 1 Lloyd’s Rep 213; National Navigation, supra n 86.

151 See Dicey, Morris and Collins, supra n 90, 654, 655; Ambrose, supra n 53, 9 et seq; van Haersolte-van Hof, supra n 69, 33; Kropholler, supra n 36, Art 1 JR, para 47.

152 See Dickey, Morris and Collins, supra n 90, 654, 655; Ambrose, supra n 53, 9 et seq; van Haersolte-van Hof, supra n 69, 33; Kropholler, supra n 36, Art 1 JR, para 47.

153 See Schlooser, supra n 18; Heidelberg Report, supra n 51; AG Darmon’s opinion in Rich, supra n 25, paras 31–33; van Houtte, supra n 89, 514; Ambrose, supra n 53, 14.

154 Phillip Alexander, supra n 17, para 92.

155 Ibid, para 114.

156 See Beraudo, supra n 70, 26; Briggs and Rees, supra n 75, 498, 499, 508. They claim, wrongly, that the judgment on the merits is “as such a decision on arbitration” and thus outside the Regulation.

157 See van Haersolte-van Hof, supra n 69, 37; Advocate General Léger’s opinion in Voe Uden, supra n 24, para 71, where he said that there was no room for the enforcing court to review the judgment, even where a jurisdictional error was made.

158 See Ambrose, supra n 53, 19.
wording “neither Art 71 nor public policy provide a firm foundation for refusing” recognition. 159

Whatever certainty there may have been regarding this issue, it has been, at the least, shaken by West Tankers. The decision left unclear whether a party can still rely on the non-recognition of a judgment that disregards an arbitration agreement.160 The issue has now been addressed by National Navigation Co v Endesa, where the Court of Appeal has not hesitated to reverse an “EU-unfriendly” first-instance decision, providing an admirably clear argumentation.161

(i) The Reversed Decision – Classic Arguments in a New Context

Holding that the court did not have to recognise the Spanish judgment, the court in first instance substantiated what had already been considered as an alternative in DHL v Finmatica.162 Following West Tankers, it found that the Spanish judgment was within the scope of the Regulation.163 Nonetheless, it held that Article 33(1) JR did not apply.164 Taking into account West Tankers, Gloster J examined whether the declaration could have consequences which undermine

159 Ambrose, supra n 53, 20. To rely on Art 71 JR would simply mean overstretching the application of the Convention as it contains no rules addressing disputes on recognition, see Section D.1(a) supra. The public policy argument, however, has been used in English case-law: see Philip Alexander, supra n 17; DHL, supra n 119; The Ivan Zagubanski, supra n 14; National Navigation, supra n 86.

160 Due to the rejection of the broad interpretation of the arbitration exception in the context of jurisdiction, even though recognition was not considered as an issue explicitly.

161 As it is the only one after West Tankers.

162 See supra n 119. The court addressed the issue distinguishing three sub-issues (see National Navigation, supra n 86, para 86): (1) Are the English proceedings within the scope of the Regulation? (2) Is the court therefore required to recognise the judgment pursuant to Art 33(1) of the Regulation? (3) If so, is it then entitled to refuse recognition on the grounds of public policy for the purpose of § 32 of the 1982 Act?

163 National Navigation, supra n 86, paras 88, 90.

164 Ibid, paras 92–95. Gloster J cites paras 50 and 51 from Through Transport, supra n 12: “50. A number of other questions which might arise under the Regulation were touched on in argument. In particular, there was some debate on the question whether the judgment of the District court of Kotka is entitled to recognition under article 33. However, we do not think that this question arises for decision at present. As we understand it, the judgment obtained to date is simply to the effect that that court has jurisdiction to entertain a claim by New India under the Finnish Act. That was essentially a matter for that court in proceedings which seem to us to be within the Regulation. Whether that judgment is entitled to recognition or not does not seem to us to be relevant to the question whether the judge was correct to grant the declarations or injunction which he did. 51. The fact that arbitration is excluded from the Convention means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise.” She also cites from Advocate General Darmon’s opinion in Rich, supra n 23: “88. . . . in no circumstances can the existence of another action pending before another court entail the result that application of the Convention is extended to the dispute concerned if it was not already covered by the convention by virtue of its subject-matter. . . . 90. Without doubt, the objectives of the Brussels Convention are of decisive importance for the interpretation of those provisions. But a mere reference to those objectives cannot justify neglect of the requirements of legal consistency or total disre-
the effectiveness of the Regulation. She did not think so. The declaration, in
the court’s view, was meant to comply with the English courts’ own and dis-
tinguishable obligation under the Convention to give effect to an arbitration
agreement where it decided it had to under its own law. The application of
Spanish law was not reviewed, nor was the Spanish court prevented from exer-
cising its substantive jurisdiction. Gloster J held that this did not run counter
to the principle of trust either, as the court’s jurisdiction in the present case
was outside the system created by the Regulation. Even if the Regulation had
to be applied, recognition could be refused under its Article 34. Citing Waller
J, the court held that judgments in breach of agreements should not have to
be recognised, regardless of whether they were decided as a preliminary or
a main issue. Article 35(3) JR would not apply in these cases, as the court
would not be reviewing the judgment but rather making its own disapproval of
the breach. Considering the English courts’ clear statutory and conventional
obligations under section 9 Arbitration Act 1996, section 32 Civil Jurisdiction
and Judgments Act 1982 and Article II(3) New York Convention, policy dic-
gard for the consequences which necessarily follow from the logic of the instrument but which are regarded as inconvenient.”

165 See National Navigation, supra n 86, para 97. The Spanish court at that point had already assumed jurisdiction and ruled. Thus it could not be stripped of any power (anymore), nor could there be any interference with an exclusive right to rule. This, Gloster J says, is the main difference to Toepfer v Molino Boschi Srl [1996] 1 Lloyd’s Rep 510 where court had not yet ruled. Gloster J explains: “In my view, any declaration granted by this court would not threaten or impede or otherwise obstruct any decision by the Spanish court as to its own jurisdiction. The decision of this court as to the arbitration issues would appear unlikely to have even any persuasive effect on the Spanish appeal court hearing NNC’s appeal.”

166 National Navigation, supra n 86. See also ibid, para 102: “Paragraph 33 of the ECJ’s judgment does not undermine this conclusion. The obligation in article II(3) is imposed upon each [italics added] contracting state which ‘is seized of an action in a matter in respect of an arbitration agreement. . . . There can, in my judgment, be no assumption, in circumstances where different member states have their separate and respective obligations under the New York Convention, that one member state will be in a position to accept, or should, on grounds of comity, accept, the decision of the court of another member state, as to the incorporation or validity of an arbitration clause, in circumstances where the latter may well have applied its own law to the question.”

167 Ibid, para 102.

168 Ibid, drawing on Advocate General Darmon’s view in Rich, supra n 23, paras 76, 77: “Harmonisation of the solutions adopted by national courts does not constitute an aim in itself, at the expense of the specific features of the area concerned. . . . Necessarily, where one set of proceedings is outside the Regulation, there will always be a risk of conflicting judgments in different member states.” For the same reason issues of comity did not arise.

169 See Phillip Alexander, supra n 17, (obiter) paras 111–14.

170 Ibid.

171 Civil Jurisdiction and Judgments Act 1982. S 32 reads as follows:

“[1] Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
tates to give effect to an agreement whenever it is held valid by that court, which Gloster J did.

It is noticeable, how many of the classic arguments that have already been mentioned earlier now return in the context of recognition.

(ii) Reversal by the Court of Appeal

The Court of Appeal disagreed with that reasoning. Interestingly, Waller J himself was involved in that decision. He appreciates as “seductive” the respondent’s argument that judgments are severable and that the question as to the effect of a judgment on a preliminary ruling was not before the ECJ. This would allow the reasoning in *West Tankers* to be disregarded for matters of recognition and constitute a way to solve the lack of reciprocity following from that reasoning. However, the court found the argument irreconcilable with the decisions in *Rich* and *West Tankers*. A court’s judgment on a preliminary issue cannot be viewed in isolation from the principal subject-matter of the proceedings for the purpose of recognition and enforcement. The Spanish court determined whether an arbitration agreement existed merely as a step on the way to determining the substantive dispute.

Gloster J was not right in holding that, because the arbitration proceedings fell outside the regulation, a regulation judgment would not be binding in those proceedings. In matters of recognition, primacy has to be given to the nature of the proceedings in which the judgment was given rather than to the one

(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).

(4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of

(a) a judgment which is required to be recognised or enforced there under the 1968 Convention or the Lugano Convention or the Regulation.”

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172 See *National Navigation*, supra n 86, para 102. The argumentation of Briggs and Rees, supra n 75, 498, where they draw a parallel to *Hoffmann v Krieg* seems similar. For a different view, see Rauscher, supra n 36, Art 1 JKR, para 31c.

173 Especially the “outside the scope”-argument, see supra Section B.2.

174 See *National Navigation (CA)*, supra n 127, para 46.

175 The lack of reciprocity is referred to *ibid*, para 41.

176 *ibid* para 104.

177 *ibid* Thus, the court concludes that proceedings can be treated as relating to two or more different subject matters and the consequent judgment as falling partly within and partly outside the scope of the Regulation only in cases where they embrace more than one principal subject matter, so that the determination of one is not a step on the way to the determination of another and cannot therefore be classed as a preliminary issue.
of the subsequent proceedings, in which a party seeks to rely on it.\(^{178}\) There is nothing in Chapter III of the Regulation to indicate that recognition depends on the nature of the proceedings currently before the court. Recognition as such is not defined, but means no more than conferring on the judgment the same authority as would be accorded to it in the Member State in which it was given.\(^{179}\) Also, the notion that a court may be obliged to recognise a foreign judgment in one set of proceedings, but not in another, would be anomalous.\(^{180}\) Section 32(4) Arbitration Act 1996 leads to a binding nature of the foreign decision.\(^{181}\) In the same way it would be anomalous if the principal issue is such that the proceedings are to be treated as falling within the Regulation, whereas a judgment given in those proceedings would not be, as the question of recognition is in the background of any decision.\(^{182}\)

Gloster J was wrong to rely on the reasoning used in *Through Transport* (in its paragraphs 50 and 51), as the question of *res judicata* did not arise on any issue for decision in that case.\(^{183}\) In the eyes of the court, *CMA v Hyundai* cannot offer any support either. Whether or not a court is acting under section 32 Arbitration Act 1996 cannot make any difference to the question as to whether an English court is bound by a Regulation judgment.\(^{184}\) Thus, even if the arbitrators in this case were entitled to disregard the Spanish judgment, courts cannot properly do so.\(^{185}\) Moreover, it seems that the Court of Appeal takes the view that tribunals too have to recognise foreign court judgments.\(^{186}\)

\(^{178}\) See *National Navigation* (CA), *supra* n 127, para 107.

\(^{179}\) *Ibid*, referring to *Hoffmann v Krieg* (C-145/86) [1988] ECR 645. See also *ibid*, para 123.

\(^{180}\) See *National Navigation* (CA), *supra* n 127, para 108.

\(^{181}\) See *ibid*, paras 53, 69: “It does not follow that the ECJ would encourage inconsistent decisions and where the court dealing with the case on the merits has ruled ‘no arbitration clause’ before an English court is asked to consider that question, the ECJ would be likely to encourage the notion that another member state should be bound by that decision. Section 32(4) simply leads to that result.”

\(^{182}\) See *ibid*, para 93.

\(^{183}\) See *National Navigation* (CA), *supra* n 127, paras 51, 121. See *Through Transport*, *supra* n 12, para 50 “Whether that judgment is entitled to recognition or not does not seem to us to be relevant.” See also *ibid*, para 51: “[I]t is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise.”

\(^{184}\) See *ibid*, paras 56, 119.

\(^{185}\) See *ibid*, para 118. Furthermore, it seems to Waller J that the judge’s conclusion in *CMA*, *supra* n 150, is contrary to the judgment of the ECJ in *West Tankers*, see *ibid*, para 57.

\(^{186}\) See *ibid*, para 118: “It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound by the Regulations themselves to recognise judgments of the courts of Member States of the EU, but it does not follow that foreign judgments, whether of the courts of Member States or other countries, can be disregarded in arbitration proceedings. A judgment of a foreign court which is regarded under English of conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law. It follows, therefore, that arbitrators applying English law are bound to give effect to that rule.”
Regarding public policy, the court noted that Phillip Alexander v Bamberger was decided in a different context and in a pre-West Tankers era.\(^{187}\) Where a party is entitled to challenge the incorporation of a clause in proceedings which lead to a judgment that has be to recognised under the Regulation, there is no room for the argument that a fundamental principle in terms of Krombach v Bamberski is infringed by the recognition of the judgment.\(^{188}\)

The obligation under the Convention to give effect to arbitration agreements does not require the English courts not to be bound by a decision of a court of a fellow Member State and co-signatory of the Convention that there was no arbitration clause.\(^{189}\)

(iii) Critique

The Court of Appeal’s decision has to be welcomed. It resolves uncertainties regarding questions of recognition in an EC-friendly way in the same way West Tankers has settled the debate over the scope of the arbitration exception as “the latest step in a consistent line of authority”.\(^{190}\) And it does so rightfully.

What follows from the fact that the English proceedings are outside the scope of the Regulation is simply that the English judgment is not recognisable under it. Thus, the only remaining reason why Article 33 JR should not apply is that recognition is not formally sought. Moreover, Article 33 JR does not distinguish between proceedings when it imposes recognition. On the contrary. The fact that Article 33 (2) JR specifies cases where the recognition is a principal issue allows the argument e contrario that the obligation in Article 33(1) JR exists in every proceeding, declaratory proceedings included. The principle of trust, as seen supra,\(^{191}\) applies as long as the decision to be recognised is within the scope of the Regulation. There is no room for “scope-based” argumentation. And – to use the Court of Appeal’s words – it would be anomalous to protect proceedings from interferences before the ruling only to allow the same result through non-recognition. The interesting question is whether, conversely, this is applicable to the arbitral anti-suit injunction.\(^{192}\)

The scope of this article does not allow exploration of this issue. However, the latest ruling of the Court of Appeal suggests that the arbitral anti-suit injunction may very well be the next in line to fall. In principle, due to its

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\(^{187}\) See National Navigation (CA), supra n 127, para 61.

\(^{188}\) See ibid, paras 63, 125, 130, 131. See especially para 131: “The failure on the part of the Spanish court in good faith to give effect to an arbitration agreement which in the eyes of English law has been sufficiently incorporated by reference does not involve a manifest breach of a rule of law regarded as essential.” Dieter Krombach v Andre Bamberski (Case C-7/98) [2001] ILPr 36 seems to be the only relevant authority for that matter.

\(^{189}\) See National Navigation (CA), supra n 127, , para 69.

\(^{190}\) See ibid, paras 84, 99.

\(^{191}\) See Section C.2(a) supra.

\(^{192}\) See n 186 supra. This could also have implications for what has been proposed as a remedy under Section D.3(a) supra.
Kompetenz-Kompetenz, a tribunal is entitled to rule on its own jurisdiction independently from what a national court in another Member State may have ruled. The Regulation is not applicable and will remain inapplicable even if it is amended as proposed and arbitration will be included.\textsuperscript{193} As we have just seen, non-recognition of the foreign ruling by the courts is no longer an option to resolve clashes. In addition, there is a dictum in the Court of Appeal’s decision suggesting that even a tribunal (though being outside the scope of the Regulation) may have to recognise foreign proceedings.\textsuperscript{194} In such a case it would also be anomalous to allow granting of arbitral anti-suit injunctions even though this is deemed to be bound to give effect to the judgments of foreign courts under English Law, even where they disregard arbitration agreements.

However, there is no need to curtail the principle of Kompetenz-Kompetenz in such a way. The concern adressed by West Tankers – judicial protection – \textit{a priori} can only be and is warranted through national courts. A tribunal may decide to take its own view as long as, in principle, there is a chance to address the issue in front of a national court as well. The need to guarantee both judicial protection and the Kompetenz-Kompetenz of arbitral tribunals as one of the pillars of the independent arbitration process necessarily leads to the risk of conflicting decisions that has already been mentioned. Nevertheless, none of these principles should be given up. The need to preserve both principles and the fact that this leads to two parallel “uncontrollable” lines of decision-making (by a court on the one hand and a tribunal on the other) in this author’s view makes it to a certain extent obvious that the solution for avoiding clashes can only lie in aligning the two lines of decision-making. Where there is just a small chance that the two decision-makers will apply different criteria when assessing the validity of an arbitration agreement, the risk in guaranteeing both judicial protection and Kompetenz-Kompetenz vanishes. This is exactly what has been proposed.\textsuperscript{195}

Of course, concerning arbitral anti-suit injunctions, the aforementioned reservations concerning the use of anti-suit injunctions remain valid.

Regarding the public policy argument, it may be argued that where a clash between the Regulation and the Convention is tolerated as an, undesired, consequence, it must be tolerated \textit{a maiore ad minus} that a national court follows its own obligation under the Convention to give effect to arbitration. However, the clash in this context is precisely based on the assumption that both award and judgment are enforceable.

In addition, the requirement of “manifest” reasons for refusal under Article 34(1) JR,\textsuperscript{196} has to be construed narrowly, due to the wide nature of the policy

\textsuperscript{193} See infra n 252.

\textsuperscript{194} See supra n 186.

\textsuperscript{195} See infra Section D.4.

\textsuperscript{196} To the contrary – Gloster J hesitates twice, see National Navigation, supra n 86, paras 97, 101.
exception, as it has been by the Court of Appeal. Furthermore, Article 35 (1) JR carries a strong argument e contrario against non-recognition.

It seems that the German approach is to recognise judgments delivered in other Member States as binding, except for in exceptional and narrow circumstances. The very general, obligation of a court under the Convention is not likely to qualify as such.

(e) Bringing Proceedings for Damages in the Forum at the Seat of Arbitration

Finally, the party could sue the other party for damages before the courts at the seat of arbitration. English case-law suggests that basically damages are available where an agreement not to use certain courts is breached. The scope of this article does not allow exploration of these claims for damages in depth, though they are covered by commentators.

Primarily relevant for the issue discussed here is the question: are damages available after West Tankers? For some, such damage claims are not compatible with the Regulation per se, as they merely replace one litigation with another and run counter to the obligation to recognise a judgment delivered in another

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201 See Magnus and Mankowski, supra n 50, Art 34 JR, para 12; van Haersolte-van Hof, supra n 69, 37. See also Krombach, supra n 188; Régie Nationale Des Usines Renault Sa v Maxicar SpA and Orazio Formento (Case C-38/98) [2000] ECDR 415. This is also why Art 35(3) JR, which expressly concerns the public policy argument, impedes reviewing the foreign courts decision on its jurisdiction, even where it is wrong; see Briggs and Rees, supra n 75, 499; Magnus and Mankowski, supra n 30, Art 33 JR, paras 9, 10; Rauscher, supra n 36, Art 1 JR, para 31a. See also Heidelberg Report, supra n 51, paras 543, 544: "According to the case law of the ECJ, mutual recognition implies that the grounds for non-recognition, especially the public policy exception of Article 34(1) JR, must be construed narrowly. This case law is now supported by the wording of Article 34(1) JR where the adverb ‘manifestly’ was introduced to qualify the contradiction between the free movement of judgments and public policy."

202 See Magnus and Mankowski, supra n 50, Art 35 JR, para 48.

203 See Oberlandesgericht Celle, supra n 86; Bundesgerichtshof [2001] ILPr 425; Mankowski, supra n 61, 32.


The main issue seems to be how to assess the amount of damages. See Gross, supra n 103, 25; Ambrose, supra n 75, 414, 415; D Tan and N Yeo, “Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?” [2003] Lloyd’s Maritime and Commercial Law Quarterly 435, 438; Schmidt, supra n 18, 497. Mainly regarding the breach of jurisdiction clauses it is controversially discussed which law is applicable. Proposing a contractual classification, see Tan and Yeo, ibid, 437; Briggs and Rees, supra n 75, 430, n 415. For a tortious nature of the claim see: HT Chee, “Damages for Breach of English Jurisdiction Clauses: More than Meets the Eye” [2004] Lloyd’s Maritime and Commercial Law Quarterly 46, 56 et seq; Mankowski, supra n 61, 28 proposes further: the lex causae of the main contract, the lex fori prorogati and the lex fori in general.
Member State.\textsuperscript{202} For others, they are permissible and not a question of non-recognition or reviewing another court’s performance, because they focus on the party’s wrongful conduct.\textsuperscript{203}

The principle of non-revision is significant. The close connection and identical aims of damages and anti-suit injunctions as remedies suggest that the ECJ’s disapproval of the latter might be sustained for the same reasons regarding damage claims.\textsuperscript{204} However, the Report states that \textit{Turner} does not seem to directly exclude the possibility of enforcing damages or related collateral remedies and that the issue needs to be further explored.\textsuperscript{205}

An interference with a power to rule in terms of \textit{West Tankers} is not possible, as the other court will already have ruled. Also, the view that awarding damages does not constitute a review of jurisdiction seems preferable. When ruling on damages, the court merely compares two situations: the actual, indeed recognising the other court’s decision,\textsuperscript{206} and the hypothetical, where no court proceedings were brought that could be reviewed.\textsuperscript{207}

The subject-matter before the court is to determine whether the arbitration agreement has been breached. The other court’s incidental decision on the existence of the agreement as a preliminary issue in order to determine its jurisdiction would be merely considered as a consequence of a possible breach. Similarly, so would the eventual decision of that court to decide on the merits of the, different, subject-matter.\textsuperscript{208}

\textsuperscript{202} See Mankowski, \textit{supra} n 61, 29, 30; Steinbrück, \textit{supra} n 19, 373; Illner and Aumann, \textit{supra} n 19, 158; L Merrett, “The Enforcement of Jurisdiction Agreements within the Brussels Regime” (2006) 55 International and Comparative Law Quarterly 315, 334, 335; Dutta and Heinze, \textit{supra} n 19, 461; P Schlosser, “Materiell-rechtliche Wirkungen von (nationalen und internationalen) Gerichtsstandsvereinbarungen?” [Substantive Effects of (National and International) Jurisdiction Agreements?]”, \textit{Facetten des Verfahrensrechts – Liber Amicorum F Lindacher} (Köln, Berlin, München, Carl Heymanns Verlag, 2007), 111, 120. See also, to a certain extent, Tan and Yeo, \textit{supra} 201, 441.

\textsuperscript{203} See Ambrose, \textit{supra} n 75, 414, 416; seemingly, Peel, \textit{supra} n 47, 368; Dicey, Morris and Collins, \textit{supra} n 90, 546; A Briggs, “Anti-suit Injunctions and Utopian Ideals” [2004] \textit{Law Quarterly Review} 529, 532; Geimer, \textit{supra} n 19, 381, para 1122. Indecisive: Briggs and Rees, \textit{supra} n 75, 451: “It is equally hard to see that . . . awarding damages . . . to reverse the findings of a foreign court . . . could be correct. . . . But in the end a contract is a contract. . . .”

\textsuperscript{204} See Mankowski, \textit{supra} n 61, 30. See also \textit{CMA}, \textit{supra} n 150, para 40: “I conclude that this is no more of a circumvention of the Judgments Regulation than would be an injunction to restrain the continuation of proceedings in a foreign court by injunction prior to its reaching a judgment.”

\textsuperscript{205} See Heidelberg Report, \textit{supra} n 51, para 462, concerning jurisdiction agreements. Briggs and Rees, \textit{supra} n 75, 451, n 424, reach the same conclusion regarding the applicability of \textit{Turner}.

\textsuperscript{206} Thus, the damage claim is based on the foreign judgment’s recognition and enforcement: see Briggs, \textit{supra} n 203, 532.

\textsuperscript{207} See \textit{CMA}, \textit{supra} n 150, para 39.

\textsuperscript{208} Taking \textit{West Tankers} as an example, one subject-matter would be the damages resulting from the collision with the jetty, the other subject-matter would be damages from an eventual breach of the agreement. See also Mankowski, \textit{supra} n 61, 31, where he says that the two claims are on different levels.
The real problem is of an eventual issue preclusion. If the English court is precluded from judging the existence differently to the foreign court, there may be no agreement that can be breached. Supposing there is no preclusion, another problem arises: damages are secondary obligations. The primary right they would derive from – the right not to be sued elsewhere – has been denied by the ECJ. In other words: “Who says B must also say A.” Due to the fact that there is no injunctive relief available, awarding damages also may run counter to the rationale underpinning the inhibition of anti-suit injunctions through the ECJ.

Finding a solution to these problems is challenging, as all positions that can be taken have plausible arguments on their side.

The first problem concerns the scope of issue preclusion. The judgment needs to be recognised – but to what extent? The scope is estimated differently by commentators. English case-law on the issue is ambiguous. However, denying preclusion – though cautiously – seems the more sensible approach. It is true that the foreign judgment must be treated as if it were an English judgment, but even some issue preclusion should apply only to what has been

209 The terms collateral estoppel or res iudicata are used interchangeably to issue preclusion. Res iudicata, though, concerns the complete relitigation of the same cause of action, whereas issue preclusion concerns the relitigation of controversial issues that were decided in another judgment: see Briggs and Rees, supra n 75, 563, 564. However, the same principles apply to both, see ibid, 574. See, for the principles in general: The Sennar (No 2) [1985] 1 WLR 490; Carl Zeiss Stiftung Appellants v Rayner & Keeler Ltd. and Others Respondents (Original Appeal) Rayner & Keeler Ltd and Others Appellants v Courts and Others Respondents (Cross-Appeal) [1966] 3 WLR 125.

210 The ECJ held that it must be possible to object in front of a national court to the other party’s allegation of a right not to be sued. This is only possible where proceedings can be brought in that court. Consequently, a procedural right not to be sued does not exist.

211 Mankowksi, supra n 61, 30.

212 See ibid. See also Geimer, supra n 19, 381, para 1122 for a different view, though before West Tankers.

213 Pro issue estoppel is Merrett, supra n 202, 336. Contra issue estoppel and denying a “direct conflict” is Mankowksi, supra n 61, 31. Also contra is Rauscher, supra n 36, Art 2 JR, para 204. Without conclusion: Briggs and Rees, supra n 75, 451, who says it “is impossible to predict”. See also, more generally, ibid, 569 et seq.

214 See The Sennar (No 2), supra n 209. See also Evans LJ in Desert Sun Loan Corporation v Hill [1996] ILPr 406, paras 38, 40: “Whilst, therefore, Lord Brandon’s formulation is wide enough to embrace a foreign court’s decision on a purely procedural issue. I do not read his judgment as extending that far. . . .” I would be prepared to hold that an issue estopped could arise from an interlocutory judgment of a foreign court on a procedural i.e. non-substantive issue.” On the other hand, see LJ Staughton in A/s D/s Svendborg and Another v Wansa (Trading AS Melbourne Enterprises) Estonian Shipping Co Ltd v Wansa (Trading AS D & M Impex) [1997] 2 Lloyd’s Rep 183, 188: “But that episode was part of the Maersk Line’s protest against the jurisdiction. I do not see that such a protest can be treated as a submission to the jurisdiction of the foreign Court to decide the issue of jurisdiction. (At one time English law took the contrary view on that point, but see now Dicey & Morris, The Conflict of Laws (London, Sweet and Maxwell, 12th edn), 480.)”

215 See Merrett, supra n 202, 334, n 53.
decided substantively by the court. This is also the approach taken in § 322(1) Zivilprozeßordnung. The preliminary and incidental decision on the existence of the agreement is a prerequisite for the foreign court’s ruling, but it is not intended to have substantive influence on the decision on the subject-matter.

The foreign court does not determine substantive rights and obligations of the parties. Articles 32 and 33 JR do not prescribe that the whole reasoning in the judgment is automatically binding. Caution in applying issue preclusion is especially acute where it is the defendant in the foreign proceedings who tries to reopen the issue.

This approach does not run counter to Articles 28 or 35(3) JR either. The latter impedes reviewing the determination of jurisdiction in a specific judgment. But, as has been seen, the foreign judgment is not reviewed. E contrario, the fact that Article 35(3) JR needs to establish a separate obligation not to review the jurisdiction allows the interpretation that Article 33(1) JR does not cover the resolution of jurisdictional issues. Article 28 JR merely establishes an obligation to stay proceedings. As the foreign court’s judgment is a prerequisite for assessing the amount of damages, a stay would be necessary anyway. Section 33(1) 1982 Act is also used to argue against issue preclusion in cases of objecting to a foreign jurisdiction, but without exploring the impact of section 33(2).

Nevertheless, the paradoxical outcome remains that awarding damages could mean reversing the foreign decision by deleting its effects – a “non-recognition through recognition”. Also, the fact that a victorious claimant in one Member State might possibly be judged to have breached an agreement through that very victory does not exactly support legal certainty.

216 See The Sennar (No 2), supra n 209, 499. See, accordingly, P Rogerson, “Issue Estoppel and Abuse of Process in Foreign Judgments” [1998] Civil Justice Quarterly 91, 94. The determination of what exactly has been decided substantively has to occur according the law of the forum where the decision has been made: see Mankowski, supra n 61, 31.

217 German Procedural Code. In Germany, issue preclusion generally can apply only to what has been decided substantively (materielle Rechtskraft). Decisions concerning jurisdiction, especially where made incidental to the decision on the subject-matter, are not a part of it: see Mankowski, supra n 61, 31.

218 See also Briggs and Rees, supra n 75, 575: “The court may have recited those considerations on which the judgment was formally based, but without intending them to have the status of decisions on the particular points.” See further Schlosser, supra n 202, 123. He says that issue preclusion can only apply where the foreign judgment is aimed at encompassing a claim for damages due to a breach of the arbitration agreement, which is almost never the case.

219 For the consequences, see Magnus and Mankowski, supra n 50, Art 33 JR, para 4.

220 See Mankowski, supra n 61, 31.

221 See ibid. See also Rogerson, supra n 210, 97.

222 See Briggs and Rees, supra n 75, 575.

223 See Pfeiffer, supra n 20, 82. See also Briggs and Rees, supra n 75, 451; Merrett, supra n 202, 334.

224 See Pfeiffer, supra n 20, 82. See also Steinbrück, supra n 19, 369: “A party initiating state court proceedings abroad is not breaking a contract for tactical purposes but merely invoking a legally available jurisdiction under the Regulation.”
However, it can be argued that awarding damages, instead of reversing the foreign judgment, ties in with and balances the overall effects. The strongest point remains that the foreign judgment simply is not concerned with damages for breaching the arbitration agreement.225 Another way to minimise the paradoxical outcome is to limit the amount of available damages to what would have been available before the foreign court.226 Overall, it may be recommendable that the party relies exclusively on the protection that the foreign forum provides from abusive proceedings.227

Turning to the second problem, what the ECJ decided needs to be considered very carefully. It denied a procedurally enforceable right not to be sued.228 The ECJ was not concerned with private rights,229 it only assured the availability of judicial protection and the mutual trust between courts to correctly decide their jurisdiction according to the Regulation.

Once judicial protection is assured, and thus a procedural protection of party autonomy denied, there is no reason why it should not be possible to decide on a substantive protection through damages in another forum with jurisdiction over that subject-matter.

The sanctity of bargains can be protected only where a consensus indeed exists.230 This consensus, however, can be established differently, according to the law applicable in different fora. And there is no reason why it should not be protected where it is found to exist, provided the court is allowed to decide. In this context, only the subject-matter is relevant.231 Thus, judging the existence of an arbitration agreement when faced with the question whether there is jurisdiction to decide a delictual claim is separable from considering it when faced with the decision of whether that agreement has been breached. The underlying problem is that arbitration agreements may be considered valid in one Member State and not in another.

This, indeed, means that from time to time there are likely to be differing decisions.232 However, there seems to be no reason why the effectiveness of the Regulation could be impaired in the same way by a substantive protection of party autonomy as it was by the procedural protection.

Bearing in mind that the Regulation, according to its recital 14, also protects private autonomy, the opportunity should be taken to enforce private bargains

225 For the same reason the foreign court’s cost-decision is not reversed through awarding damages: see Mankowski, supra n 61, 32 and Schlosser, supra n 202, 122, 123.
226 Mankowski, supra n 61, 31
227 Dutta and Heinze, supra n 19, 458.
228 Mankowski, supra n 61, 30, recognises that the ECJ denied the primary obligation “in its procedural dress”.
229 Merrett, supra n 202, 332.
230 See West Tankers (AG’s opinion), supra n 38.
231 According to Rich, supra n 23 and West Tankers above.
232 See supra n 168.
on the substantive level. Where the parties are protected from a public law perspective, the ECJ may show sensibility towards commercial needs.

However, this is a field where future clarification is needed. The Court of Appeal has provided useful and correct guidance for the question of recognition that may also have an influence in this context. If public policy does not require valid arbitration agreements to be enforced, the same considerations may, in principle, be applied to enforcing connected damages. The ECJ's view on how detachable secondary claims are from the primary obligation under the Regulation may also contribute to solving the issue.

Parties may also agree on damages contractually through indemnity and/or liquidated damages clauses. The determination in advance of the amount of damages eliminates all problems connected with the assessment of the damage and makes it easier to bring a claim. For some, these clauses also are impermissible following the ratio underlying West Tankers.

Under German law, the best solution would be to insert penalty clauses as they are not secondary rights but separate primary contractual obligations, similar to guarantees, which have broader aims than damages. But, under common law, such penalty clauses are not enforceable. However, indemnity clauses are primary obligations too. Their aims are different from those of damages clauses. The only difference from guarantees is that guarantees merely establish an ancillary obligation. Thus, it seems less arguable that indemnity clauses can be “infected” as well.

4. The Future of the Framework: News from Heidelberg?

Different ideas have been proposed as to how to prevent the risk of irreconcilable decisions following from parallel proceedings in courts and tribunals by amending the Regulation.

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233 See also, regarding this connection, Briggs and Rees, supra n 75, 451.
234 Byford and Sarwar, supra n 136, 30.
235 Mankowski, supra n 61, 33. He states very briefly that the agreements are “infected” by the fact that a right not to be sued is denied by the ECJ, as the aims of both obligations are the same. He says that the problem is not the means used to secure but the object that is secured.
236 Ibid. 34.
237 See Alfred McAlpine Capital Projects Ltd v Tilebox Ltd [2005] EWHC 281 (TCC); Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79.
238 Some of the proposals are: to eliminate the arbitration exception (see West Tankers (AG’s opinion), supra n 38, para 73; van Houtte, supra n 90, 518); to insert an exclusive jurisdiction for ancillary and declaratory court proceedings (van Houtte, ibid, 518); to insert a true arbitration exception under which arbitrators could decide whether they have jurisdiction (van Houtte, ibid, 519); to add a new ground to Art 33 JR for refusing recognition where irreconcilable with an award (van Houtte, ibid, 520; Ambrose, supra n 53, 26); to insert a provision that expressly allows to pursue secondary rights independently from the primary right (Mankowski, supra n 61, 35).
The Report was published to deal, inter alia, with the practical problems arising in interfaces between the Regulation and international arbitration. After considering the above-mentioned proposals, the Report confirms the prevalence of the Convention and concludes that it is not appropriate to make far-reaching amendments to the Regulation. It seems to suggest an exception from the obligation to stay for the designated court. This would be in line with the rule under Articles 5 and 6 of the Hague Convention.

In detail, it is proposed to delete Article 1(2)(d) JR, to insert a provision on supportive proceedings into Article 22(6) JR, and to add a new Article 27A JR as well as a new recital concerning the place of arbitration. The Report does not follow proposals to insert a true arbitration exception or a new ground for non-recognition. The importance of the principle of free movement of judicial decisions in the European Union and the wide acceptance of the recognition and enforcement of judgments rendered in disregard of arbitration agreements are stressed.

239 See Heidelberg Report, supra n 51, esp para 205. These interfaces are: the enforcement of an arbitration agreement, ancillary measures, recognition of declaratory judgements on the validity of an arbitration clause, enforcement and conflicts between arbitral awards and judgements. 240 Ibid, paras 131, 864. The Report recognises that most Member States are critical towards an extension of the Regulation to arbitration. Nevertheless it is possible “to address the interfaces between arbitration and the Judgment Regulation in a positive, comprehensive way” (para 205). 241 Ibid, para 889: “It appears appropriate to release the court designated in an exclusive choice-of-forum agreement from its obligation to stay proceedings under Article 27 JR and to tolerate parallel proceedings if the risk of conflicting decisions on jurisdiction can be minimised. One possibility to reduce this risk is to introduce an additional mode to conclude an exclusive choice-of-forum agreement by way of a short and clearcut standard form. Any derogation from Article 27 JR in this revision of the Judgments Regulation could then be restricted to agreements concluded under this standard form. This modification appears more appropriate than any of the following two alternatives.” 242 See The Hague Convention on Choice of Court Agreements, adopted by The Hague Conference on Private international Law on 30 June 2005. Courts which are seised although they are not the ones appointed by the jurisdiction agreement must decline their jurisdiction even if they are seised first. 243 See Heidelberg Report, supra n 51, para 131. 244 Ibid, para 132. The proposed text reads: “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.” 245 Ibid, para 134. The proposed text reads: “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 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.” 246 Ibid, para 136. The proposed text reads: “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.” 247 See ibid, para 126, where the “several flaws” of this proposal are discussed. 248 Ibid, paras 128, 129: “Acceptance in case law and legal doctrine”. See especially para 129: “However, the more principal question is whether an arbitral award can be assimilated to a
In fact, the Report proposes reducing grounds for non-recognition, as judicial review is not in line with the general principle of trust.249 Deleting the exception would bring declaratory judgments and ancillary court proceedings under the scope of the Regulation. The relationship between the Regulation and the Convention would be governed by Article 71 JR, thus reducing the danger of conflicting decisions and enforcing the position of the party relying on an agreement in cases where a court confirms its existence.250 In order to discourage frustrating litigation, it is proposed to require court proceedings to be stayed once declaratory relief is sought in the country of the place of arbitration in due time, as well as standard forms for arbitration agreements.251 However, arbitration proceedings would still not be classified as court proceedings, nor arbitral awards as judgments.252 The Regulation would cover only court proceedings concerning arbitration. Thus, arbitral anti-suit injunctions would remain possible.

The Report’s suggestions were included in the European Commission’s Green Paper.253 It basically proposes every possible solution together with its drawbacks.254 However, it follows the Report in considering a deletion of the judgment of a civil court. This question relates to the basic concept of the free movement of judgments in the European Judicial Area which is built on the mutual trust in the court systems of the Member States. The assimilation of arbitral awards to judicial decisions would entail that the same mutual trust existed in relation to arbitration. While there is no doubt that the European Community and all Member States recognise the utility and the judicial quality of arbitration . . . there is equally no doubt that . . . a residual judicial control of the procedural fairness of the award (as contemplated by Article V of the New York Convention) is still necessary.255

249 See Heidelberg Report, supra n 51, para 560.

250 Ibid, para 122.

251 The Heidelberg Report states that “the proposition, however, presupposes that a device could be developed for the purpose of discouraging obstructing or frustrating litigation” (para 123). The proposed text for the standard form – in the context of jurisdiction agreements – reads: “[Party 1] and [Party 2] agree that the courts of [Member State] have exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any dispute or disputes which may arise out of or in connection with the [Agreement], including, without limitation, a dispute or disputes regarding existence, validity, termination, authority to conclude the agreement, or the consequences of nullity” (paras 450, 451).

252 Ibid, para 122.


254 Ibid. It is proposed, on p 5: (1) to release the second-seised court from its obligation to stay, (2) to reverse the priority rule insofar as exclusive choice of court agreements are concerned, (3) to establish a direct communication and cooperation between the two courts, combined with a deadline for the court first seised to decide on the question of jurisdiction; (4) to grant damages; (5) to exclude the application of the lis pendens rule in situations where the parallel proceedings are proceedings on the merits on the one hand and proceedings for (negative) declaratory relief on the other hand. The drawbacks are: (1) the risk of irreconcilable judgments; (2) the fact that if the agreement is invalid, a party must seek first to establish the invalidity before the
arbitration exclusion as beneficial.\cite{255} It is proposed to grant an exclusive jurisdiction to the courts of the seat of arbitration for proceedings in support of arbitration, to allow the recognition of judgments on the validity of an arbitration agreement and to give priority to the courts of the Member State where the arbitration takes place to decide on the existence of an arbitration agreement, possibly combined with time limits for the party which contests its validity.\cite{256} A uniform conflict rule concerning the validity of the agreement is considered to reduce the risk of varying decisions between Member States.\cite{257} Contrary to the Report, it is noted that the Convention might benefit from an additional ground for non-recognition due to a conflicting award.\cite{258}

5. Reactions to the Proposed Changes\cite{259}

Considering the complex nature of the issue, the multiplicity of reactions to the proposed changes is not surprising. The scope of this article does not allow them all to be explored in depth, though a few comments seem mandatory.

(a) Reactions

\textit{Prima facie} it seems, especially considering the reactions from arbitration institutions and international law firms, that the propositions in the Green Paper are viewed as being too far-reaching and detrimental to international commercial arbitration.

Recurring criticisms are: (i) the limited number of actual problems caused by the arbitration exception does not justify the fundamental structural change

\begin{itemize}
  \item court designated in the agreement before being able to seise the otherwise competent courts;
  \item the fact that a claimant may lose a legitimate forum for reasons outside his/her control.
\end{itemize}

\cite{256} Ibid the exclusive jurisdiction could possibly be subject to an agreement between the parties. If this approach is followed, uniform criteria should permit to determine the place of arbitration. The Green Paper follows the Heidelberg Report, supra n 51, para 125, where it is proposed that the Regulation should be supplemented by some kind of guideline for a determination of the seat of arbitration before adding a new head of exclusive jurisdiction for ancillary proceedings, as sometimes the place of arbitration is not determined in the arbitration agreement and there is no uniform definition of the seat in the Member States. The goal is to give arbitration agreements the fullest possible effect.
\cite{257} Ibid.
\cite{258} Ibid an alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness.

\cite{259} Reactions to the Commission’s Green Paper were due in June 2009 and are published on the Commission’s website: http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm. According to the general theme of this article, the focus hereinafter remains on German and English reactions. For a particularly interesting view, focusing on the Italian perspective, see C Consolo, “Arbitration and EC Law – An Italian Reaction in the Heidelberg Colloquium” (2009) International Arbitration Law Review 49.
which the deletion of the exception would constitute;\textsuperscript{260} (ii) a deletion of the exception would cause systematic contradictions with other conventions;\textsuperscript{261} (iii) The default rule for a uniform determination of the seat of arbitration would benefit the then-defendant (in breach of the agreement); \textsuperscript{262} (iv) the Regulation is not the appropriate place to regulate conflict of law issues regarding the existence of the arbitration agreement; \textsuperscript{263} (v) the new system does not take into account the international nature of arbitration; \textsuperscript{264} (vi) the proposed exclusive jurisdiction in support of arbitration is unclear and should be limited; \textsuperscript{265} (vii) the new priority rule in Article 27A JR disregards the principle of Kompetenz-Kompetenz.\textsuperscript{266}

Moreover, the biggest issue remains that an obligation to recognise and enforce judgments dealing with the existence of arbitration agreements which are rendered under the Regulation would prevent an assessment of the existence of the agreement where a judgment on the merits or a judgment annulling an award has to be recognised. This, in turn, might lead to conflicts for the

\textsuperscript{260} See Reaction of the International Bar Association – Arbitration Committee; Reaction of the French Arbitration Committee; Reaction of the Association of International Arbitration; Reaction of Lovells. See, for a differing view, Reaction of the Max-Planck-Institut for PIL, which stresses the new situation caused by \textit{West Tankers}.

\textsuperscript{261} Such as the Lugano Convention and Rome II or even the the UNCITRAL Model Law French, which is technically not a convention. See eg Reaction of the International Bar Association – Arbitration Committee.

\textsuperscript{262} A related consequence is the loss of the neutrality which characterises the arbitration process, see eg Reaction of Allen Overy; Reaction of the International Bar Association – Arbitration Committee. Another problem arises where no party to the arbitration agreement is from a Member State, see Reaction of Allen Overy.

\textsuperscript{263} Although such a rule seems to be welcomed: see Reaction of Allen Overy. Generally, the Convention is proposed as an appropriate place for such a rule: see Reaction of the International Bar Association – Arbitration Committee; Reaction from Professors Magnus and Mankowski.

\textsuperscript{264} It is proposed that exclusive jurisdiction should not apply to evidential and provisional matters: see Reaction of the International Bar Association – Arbitration Committee; Reaction from Professors Magnus and Mankowski. It is also perceived to be unclear whether the Regulation would apply only to ancillary and not to parallel measures: see Reaction of Allen Overy.

\textsuperscript{265} Due to the strictly regional consideration of arbitration in the Green Paper of the Commission: see Reaction of the International Bar Association – Arbitration Committee.

\textsuperscript{266} See Reaction of Allen Overy, especially paras 116–18. See also A Pullen, “The Future of International Arbitration in Europe: West Tankers and the EU Green Paper" [2009] \textit{International Arbitration Law Review} 56, where he complains that the Commission’s proposals focus entirely on the role of the court and neglect the role of the tribunal. It is also proposed that Art 27A JR “should be amended so as to make clear that the stay is to be issued even where the parallel court proceedings are aimed at obtaining a decision on the prima facie existence, validity or scope of the arbitration agreement, or where the decision on the existence, validity or scope of the arbitration agreement is to be made in the first instance by the arbitral tribunal itself. Such a formulation differs from the Heidelberg Report’s proposal in that it covers all court and arbitral tribunals’ decisions permitting the arbitration to proceed.” See Reaction of the International Bar Association – Arbitration Committee. Also, if priority were given to the courts of the seat of the arbitration to decide the validity and scope of the arbitration agreement, the relevant provision should apply also where the decision on the validity of the arbitration agreement is to be made in the first instance by the arbitral tribunal itself, see \textit{idem}.
recognising courts with the – paramount267 – obligation under the Convention to refer disputes to arbitration where the arbitration agreement is deemed valid. The fear is that automatic recognition would result in jurisdictions less favourable to arbitration dictating the lowest common denominator utilised in Europe in determining whether an arbitration agreement is enforceable or not.268

It is not surprising that the proposition to include further grounds for refusal of recognition of judgments resulting from proceedings brought in breach of an arbitration agreements is widely approved.269

(b) A Different Point of View

Although all the above-mentioned reactions stress valuable and critical points, this article would like to assume a differing viewpoint: it should be recalled that the overall goal is to reach a mechanism to enforce party autonomy and discourage tactical litigation which also, and maybe foremost, allows the free movement of decisions, legal certainty and judicial protection throughout the internal market. The importance of the last aspect, which was one of the basic reasons for the West Tankers decision, is also mirrored in the reactions.270

Thus, in the context of balancing party autonomy with other concerns, it seems just that where parties want to see their autonomous choices enforced they can be expected to do their bit when negotiating and drafting their contracts – even to the extent of what in Germany is known as the concept of Obliegenheit.271 The key to the new system proposed by the Green Paper is the responsible choice of the parties: how can “arbitration-unfriendly” courts influ-

267 See Heidelberg Report, supra n 51, para 116, where it recognises the “prevalence of the New York Convention”. See Green Paper, supra n 253: “The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action.”

268 See Reaction of the French Arbitration Committee.

269 See Reaction of the International Bar Association – Arbitration Committee; Reaction of the House of Lords; Reaction of Professors Magnus and Mankowski. The Reaction of Allen Overy proposes following wording: “A judgment shall not be recognised . . . (5) if it disregards an arbitration agreement, unless in the Member State where recognition is sought the arbitration agreement would be regarded as null and void, . . . or the subject matter of the dispute is not capable of settlement by arbitration; (6) if it is reconcilable with an arbitral award binding on the same parties, provided that the award meets the conditions for recognition in the Member State in which recognition of the judgment is sought.”

270 See Reaction of Professors Magnus and Mankowski, who remind that “the mere defence that parties have allegedly agreed upon arbitrating should not amount to depriving a court properly seized of its jurisdiction over the main subject matter.”

271 Obliegenheiten are requirements to act in a certain way which are more in the party’s own interest than an obligation in the strict sense of the word. They cannot be enforced but non-compliance results in the preclusion of certain rights. Usually, they exist within contractual obligations, but there are also procedural Obliegenheiten, eg under § 138 Zivilprozessordnung. See also AG Léger’s opinion in Gasser at para 82, where he reminds firms “of their own responsibilities . . . to conclude jurisdiction agreements which, precisely, leave no doubt as to their validity and scope”.

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ence the enforcement of the arbitration process where parties unambiguously choose their arbitration seat in an “arbitration-friendly” Member State, where courts are known generally to refer disputes to arbitration? What has been alleged in reaction to *West Tankers* regarding parties who prefer to choose arbitration seats where anti-suit injunctions are available must be true in this context too. Only the remedy has changed from injunctive to declaratory relief. It is true that a party facing a possible torpedo cannot simply continue with arbitration – it must obtain a “protective judgment”. However, under the proposed regime the “friendly” courts, chosen indirectly through the seat of arbitration, will avail themselves of an exclusive jurisdictional head as well as priority to decide on the existence of the agreement, and their judgments will have to be recognised in the “unfriendly” Member States.272 Thus, the more likely result seems to be a rise in the level to which arbitration will be enforced in Europe. A clear choice of the seat of arbitration would furthermore reduce the problems connected with its uniform determination.273

This new priority-based relief system, which is indeed supported by the House of Lords in its reaction,274 is an invitation to the parties and their legal advisers. But, in the end, it is only the parties’ clear choice that will allow the new system to work.

Most importantly, the *Kompetenz-Kompetenz* of the arbitral tribunal remains untouched. The chosen tribunals can decide in parallel to the declaratory proceedings, *inter alia* on their jurisdiction. This is the only systematically and (teleo-) logically sound interpretation of the “partial deletion” the Green Paper proposes – which aims “to strengthen the effectiveness of arbitration agreements at Community level in so far as such arbitral agreements come to be considered before

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272 See also Reaction of the Max-Planck Institute for PIL: “If the courts at the place of arbitration were to determine the issue exclusively (once seised for declaratory relief) and if this court’s decision was to be recognized by the courts of the other Member States under the Regulation’s scheme of recognition, . . . the torpedo scenario would be addressed very practically.” See also Reaction of the Law Society of England and Wales.

273 See Reaction of Professors Magnus and Mankowski: “The Heidelberg Report makes a convincing proposal how to accomplish the necessary definition by adding a new Recital. Difficulties in this regard will be over come eventually.”

274 See Reaction of the House of Lords: “The present blanket exclusion of arbitration from the scope of the Regulation does not provide the best solution. We believe that the idea of giving exclusive jurisdiction to the courts of the Member State of the seat of the proposed arbitration to determine issues relating to the existence (including validity), scope and applicability of an arbitration agreement is a promising one.” Others see the benefits, but also some practical problems: see Reaction of Clifford Chance; Reaction of the German Ministry of Justice (Bundesjustizministerium), where it is said that “at the most one could follow the proposal to add an exclusive jurisdictional head in favour of the courts at the seat of arbitration to Art 22. . . . It is questionable whether an additional reversal of the *lis pendens* rule in Art 27 would be helpful.” (“Es könnte allenfalls an den Vorschlag gedacht werden, den Katalog des Artikels 22 der Brüssel I Verordnung zu erweitern und eine ausschließlich Zuständigkeit der Gerichte des Mitgliedstaats, in dem das Schiedsverfahren stattfindet, zu schaffen. . . . Inwieweit darüber hinaus ergänzend eine Umkehrung des Prioritätsprinzips des Artikels 27 Absatz 1 der Verordnung gewinnbringend wäre, ist fraglich.”)
This interpretation merely restates what already is European case-law. It is also in line with the paramount position of the Convention, which was restated in the Report and in the travaux préparatoires. Thus, courts do not decide on jurisdiction instead of tribunals; they decide instead of other courts that have been seised in breach of an arbitration agreement. It is important to stress that “providing for declaratory relief does not force the party adhering to the arbitration agreement into state court litigation any more than a torpedo action would do”.

It is indeed perceived that “torpedoing” might have become more attractive after West Tankers. The result is that the existence of the arbitration agreement may be judged in parallel by two bodies, with possible implications at the enforcement stage. However, under the new system the monopolisation in terms of exclusivity and priority of the declaratory decision on the existence of the arbitration agreement together with the obligation to recognise this decision minimises the risk that the jurisdiction may be judged differently than by the tribunal. This, in turn, minimises enforcement risks for the award. Thus, where a torpedo action is imminent, the proposed defensive mechanism can be used effectively. However, its deterrent effect may already be sufficient and there may be no need to seize a national court. Therefore, it is not true that the Commission is trying to replace the system of recognising awards by a system of recognising judgments. It tries to establish an optional system to enforce private choices which has two distinctive features: (i) a priority-based protective relief available in cases of torpedoing; (ii) minimising conflicting decisions – and thereby enforcing arbitration – through allowing parallel proceedings before national courts in a monopolised way. In terms of enforcement, the formal criterion as to which kind of body rendered the decision is operable and certain.

In order to make the defensive mechanism work, it is necessary to open up the arbitration exclusion, thereby guaranteeing that the prioritised decision will have to be recognised in the other, eventually “unfriendly”, Member States.

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276 See especially Rich and West Tankers.
277 See Reaction of the Max-Planck Institute for PIL. It stresses the numerous advantages of declaratory relief and the fact that the “proposed Art 27A . . . merely provides for an exclusive jurisdiction if the national law chooses to grant such power and provides for the binding force of a declaratory judgment. . . . This solution respects different systems and peculiarities of the national arbitration laws.” For a differing view, see Pullen, supra n 266, 59.
278 See above and Reaction of the Max-Planck Institute for PIL.
279 See Reaction of the Association of International Arbitration.
280 See Reaction of Professors Magnus and Mankowski: “In general, the line between the Regulation and the New York Convention should be a rather simple yet convincing one: Decisions by State courts and their recognition and enforcement fall under the Regulation whereas arbitration awards and their recognition and enforcement under the New York Convention.”
281 See Reaction of the Max-Planck Institute for PIL. It proposes a five-year plan for practical implementation, which seems very feasible.
This differentiation not only could, but should, be mirrored in the wording of the exception, in order to reinforce the systematical and teleological arguments with a literal one. In addition, any consideration of the agreement before the courts must give due respect to the principle of Kompetenz-Kompetenz.

(c) Remaining Issues

Nevertheless, the new system will leave a number of problems unsolved. Firstly, it might allow “torpedoing” at the enforcement stage of the award. Secondly, a connected problem is that the “protective system” may lead to two-step proceedings, both at the stage of decision-seeking and enforcement. Thirdly, it remains unclear how to handle cases where the seat of arbitration is not in a Member State or where both parties are from outside the European Community. Fourthly, it needs to be carefully considered whether additional grounds of refusal should be inserted. This might lead to exactly those uncertainties, which the deletion of the exception tries to eliminate in the first place.

Lastly, the risk of clashes with the recognising court’s obligation under the Convention needs to be assessed. Interestingly, the ECJ used this obligation as an argument for its decision. Indeed, the Convention does not only confer an obligation to refer, but also a right not to refer. The last right is safeguarded by the Regulation. Maybe Article 33(1) JR can provide an additional argument. Recognition under the Regulation is automatic. Thus, the recognising court does not consider anything, ie the existence of the agreement, substantially and therefore there is no obligation that can be violated. Of course, this means that the European Community appears as a single party to the Convention. This may be critical as this party’s position may vary according to whether national courts have been seised for declaratory proceedings and where the

282 See Reaction of Professors Magnus and Mankowski, where they propose: “arbitration agreements, measures by arbitration tribunals and the recognition and enforcement of arbitral awards”.

283 See Reaction of the International Bar Association – Arbitration Committee, where it is suggested to make a distinction according to where enforcement of the award is being sought: if it is sought at the seat of arbitration, the priority rule applies, if it is sought in another Member State, the courts in that place should be released from their obligation to stay under Art 27 JR. It is also submitted that “the inclusion in the Regulation of a provision inspired by Article IX of the Geneva Convention could be studied. For example, there could be an exception to the general rules applicable to the recognition of judgments such that a judgment rendered in a Member State on the validity of the award benefits from the Regulation only if (i) it has been rendered at the seat of the arbitration and (ii), in case of annulment of the award, the annulment decision was made on one of the grounds set out in Article V-1(a) to (d) of the New York Convention.”

284 See Reaction of Allen Overy.

285 See Section C.1, n 41 supra.

286 See Reaction of the Association of International Arbitration: “What the Green Paper aims at, is to treat the whole territory of the European Union as if it were one territory with respect to the Convention.”
seat of arbitration is. However, there are difficulties in applying Article 71 JR and “it seems well advisable to look closely at the scope of Art 71 JR and to reduce it as far as possible”.\textsuperscript{287} Thus, the risk of clashes in this context should not be overstated.

**E. Conclusion**

The ECJ’s decision in *West Tankers* still makes sense. The protection of the judicial right to access national courts makes it necessary that even proceedings outside the scope of the Regulation may not impede other proceedings that are within the scope and that the arbitration exception is interpreted narrowly. It is not always just the defendant who needs protection.\textsuperscript{288}

Although so far it has only replaced one risk of conflicting decisions with another one, there is a good chance that the current risk constitutes simply an interphase.\textsuperscript{289} Eliminating the anti-suit injunction in Europe has been the first step to a certain and coherent system of free movement of judgments. The next step is the partial elimination of the arbitration exception. Both the Report and the Green Paper show the efforts taken to achieve the goal of reducing the risk of conflicting decisions. Declarative proceedings will have an exclusive jurisdictional head in the state of the seat of arbitration, and the judgments on the existence of the agreement will be within the scope of the Regulation and thus will have to be recognised. Once this has happened, tactical litigation will be senseless.\textsuperscript{290} The (relative) *Kompetenz-Kompetenz* of tribunals will remain untouched as well as the paramount position of the Convention. The positive effect of arbitration will be maximised through a system of parallel litigation which gives effect to party autonomy and the free movement of decisions – provided that parties choose responsibly.

The bitter taste of the possible loss of confidentiality remains. However, it would be equally lost where a party applies for an anti-suit injunction to a national court.

In the meantime, the anti-suit injunction as a protective means for party autonomy can be substituted through equipollent remedies. The issue as to if, and to what extent, damages are permissible under the Regulation needs to be

\textsuperscript{287} See Heidelberg Report, supra n 51, para 145.\textsuperscript{288} See A Briggs, *Agreements on Jurisdiction and Choice of Law* (New York, Oxford University Press, 2008), 351, where he reminds that any approach which makes the assumption that there is a valid jurisdiction agreement is controversial, as “freedom to make an agreement is also freedom not to make an agreement”.\textsuperscript{289} In this interphase, good legal advice on how to draft contracts, how to proceed tactically and how to amend old clauses becomes prominently important.\textsuperscript{290} Supported by the notification provisions inserted by the parties to assure that they can be first in the race: see Section D.3(b) supra.
clarified. This is the chance to show sensibility regarding the sanctity of bargains and commercial needs.

Contractual provisions cannot prevent parties from bringing court actions, but they may have deterrent value and provide additional clear evidence. They hasten proceedings and thereby may reduce the risk of a party becoming insolvent after exhausting his resources during court proceedings. One year after the decision, there are still no signs of danger for London as an arbitration centre.

Dealing with legal traditions always requires sensibility. In the same way that the Common Law has lost the anti-suit injunction in Europe, French law cannot uphold its “Fincantieri”-rule. Thus, to consider and respect national procedural systems, which work perfectly when observed in isolation from the Regulation, is of utmost importance. This needs to be contemplated during the decision how far changes to the Regulation need to go, as well as to what extent national procedures will have to (or even can) be changed in order to implement the new rules. However, “the Regulation is one of the most successful pieces of EC legislation”. It should be cultivated and its fundamental principles should be promoted. Sometimes it is necessary to give up national traditions in the compromise for a greater good. The advantages of the free internal market are well worth it.

291 Indeed, where a foreign court decides that the arbitration agreement does not exist, all included supporting provisions will be void: see Byford and Sarwar, supra n 136, 31
293 See Heidelberg Report, supra n 51, para 1.
294 See Heinze and Dutta, supra n 10, 437, where they recall that in another context it has been the German position which has been “dismantled”. 