

ARBITRATION EXCEPTION IN THE REGULATION BRUSSELS I

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Abstrakt v rodném jazyce

Tento příspěvek je věnován problematice vyloučení rozhodčího řízení z nařízení Brusel I. Článek 1 odst. 2 pís. d) nařízení Brusel I, který vylučuje rozhodčí řízení z působnosti nařízení, byl od vzniku Bruselské úmluvy předmětem debaty mezi právními teoretiky i praktiky. I přesto zůstala řada otázek nezodpovězena. V roce 2007 byla publikována *Zpráva o aplikaci nařízení Brusel I*, která potvrdila problémy týkající se vyloučení rozhodčího řízení a navrhuje změny nařízení v tomto smyslu. Tento příspěvek se věnuje především problematickým otázkám souvisejícím s vyloučením rozhodčího řízení.

Klíčová slova v rodném jazyce

Nařízení Brusel I, rozhodčí řízení, článek 1 odst. 2 pís. d), případ Marc Rich, případ Van Uden, řízení o platnosti rozhodčí smlouvy, rozsudek vydaný bez ohledu na rozhodčí smlouvu, anti-suit injunctions, případ Front Comor, Zpráva o aplikaci nařízení Brusel I.

Abstract

This article deals with the arbitration exception in the Regulation Brussels I. The arbitration exception contained in the Article 1(2)(d) has been subject of an intensive debate among legal scholars and practitioners since the Brussels Convention came into force. Even though certain amount of questions have stayed unresolved. In September 2007 *Report on the Application of Regulation Brussels I* was published. This Report confirms the existing problems relating to the arbitration exception and suggests the possible solution. This article aims to analyze the problematic questions concerning the arbitration exception.

Key words

Brussels I Reagulation, arbitration, Article 1(2)(d), Marc Rich case, Van Uden Case, proceedings on the validity of an arbitration agreement, judgement rendered in disregard of an arbitration agreement, anti-suit injunctions, Front Comor case, Report on the Application of Regulation Brussels I.

1. INTRODUCTION

The arbitration exception contained in the Article 1(2)(d) of the Brussels I Regulation¹ („the Regulation“) has been subject of an intensive debate among legal scholars and practitioners since the Brussels Convention² came into force. Even though certain amount of questions have stayed unresolved. In September 2007 *Report on the Application of Regulation Brussels I*, known as Heidelberg Report („the Report“)³ was published. This Report confirms the

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

² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ No L 299, 31.12.1972

³ Hess, B., Pfeiffer, T., Schlosser, P.: Report on the Application of Regulation Brussels I in the Member States, Heidelberg: Ruprecht-Karls-Universität Heidelberg, 2007, available from http://ec.europa.eu/civiljustice/news/whatsnew_en.htm.

existing problems relating to the arbitration exception and suggests the possible solution vesting in the deletion of the arbitration exception. On 4th September 2008 the Opinion of Advocate General to the case *C-185/07 – Allianz SpA and Others v West Tankers Inc. (Front Comor)*⁴ was disclosed. Advocate General Kokott proposed that anti-suit injunctions are not allowed within the regime of the Regulation. Next year, the European Commission will implement the improvements to the Regulation and it will be very interesting to see the fate of the Article 1(2)(d). This article aims to analyze the problematic questions concerning the arbitration exception with the focus on the Report and the Opinion.

2. WHY IS ARBITRATION EXCLUDED FROM THE REGULATION?

To conclude why arbitration is excluded from the Regulation it is necessary to go back to the time when Brussels Convention came into existence. Article 220 (293) of the Treaty establishing the European Community („TEC“) envisaged the simplification of recognition and enforcement of both judgments and arbitral awards. Brussels Convention created between Member States on the basis of this Article on one side made a step further as it introduced uniform rule of international jurisdiction as well. On the other side, arbitration was excluded from its scope.

The Jenard Report⁵ states two reasons for excluding the arbitration - the existence of many international agreements on arbitration and the preparation of a European Convention providing the uniform law on arbitration and its Protocol on recognition and enforcement of arbitral awards. The Jenard Report further quotes that the Brussels convention does not apply to the recognition and enforcement of arbitral awards, to the jurisdiction of courts in respect of litigation relating to the arbitration (for example proceedings to set aside an arbitral award) and to the recognition of judgments given in such proceedings.⁶

The preparation of the abovementioned European Convention by the Council of Europe was unsuccessful as only Austria and Belgium signed it. At the first sight the reason for the arbitration exception disappeared. However, in 1978 when Great Britain, Ireland and Denmark acceded to the Brussels Convention the exception was retained.⁷ The Schlosser Report⁸ introduces two basic divergent positions of the Member States. One of them expresses the opinion that the arbitration exception covers all disputes which the parties agreed to be settled by arbitration including any secondary disputes connected with arbitration. The other position only regards proceedings before national courts as part of arbitration if they refer to arbitration proceedings. Regardless of these positions the text of the Brussels Convention was not changed. The Schlosser Report states as a main reason that almost all Member States are Contracting Parties of the 1958 United Nations Convention on

⁴ Opinion of Advocate General Kokott, Case C-185/07 – Allianz SpA (formerly Riunione Adriatica Di Sicurtà SpA) and Others v West Tankers Inc, 4.9.2008

⁵ Jenard, P.: Report on the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ No C 59, 5.3.1979

⁶ Jenard, P.: Report on the on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ No C 59, 5.3.1979, Chapter III, Part IV., Section D.

⁷ Van Houtte, H.: Why not include arbitration in the Brussels Jurisdiction Regulation, *Arbitration International*, Vol. 21, No. 4, p. 510

⁸ Schlosser, P.: Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and to the Protocol of its interpretation by the Court of Justice, OJ No C 59, 5.3.1979

the recognition and enforcement of foreign arbitral awards („New York Convention“). According to the Schlosser Report the Brussels Convention does not cover court proceedings which are ancillary to arbitration proceedings such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on question of substance. A judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings is not covered the Brussels Convention. Nor the Brussels Convention regulates proceedings and decisions concerning applications for the revocation, amendments, recognition and enforcement of arbitral awards. The arbitration exception also applies to court decisions incorporating arbitral awards.⁹

During the preparation of the Regulation the arbitration exception was not specifically discussed in the preparatory reports and was retained even in the Regulation. Because of this we can presume that the intention was to follow the same scope of the exception as in the Brussels Convention.¹⁰

3. THE MARC RICH CASE AND THE VAN UDEN CASE

The European Court of Justice („ECJ“) has given two important decisions concerning the scope of the arbitration exception but they are in some points not very clear and do not solve all problematic aspects.

3.1 THE MARC RICH CASE¹¹

3.1.1 FACTS OF THE CASE

By telex message of 23rd January 1987 Marc Rich whose registered office was in Switzerland made an offer to purchase crude oil from Impianti, the company whose registered office was in Italy. On 25th January, Impianti accepted the offer subject to certain further conditions. On 26th January, Marc Rich confirmed acceptance of these further conditions and on 28th January sent a telex message setting out the terms of the contract and including the following clause: *Construction, validity and performance of this contract shall be construed in accordance with English law. Should any dispute arise between buyer and seller the matter in dispute shall be referred to three persons in London. One to be appointed by each of the parties hereto and the third by the two so-chosen, their decision or that of any two of them shall be final and binding on both parties.*¹²

On 6th February 1988 Marc Rich received the cargo and on the same day he complained that it was seriously contaminated. On 18th February, Impianti summoned Marc Rich to appear before the Tribunale in Genoa (Italy) in an action for a declaration that it was not liable to Marc Rich. The summons was served on Marc Rich on 29th February and on 4th October he, relying on the existence of arbitration clause, lodged submissions to the effect that the Italian

⁹ Schlosser, P.: Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and to the Protocol of its interpretation by the Court of Justice, OJ No C 59, 5.3.1979, Chapter 3, Part IV, Section D, points 61 - 65

¹⁰ Ambrose, C.: Arbitration and the Free Movement of Judgements, Arbitration International, Vol. 19, No. 1, 2003, p. 6

¹¹ Case C-190/89 – March Rich & Co. AG v Società Italiana Impianti PA, 25.7.1991

¹² Case C-190/89 – March Rich & Co. AG v Società Italiana Impianti PA, 25.7.1991, points 2 - 3

court had no jurisdiction. Also on 29 February, Marc Rich commenced arbitration proceedings in London, in which Impianti refused to take part. On 20th May, Marc Rich commenced proceedings before the High Court of Justice in London for the appointment of an arbitrator. The High Court granted leave to serve an originating summons on Impianti. Impianti requested that the order granting leave to be set aside, contending that the real dispute between the parties was linked to the question of existence of the arbitration clause. It considered that such a dispute fell within the scope of the Brussels Convention and should be adjudicated in Italy.¹³

On 5th November, the High Court held that the Brussels Convention did not apply. On appeal, the Court of Appeal decided to stay proceedings and referred several questions to the ECJ for a preliminary ruling. The ECJ finally answered only the first question which sought to determine whether Article 1(2)(d) must be interpreted in such manner that the exclusion provided for therein extended to proceedings pending before a national court concerning the appointment of an arbitrator and, if so, whether that exclusion also applied where in those proceedings a preliminary issue was raised as to whether an arbitration agreement existed or was valid.¹⁴

3.1.2 CONCLUSIONS OF THE ECJ

The ECJ made following conclusions: *„By excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts. The appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration. That interpretation is not affected by the fact that the international agreements in question have not been signed by all Member States and do not cover all aspects of arbitration. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot justify application of the Convention. Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even of the existence or validity of an arbitration agreement is a preliminary issue.“*¹⁵

In the Marc Rich the ECJ made the distinction between the main issue and the preliminary issue of the proceedings. Only the main issue influences the fact that the proceedings falls within the scope of the Regulation. The relevant criterion is thus the nature of the main claim. Only the subject matter of the main claim and not the objections raised to that claim is decisive whether the proceedings fall under the arbitration exception. Appointment of arbitrators was the main issue in Marc Rich which is certainly ancillary to the conduct of the arbitration and therefore covered by the arbitration exclusion.¹⁶

¹³ Case C-190/89 – March Rich & Co. AG v Società Italiana Impianti PA, 25.7.1991, points 4 - 7

¹⁴ Case C-190/89 – March Rich & Co. AG v Società Italiana Impianti PA, 25.7.1991, points 8 - 11

¹⁵ Case C-190/89 – March Rich & Co. AG v Società Italiana Impianti PA, 25.7.1991, points 13 - 29

¹⁶ Beraudo, J.P.: The Arbitration exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements, *Journal of International Arbitration* 18(1), 2001, p. 15; Van Houtte, H.: Why not include arbitration in the Brussels Jurisdiction Regulation, *Arbitration International*, Vol. 21, No. 4, p. 513

3.2 VAN UDEN CASE¹⁷

3.2.1 FACTS OF THE CASE

This case concerned the dispute between Van Uden Maritime BV („Van Uden“) established in the Netherlands and Kommanditgesellschaft in Firma Deco Line and Another („Deco Line“) from Germany. In March 1993 Van Uden and Deco Line concluded a charter agreement, under which Van Uden undertook to make available cargo space on board vessels operated on a liner service between northern or western part of Europe and west Africa. In return, Deco Line was to pay charter hire. Van Uden instituted arbitration in the Netherlands pursuant to the agreement, on the ground that Deco Line had failed to pay certain invoices. Van Uden also applied to the President of the Rechtbank Rotterdam for interim relief on the grounds that Deco Line was not displaying the necessary diligence in the appointment of arbitrators and that non-payment of the invoices was disturbing its cash flow.¹⁸

In the court proceedings Deco-Line objected that the court had no jurisdiction. Because established in Germany, it could only be sued there. The President of the Rechtbank dismissed that objection on the ground that an interim relief sought must be considered as provisional measure according to the Article 24 of the Brussels Convention. Referring to the Code of Civil Procedure, he decided that, as court of the plaintiff's domicile, he had jurisdiction to entertain an application and concluded that the case had the requisite connection with Netherlands law. The President also took the view that his jurisdiction was not affected by the fact that the parties had arbitration clause in their contract. He therefore ordered Deco-Line to pay Van Uden certain amount of money. The second appeal against the decision was brought before the Hoge Raad der Nederlanden which requested a preliminary ruling on eight questions.¹⁹

The Hoge Raad wished to know both whether jurisdiction to hear application for interim relief could be established on the basis of Article 5 (1) and whether it could be established on the basis of Article 24. In both cases, the questions relates to the relevance of the fact that the dispute in question is subject, under the term of the contract, to arbitration.²⁰

3.2.2 CONCLUSIONS OF THE ECJ

Concerning the topic of this article, the ECJ made following conclusions: *It is accepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures. In addition, Article 24 adds rule of jurisdiction whereby a court may order provisional or protective measures even if it does not have jurisdiction as to the substance of the case. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any state that have jurisdictions as to the substance of the case. It is only Article 24 that a court may be empowered to order provisional or protective measures. Article 24 cannot be relief on to*

¹⁷ Case 391/95 – Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line, 17.11.1998

¹⁸ Case 391/95 – Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line, 17.11.1998, points 2 - 10

¹⁹ Case 391/95 – Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line, 17.11.1998, points 11 - 17

²⁰ Case 391/95 – Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line, 17.11.1998, point 18

*bring within the scope of the Convention measures relating to matters which are excluded from it. Provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights they serve to protect.*²¹

Even in Van Uden the ECJ confirmed that the decisive criterion in respect to fall within the scope of the Regulation is the subject matter lying in the heart of the proceedings.²² According to this case the Regulation applies where the provisional measure concerns the performance of the contractual obligation itself and does not concern the arbitration proceedings. The ECJ made a distinction between the ancillary and supporting proceedings which is not very precise.²³

4. SCOPE OF THE ARBITRATION EXCEPTION

4.1 CLEAR AREAS

Even though the above mentioned decisions of the ECJ have contributed to certainty about the scope of the exclusion, several questions remain unanswered. First, it is useful to give the areas which certainly fall within the scope of the arbitration exception and they are thus excluded from the scope of the Regulation. The Regulation clearly does not regulate recognition and enforcement of arbitral awards as well as court proceedings for setting aside the award and their recognition.²⁴ The Regulation also does not cover court proceedings which are ancillary to the arbitration. According to the ECJ's decision in Marc Rich, ancillary are those proceedings whose main issue or subject matter is arbitration. Among the ancillary proceedings we rank appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for the rendering award, taking of evidence by the courts, court orders for security for costs, answering some point of law raised in arbitration.²⁵

²¹ Case 391/95 – Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line, 17.11.1998, points 19 – 34

²² Lew, J.D.M., Mistelis, L.A., Kröll, S.M.: Comparative International Commercial Arbitration, Kluwer Law International, The Hague, 2003, p. 497

²³ Van Houtte, H.: Why not include arbitration in the Brussels Jurisdiction Regulation, Arbitration International, Vol. 21, No. 4, p. 515 - 516

²⁴ Jenard, P.: Report on the on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ No C 59, 5.3.1979, Chapter III, Part IV., Section D.; Schlosser, P.: Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and to the Protocol of its interpretation by the Court of Justice, OJ No C 59, 5.3.1979, Chapter 3, Part IV, Section D, point 65; Magnus, U., Mankowski, P.: Brussels I Regulation, München: European Law Publisher, 2007, p. 64; Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, Journal of International Arbitration 18(1), 2001, p. 27-28, 38

²⁵ Schlosser, P.: Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and to the Protocol of its interpretation by the Court of Justice, OJ No C 59, 5.3.1979, Chapter 3, Part IV, Section D, point 64; Magnus, U., Mankowski, P.: Brussels I Regulation, München: European Law Publisher, 2007, p. 64; Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, Journal of International Arbitration 18(1), 2001, p. 28; Lew, : p. 497

On the other hand court proceedings which are parallel to arbitration fall within the scope of the Regulation.²⁶ The problem is that it is not completely clear what is the difference between ancillary and parallel proceedings.²⁷

4.2 UNRESOLVED QUESTIONS

Concerning the scope of the arbitration exception there still remain two main problematic questions. First, it is the proceedings relating to the existence or validity of arbitration agreement. Secondly, it is the recognition and enforcement of court judgements rendered in disregard of an arbitration agreement.²⁸

Relating to the first question it is suitable to distinguish between the situation where the validity of the arbitration agreement is the main issue of the proceedings or where it only constitutes the preliminary question. The proceedings where the first possibility arises are commonly declaratory proceedings or anti-suit injunctions.²⁹ The distinction between the main and preliminary issues also reflects the decision of the ECJ in *Marc Rich*. However, sometimes it can be difficult to apply this distinction.³⁰

4.2.1 COURT PROCEEDINGS CONCERNING THE VALIDITY OF AN ARBITRATION AGREEMENT (AS A MAIN ISSUE)

As stated above the question of validity of an arbitration agreement as a main issue can arise in the declaratory proceedings or in proceedings on anti-suit injunction (see separate chapter). Taking into account the *Marc Rich* decision, if the validity is the main issue the subject matter of the case is undoubtedly arbitration and thus such proceedings fall outside the scope the Regulation. The judgement rendered in such proceedings cannot be recognised under the Regulation. This problem has to be resolved on the basis of international convention or of national law.³¹

²⁶ Case 391/95 – *Van Uden Maritime BV v Komanditgesellschaft in Firma Deco Line*, 17.11.1998

²⁷ See Van Haersolte-van Hof, J.J.: *The Arbitration Exception in the Brussels Convention: Further Comment*, *Journal of International Arbitration* 18(1), 2001, p. 28 – 31; Van Houtte, H.: *Why not include arbitration in the Brussels Jurisdiction Regulation*, *Arbitration International*, Vol. 21, No. 4, p. 516

²⁸ Magnus, U., Mankowski, P.: *Brussels I Regulation*, München: European Law Publisher, 2007, p. 64; Beraudo, J.P.: *The Arbitration exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements*, *Journal of International Arbitration* 18(1), 2001, p. 17-18; Van Haersolte-van Hof, J.J.: *The Arbitration Exception in the Brussels Convention: Further Comment*, *Journal of International Arbitration* 18(1), 2001, p. 31-38; Van Houtte, H.: *Why not include arbitration in the Brussels Jurisdiction Regulation*, *Arbitration International*, Vol. 21, No. 4, p. 514-516; Ambrose, C.: *Arbitration and the Free Movement of Judgements*, *Arbitration International*, Vol. 19, No. 1, 2003, p. 8-21

²⁹ Van Haersolte-van Hof, J.J.: *The Arbitration Exception in the Brussels Convention: Further Comment*, *Journal of International Arbitration* 18(1), 2001, p. 31

³⁰ Ambrose, C.: *Arbitration and the Free Movement of Judgements*, *Arbitration International*, Vol. 19, No. 1, 2003, p. 11

³¹ See Van Haersolte-van Hof, J.J.: *The Arbitration Exception in the Brussels Convention: Further Comment*, *Journal of International Arbitration* 18(1), 2001, p. 31-32; Ambrose, C.: *Arbitration and the Free Movement of Judgements*, *Arbitration International*, Vol. 19, No. 1, 2003, p. 13; ; Van Houtte, H.: *Why not include arbitration in the Brussels Jurisdiction Regulation*, *Arbitration International*, Vol. 21, No. 4, p. 514

4.2.2 COURT PROCEEDINGS CONCERNING THE VALIDITY OF AN ARBITRATION AGREEMENT (AS A PRELIMINARY ISSUE)

The situation is less clear where the existence or validity of an arbitration agreement is raised as a defence in proceedings whose subject matter otherwise falls within the scope of the Regulation. The Evrigenis-Kerameus Report on the accession of Greece to the Brussels Convention³² states that: „*Proceedings which are directly concerned with arbitration as the principal issue are not covered by the Convention. However the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention must be considered as falling within its scope.*“

According to the Marc Rich decision it is only the subject matter of the case which decides about the application of the Regulation. However in Marc Rich arbitration was the main issue, so the question remains about the applicability of Marc Rich conclusions to the situation where the subject matter falls within the scope of the Regulation and arbitration is the preliminary issue.

On the basis of Evrigenis-Kerameus Report and Marc Rich we can come to the conclusion that the Regulation is applicable. This conclusion is not without problem, especially in the situation when a court considers arbitration agreement invalid and renders the judgement on the merit of the case and in the meantime the respondent institute the arbitration proceeding in another Member State. If the arbitrators consider the arbitration agreement valid, they render an arbitral award which can be incompatible with the court judgement. While the judgement is enforceable under the Regulation, the award is enforceable under the New York Convention.³³ Even though the potential problems, this solution is in accordance with the objectives of the Regulation and the relevant case law.³⁴

On the other hand there are opinions that such proceedings are outside the scope of the Regulation. The distinction between preliminary and main issue is not persuasive. Moreover, the issue of jurisdiction will not play major role. The court anyway has to apply Article II(3) of the New York Convention and national law facing the arbitration defence. Jurisdiction should be thus based on national law.³⁵

4.2.3 RECOGNITION AND ENFORCEMENT OF COURT JUDGEMENT RENDERED IN DISREGARD OF AN ARBITRATION AGREEMENT

The solution of this question is closely connected with the solution of the previous one. This question arose already during the negotiations for the United Kingdom's accession to the Brussels Convention. While the UK supported the broad interpretation of the arbitration

³² OJ C 298, 24.11. 1986

³³ Van Houtte, H.: Why not include arbitration in the Brussels Jurisdiction Regulation, *Arbitration International*, Vol. 21, No. 4, p. 513-514

³⁴ Lew, J.D.M., Mistelis, L.A., Kröll, S.M.: *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, 2003, p. 502

³⁵ Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, *Journal of International Arbitration* 18(1), 2001, p. 33

exception which should thus applied to judgements rendered in disregard of arbitration agreement, other Member States were for more restrictive approach.³⁶

At present there is some consensus of the view that if the subject matter of the judgement rendered in disregard of an arbitration agreement fall within the scope of the Regulation then the judgement is also covered by the Regulation.³⁷ First it is suitable to point out that Title III of the Regulation on Recognition and Enforcement does not necessarily correspond to the Title II on Jurisdiction. A judgement falls within the regime of the Regulation if it fulfils the conditions of Article 1. The part on recognition does not take into account the jurisdictional rules contained in Part two except Sections 3, 4, and 6.³⁸ The Schlosser Report states: „*The literal meaning of the word arbitration itself implied that it cannot extend to every dispute affected by arbitration agreemen.*“.³⁹ It thus supports the view that the judgement rendered in disregard of the arbitration agreement can be recognised under the Regulation. Similar view is expressed in Evrigenis Report (see above) – the Regulation applies to recognition of a judgement which concerns the dispute within the scope of the Regulation after the decision on the validity of the arbitration agreement.⁴⁰ Neither Marc Rich case nor Van Uden Case deals directly with this question.

Several national case law also supports this view. In the *Heidelberg case* the English High Court held that *it was beyond doubt that a judgement of a Contracting State on the substance of the dispute would be recognised under the Brussels Convention even if obtained in breach of a valid arbitration agreement. The violation of an arbitration agreement is not a valid defence to recognition and enforcement.*⁴¹ Similar conclusion can be found in *PASF v Bamberger* where the court decided that a German judgement on the substance obtained in disregard of an arbitration agreement was a Convention judgement.⁴² The decision of *Oberlandesgericht Celle* also came to the same result.⁴³

The question stays if it is possible to refuse the recognition and enforcement under the Regulation on the ground that the arbitration agreement was valid. Two grounds for non-

³⁶ See Schlosser, P.: Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and to the Protocol of its interpretation by the Court of Justice, OJ No C 59, 5.3.1979, Chapter 3, Part IV, Section D, point 61; Lew, J.D.M., Mistelis, L.A., Kröll, S.M.: Comparative International Commercial Arbitration, Kluwer Law International, The Hague, 2003, p. 500

³⁷ Ambrose, C.: Arbitration and the Free Movement of Judgements, Arbitration International, Vol. 19, No. 1, 2003, p. 17

³⁸ Beraudo, J.P.: The Arbitration exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements, Journal of International Arbitration 18(1), 2001, p. 21

³⁹ Schlosser, P.: Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and to the Protocol of its interpretation by the Court of Justice, OJ No C 59, 5.3.1979, Chapter 3, Part IV, Section D, point 62

⁴⁰ Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, Journal of International Arbitration 18(1), 2001, p. 35

⁴¹ Cited according to Ambrose, C.: Arbitration and the Free Movement of Judgements, Arbitration International, Vol. 19, No. 1, 2003, p. 16

⁴² Cited according to Ambrose, C.: Arbitration and the Free Movement of Judgements, Arbitration International, Vol. 19, No. 1, 2003, p. 16

⁴³ See Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, Journal of International Arbitration 18(1), 2001, p. 36

recognition were suggested – public policy ground and article 71. In the first case the recognition can be refused if the disregard of the valid arbitration agreement is considered as contributing to violation of public policy. This possibility is probably unworkable under the Regulation for Article 34(1) mentioned only apparent breach of public policy. Moreover, according to the Article 35(3) the test of public policy may not be applied to the rules relating to jurisdiction. Even the decisions of national courts do not support such solution (see above).

Some authors suggest that the non-recognition can be based on Article 71 which gives precedence to specific conventions. According to this provision Article II(3) of the New York Convention supersedes the Regulation. If the court before which the recognition is sought does not share the view of the court of origin concerning the validity of the arbitration agreement, the only basis for refusing the recognition is the Article 71.⁴⁴ This argument is also problematic. The New York Convention provides the relevant substantive framework but it does not contain procedural rules and it certainly does not regulate the problem of recognition of court decisions.⁴⁵

We can conclude that the present text of the Regulation does not provide the ground which can be used to refuse the recognition and enforcement of a judgement rendered in disregard of an arbitration agreement.⁴⁶ On the other hand there is a strong argument which supports the opposite view and that is the Article 35 which precludes a recognizing court from reviewing the jurisdiction of a court which adjudicated the case.

4.3 ANTI-SUIT INJUNCTIONS

Anti-suit injunctions are orders typical for common law system whose purpose is to restrain proceedings pursued in another jurisdiction.⁴⁷ Civil law systems are not familiar with such kind of remedy. The English courts traditionally have asserted the right to grant the anti-suit injunction against a party which commenced proceedings in another state in breach of an exclusive jurisdiction clause or arbitration agreement. The right of the English courts is based on the idea that English courts have the power to restrain a person who is subject to their jurisdiction from commencing proceedings in a foreign court. Anti-suit injunctions are personal remedies; they are aimed at the party in breach of his obligation not at the challenge of the foreign court's jurisdiction.⁴⁸

Since the Great Britain acceded to the Brussels Convention there has been a great debate about whether the anti-suit injunctions are in accordance with the Regulation. While the ECJ

⁴⁴ Beraudo, J.P.: The Arbitration exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements, *Journal of International Arbitration* 18(1), 2001, p. 26; Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, *Journal of International Arbitration* 18(1), 2001, p. 37

⁴⁵ Van Haersolte-van Hof, J.J.: The Arbitration Exception in the Brussels Convention: Further Comment, *Journal of International Arbitration* 18(1), 2001, p. 37

⁴⁶ For the negative side of this conclusion see Ambrose, C.: Arbitration and the Free Movement of Judgements, *Arbitration International*, Vol. 19, No. 1, 2003, p. 18 - 19

⁴⁷ Ambrose, C.: Arbitration and the Free Movement of Judgements, *Arbitration International*, Vol. 19, No. 1, 2003, p. 20

⁴⁸ Seriki, H.: Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin, *Journal of International Arbitration* 23(1), 2006, p. 25

in the decision *Turner v Grovit*⁴⁹ decided that the English courts didn't have the right to grant an anti-suit injunction when a party commenced proceedings in breach of a jurisdictional clause, it has yet to rule on arbitration agreements.

Brussels Convention as well as the Regulation are silent on their relation to anti-suit injunctions. The space was therefore given to national courts and especially to the ECJ to decide this question. This issue was considered before the ECJ in *Turner v Grovit*. The ECJ held the anti-suit injunctions incompatible with the Regulation. The Regulation is based on the mutual trust between the Member States and granting the injunction undermines the foreign court's jurisdiction. This decision concerns the situation where a party to proceedings pending before a national court was restrained from commencing or continuing proceedings before the courts of another Member State.

The *Turner decision* does not cover the anti-suit injunctions concerning arbitration agreements. Since the judgement in *Turner* the English courts have continued to issue the injunctions when a party commences proceedings in a Member State in breach of an arbitration agreement governed by English law or under which the arbitration is to take place in UK. They are of the opinion that the anti-suit injunctions fall within the scope of arbitration exception.⁵⁰ The current English position on anti-suit injunctions and on the influence of the *Turner* judgement is set out in the decision *Through Transport Mutual Insurance Association (Eurasia) Ltd. v New India Assurance Co. Ltd. (The Hari Blum)*. The Court of Appeal decided that the power of the English courts to grant anti-suit injunctions in the aid of arbitration was not abolished by the *Turner* decision. The injunction fall within the arbitration exception and thus the Regulation does not apply to them.⁵¹

4.3.1 OPINION OF ADVOCATE GENERAL TO THE FRONT COMOR CASE

On 4th September the Opinion of Advocate General to the case *Allianz SpA (formerly Réunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc. (Front Comor)* was published. This is the first step towards the decision of the ECJ on the problem of the anti-suit injunctions on support of arbitration.

In August 2000 the Front Comor, a vessel owned by West Tankers and chartered to Erg Petrovi SpA, collided with a jetty owned by Erg Petrovi in Syracuse (Italy) and caused damage. The charterparty contained an arbitration clause providing for arbitration in London. Moreover, English law was applicable to the contract. Réunione Adriatica di Sicurta SpA and Generali Assicurazioni Generali („Allianz and others“) had insured Petrovi and paid compensation for the damage caused by the collision. Erg Petrovi claimed damages against West Tankers for its uninsured losses in arbitration in London. On 30th July Allianz and Others commenced proceedings against West Tankers before an Italian court to recover the amounts they had paid to Petrovi. The main question in both proceedings was the issue of liability of West Tankers. On 10th September 2004 West Tankers commenced proceedings in the High Court of the UK against Allianz and Others seeking a declaration that the dispute which was the subject-matter of the proceedings before the Italian court arose out of the

⁴⁹ Case C-159/02 – Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd. and Changepoint SA, 27.4.2004

⁵⁰ Opinion of Advocate General Kokott, Case C-185/07 – Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc, 4.9.2008;

⁵¹ Seriki, H.: Anti-Suit Injunctions and Arbitration: A Final Nail in the Coffin, *Journal of International Arbitration* 23(1), 2006, p. 25, 31 - 32

charterparty and that Allianz and Others were bound by the arbitration clause. West Tankers also applied for an injunction to restrain Allianz and Others from continuing the proceedings in Italy.⁵²

The High Court granted the applications. The House of Lords before which an appeal was brought decided to stay proceedings and referred the following question to the ECJ: „*Is it consistent with Regulation (EC) No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another member State on the ground that such proceedings are in breach of an arbitration agreement?*“⁵³

The Advocate General came to conclusion that *the Regulation precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member States because, in the opinion of the court, such proceedings are in breach of an arbitration agreement*⁵⁴. The main focus of the AG is to find out if the principles set out in the *Turner decision* are also applicable to anti-suit injunctions in support of arbitration. In *Turner* the ECJ held that the effect of anti-suit injunctions infringed the operation of the Regulation even if it was presumed that the injunctions were matter of national procedural law. According the AG it is not decisive whether the anti-suit injunction falls within the scope of the Regulation, but whether the proceedings before national law against which the injunction is directed do so. The principle of mutual trust, which was the core argument in the *Turner judgement*, does not require that both the injunction and the proceedings which should be barred are covered by the Regulation. The principle of mutual trust can also be violated by a decision of a court which does not fall within the scope of the Regulation.⁵⁵ *The national authorities of a Member State may not impair the practical effectiveness of the Community law when they exercise a competence which is not governed by Community law.*⁵⁶

The dispute at stake before the national court concerns the claim for damages. The subject matter is the claim in tort which is certainly covered by the Regulation. Only the main subject matter of the case decides about the application of the Regulation. This is in accordance with ECJ's previous case law.⁵⁷ The existence of the arbitration agreement only constitutes a preliminary issue and it cannot change the applicability of the Regulation. It is compatible with the Article II(3) of the New York Convention that a court having jurisdiction over the subject matter of the proceedings examines the issue of existence and validity of the arbitration agreement. Article II(3) requires national courts to refer the case to the arbitration if three conditions are fulfilled: the subject matter of the dispute is capable of being resolved in arbitration, the court is seized of an action in a matter in respect of which the parties made an arbitration agreement within the meaning of Article II and the court does not find that arbitration agreement is null and void, inoperative or incapable of being performed. Every

⁵² Opinion of Advocate General Kokott, Case C-185/07 – Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc, 4.9.2008 (the Opinion), points 15 - 18

⁵³ The Opinion, point 20

⁵⁴ The Opinion, point 74

⁵⁵ The Opinion, points 33 - 34

⁵⁶ The Opinion, point 35

⁵⁷ More closely see the Opinion, points 39 - 53

court seized is thus entitled to consider these three conditions. Article II(3) does not reserve this right only to arbitral body or the courts of the seat of arbitration.⁵⁸

According to the *Gasser case*⁵⁹ every court in Member States is entitled to examine its own jurisdiction which certainly includes the right to examine the validity of the arbitration agreement as a preliminary issue. Otherwise it would be possible for a party to avoid the proceedings merely by claiming that there is an arbitration agreement.⁶⁰ *A legal relationship cannot fall outside the scope of the Regulation simply because the parties have entered into an arbitration agreement. The Regulation becomes applicable if the substantive subject matter is covered by it. The preliminary issue to be addressed by the court seized is whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation.*⁶¹

In the final part of the opinion the AG deals with the view of the House of Lords that the anti-suit injunctions are required by the practical reality of arbitration proceedings and if the English courts lose the right to grant them that will mean competitive disadvantage for arbitration in Great Britain.⁶² The AG stresses that the above mentioned conclusions respect party autonomy. Proceedings before a national court occur only if the parties disagree as to validity or applicability of the arbitration agreement. In that situation it is not clear whether there is a real consensus of the parties to submit their dispute to arbitration. If a national court finds the arbitration agreement valid, it is required by the New York Convention to refer the case to arbitration.⁶³

To sum up the opinion of the AG, she does not expressly state if the anti-suit injunctions are within or out of the scope of the Regulation. However, they are clearly not compatible with it. The starting point is not the application for the injunction but the proceedings before a national court against which the injunction is directed. If these proceedings are covered by the Regulation, the injunction is not permissible because it infringes the operation of the Regulation. The only criterion as to whether the case falls within the Regulation is the subject matter of the proceedings. Here, the AG confirms the previous decisions of the ECJ. In the final provision the AG also advocates the change in the text of the Regulation in the sense that the arbitration should be included to the scheme of the Regulation.⁶⁴

5. HEIDELBERG REPORT

In September 2007 *Report on the Application of Regulation Brussels I, known as Heidelberg Report* (the Report) was published. The Report provides for a comprehensive analysis on the application of the Regulation in Member States. It addresses the practical application of the

⁵⁸ The Opinion, points 54 - 56

⁵⁹ Case C-116/02 - Erich Gasser v MISAT Srl., 9.12.2003

⁶⁰ The Opinion, points 57 - 60

⁶¹ The Opinion, point 62

⁶² The Opinion, points 63 - 65

⁶³ The Opinion, points 66 - 68

⁶⁴ The Opinion, point 73

Regulation in the Member States and brings proposals for its improvement.⁶⁵ Any of the proposals means fundamental change of the Regulation. *However, the general impression from the Report is that the Regulation is one of the most successful pieces of EC legislation.*⁶⁶

One of the proposals confers the exclusion of the arbitration from the scope of the Regulation. The general reporters of the Report were fully aware of the fact that the scope of the arbitration exception had been disputed in the literature during the last years. Therefore, they explicitly asked about the relationship between the Regulation and arbitration and about its extension to ancillary proceedings. Most of the national reports were critical towards possible extension of the Regulation to arbitration.⁶⁷

The Report recognizes that there is a tendency in the Member States not to extend the Regulation to arbitration. On the other hand it concludes that practical problems concerning the application of the exception must be resolved. The Report states some guiding principles which should be respected if the arbitration will be included into Regulation. Firstly, the New York Convention provides a uniform framework for the enforcement of arbitration agreements and arbitral awards. The Convention should not be infringed by a regional regulation. Secondly, the New York Convention has broad scope of application. The Regulation should not address questions dealt with by the Convention. *However, the prevalence of the New York Convention does not exclude supplemental and supporting provisions, especially provisions concerning interfaces between the Convention and the Regulation.*⁶⁸

The interfaces relate to these issues: the enforcement of an arbitration agreement, ancillary measures, recognition and enforcement and conflicts between arbitral awards and judgements.⁶⁹ The first problem concerns the recognition of declaratory judgements on the validity of an arbitration clause. These judgements have not been understood as to fall under the Regulation so far. As a consequence an arbitration agreement may be considered valid in one Member State and void in another. The result of this fact is the possible existence of parallel proceedings and conflicting judgements.⁷⁰ The deletion of the arbitration exception would bring these judgements under the scope of the Regulation. The relation between the Regulation and New York Convention would be solved by the Article 71 of the Regulation which gives precedence to the New York Convention. Even after the deletion arbitration proceeding would not be qualified as court proceedings and arbitral award would not be a judgement. The Regulation would cover only court proceedings concerning arbitration and a judgement relating to the validity of an arbitration agreement could be recognised according to the Regulation. The above mentioned danger of conflicting decisions would be diminished.⁷¹

⁶⁵ For details concerning the methodology, scope and aim of the Report see its p. 4 and following

⁶⁶ The Report, p. 1, point 1

⁶⁷ The Report, p. 51 – 54, points 109 - 114

⁶⁸ The Report, p. 54, point 116

⁶⁹ The Report, p. 55 – 56, points 117 - 120

⁷⁰ The Report, p. 56, point 121

⁷¹ The Report, p. 57 – 58, point 122

The deletion of arbitration exception would also extend the scope of the Regulation to the measures ancillary to arbitration. Concerning this issue it is suggested that the arbitration must be address positively as well. It would be suitable to add a new head of the exclusive jurisdiction for ancillary proceedings at the state court of the seat of arbitration. The problem of this solution is that 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 new head should be supplemented by some kind of guideline for a determination of the seat of arbitration. Another alternative is to add a specific head of jurisdiction into the Article 5. However, Article 5 does not prevent concurring proceedings.⁷²

It is also suggested to insert into the Regulation the provision drafted in the line of Article 23(3) which would regulate the formal validity and legal effects of an arbitration clause. But this suggestion has several problematic aspects. At first, such provision would overlap with Article II of the New York Convention. Such a provision would cover not only the commercial arbitration, but also arbitration for example in consumer matters. This proposal would require the change of the Article 1(2) of the Rome Convention (Regulation Rome I). As a result of this solution the arbitration would become a matter of Community law.⁷³

Finally, it is suggested that the arbitration should be one of the ground for non-recognition. At present recognition and enforcement of judgements rendered in disregard of arbitration agreement are widely accepted in case law and legal doctrine. The question is whether an award can be assimilated to a judgement. The free movement of judgement in the EU is based on the mutual trust in the court systems of the Member States. The assimilation of awards would require the same trust in relation to arbitration which is at present probably not possible.⁷⁴

To conclude the authors of the Report seem that it is not appropriate to make far-reaching amendments to the Regulation. But they realize that the present situation is not satisfactory. Thus, they suggest following changes. Article 1(2)(d) should be deleted. Specific provision on supportive proceedings should be inserted into Article 22(6): „*In ancillary proceedings concerned with the support of arbitration the courts of the Member State in which arbitration takes place.*“ They also suggest addressing the situation of concurring litigation on the validity of the arbitration agreement in different Member States. They wanted the new Article 27A to be added: „*A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity and/or scope of that arbitration agreement.*“ Finally, a new recital should be inserted addressing the issue of the place of arbitration: „*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.*“⁷⁵

⁷² The Report, p. 58 – 60, points 124 - 125

⁷³ The Report, p. 60 – 61, point 126

⁷⁴ The Report, p. 61 – 64, points 127 - 130

⁷⁵ The Report, p. 64 – 65, points 131 – 136

6. CONCLUSION

Since the Brussels Convention entered into force, there has been a debate relating to the scope of arbitration exception. Even the decisions of the ECJ, which introduced the subject matter criterion, have not made everything clear. While some questions concerning arbitration come under the exception and are thus excluded from the Regulation, some are covered by it and some of them are questionable. The most problematic have been proceedings concerning the validity of an arbitration agreement as a main issue, judgements rendered in such proceedings, proceedings in which the validity of an arbitration agreement constitutes the preliminary issue and judgements rendered in disregard of an arbitration agreement. While the first two questions are according to most authors excluded from the Regulation in accordance with ECJ's decisions, the other two fall within its scope. This distinction has been criticised as not persuasive.

Anti-suit injunctions constitute specific issue in relation to arbitration. At present the judgement of the ECJ in the case *Front Comor* is expected. The Advocate General in her opinion suggests extending the principles set by the ECJ in the *Turner judgement* even to the anti-suit injunction in support of arbitration. We can assume that the ECJ will follow its previous decision and will confirm that anti-suit injunctions are not compatible with the Regulation.

Next year, the European Commission is going to implement the amendments of the Regulation. One of the suggested is the deletion of the arbitration exception in the Article 1(2)(d) and several relating amendments. On one hand, the Member States in the Report expressed their will not to change the present state of the Regulation concerning arbitration. On the other hand, the present situation is clearly not satisfactory. The suggested amendments would resolve at least some of the questions which are now problematic.

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