

# A Swiss Perspective on *West Tankers* and Its Aftermath

## What about the Lugano Convention?

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### I. Introduction

The now (in)famous *West Tankers* case<sup>1</sup> has been at the origin of much debate between two worlds which have been following their own separate paths as polite, yet indifferent neighbours for the past four decades, namely the world of arbitration and that of the European Union (EU) civil judicial system.<sup>2</sup>

Since the ruling of the European Court of Justice (ECJ) on 10 February 2009, the EU has come up with a Green Paper,<sup>3</sup> which in turn has caused passionate reactions particularly with respect to the possible inclusion of arbitration within the scope of the Brussels I Regulation.<sup>4</sup>

Yet, the impact of these new developments on the Brussels I Regulation's younger sister, the Lugano Convention,<sup>5</sup> has not attracted as much

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<sup>1</sup> Case C-185/07, *Allianz SpA v. West Tankers Inc.*, 2009 E.C.R. I-0000.

<sup>2</sup> See, e.g., A. Mourre & A. Vagenheim, *À propos de la portée de l'exclusion d'arbitrage dans le règlement No. 44/2001, notamment après l'arrêt West Tankers de la CJCE*, 129 *Gazette du Palais* 20 (2009); A. Bělohávek, *West Tankers as a Trojan Horse with Respect to the Autonomy of Arbitration Proceedings and the New York Convention 1958*, *ASA Bull.* 4/2009, at 646; M. Schöll, *Brussels I/Lugano and Arbitration: Problems and Perspectives*, in *New Developments in International Commercial Arbitration 2009*, at 43 (C. Müller & A. Rigozzi eds., 2009); *Conflictoflaws.org*, *West Tankers Online Symposium*, <http://conflictflaws.net/2009/west-tankers-online-symposium> (last visited Jan. 3, 2010).

<sup>3</sup> *Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, COM (2009) 175 final (Apr. 21, 2009) [hereinafter *Green Paper*]. Green Papers are "documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers." *Europa Glossary*, *Green Paper*, [http://europa.eu/scadplus/glossary/green\\_paper\\_en.htm](http://europa.eu/scadplus/glossary/green_paper_en.htm) (last visited Jan. 3, 2010).

<sup>4</sup> Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) [hereinafter *Brussels I Regulation*].

<sup>5</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter *Lugano Convention*].

interest. This is forgetting the close interrelation between the two instruments which has even been strengthened by the revised Lugano Convention.<sup>6</sup>

The present article seeks to address the issue by providing a Swiss perspective, particularly from the vantage point of the Lugano Convention, on the latest developments affecting the interactions between the European civil judicial system and arbitration.

## II. The Brussels/Lugano Regime and the Arbitration Exclusion

### A. The Brussels/Lugano Regime

The European jurisdictional landscape is shaped by the Brussels/Lugano regime, which consists of the 1968 Brussels Convention,<sup>7</sup> the Lugano Convention, the Brussels I Regulation, and, as of 2010, the revised Lugano Convention.

The Brussels Convention was agreed upon by the Member States of the then European Community (EC) with the aim of increasing economic efficiency and promoting the single market by harmonising the rules on jurisdiction and preventing parallel litigation. Resting on the principle of mutual trust among States,<sup>8</sup> the Convention established a system of determination of the competent judge within the European legal order and a simplified mechanism of recognition and enforcement of judgments.

The rules of the Brussels Convention became then the object of a parallel convention, the Lugano Convention, which extended the Brussels Convention to the States of the European Free Trade Association (EFTA) – with the exception of Liechtenstein – i.e., Switzerland, Norway, and Iceland.

The *communitarisation* of the Brussels Convention later resulted in the Brussels I Regulation,<sup>9</sup> which is now considered to be the “matrix of

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<sup>6</sup> Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007 (in force for Switzerland as of 1 January 2011), available at [http://www.bj.admin.ch/bj/en/home/themen/wirtschaft/internationales\\_privatrecht/lugano\\_uebereinkommen/0.html](http://www.bj.admin.ch/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugano_uebereinkommen/0.html) [hereinafter revised Lugano Convention].

<sup>7</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention].

<sup>8</sup> See Brussels I Regulation, *supra* note 4, pmb., ¶ 16 (“Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.”).

<sup>9</sup> In 2000, the EU decided to incorporate the Brussels Convention, an international instrument by nature, within the scope of Community law. It is worth noting that the Brussels I Regulation, as it stands today, is the result of a combined effort of the EU and the EFTA Member States. Indeed, at the

European judicial cooperation in civil and commercial matters.”<sup>10</sup> Because of imperatives linked to the EU political agenda, the finalisation of the revised Lugano Convention and its ratification has been delayed by almost ten years,<sup>11</sup> but the Convention is now due to enter into force for Switzerland on 1 January 2011.<sup>12</sup>

## B. The Arbitration Exclusion

The Brussels regime covers all civil and commercial matters with the exception of arbitration – the so-called “arbitration exclusion.”<sup>13</sup>

This exclusion is the result of (1) the absence of a need to deal with arbitration within the Brussels Convention, and (2) the concern not to interfere with the operation of the New York Convention.<sup>14</sup> Indeed, it seems

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end of April 1999, an EU-EFTA Working Group completed a draft of the substantive part of the revision of the Lugano and Brussels Conventions. The revised text of the new agreement was subsequently moulded into the Brussels I Regulation, without having any substantive effect on the former outcome of the negotiations.

<sup>10</sup> *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, at 2, COM (2009) 174 final (Apr. 21, 2009) [hereinafter *Commission's Report*].

<sup>11</sup> The revision of the Lugano Convention was delayed for several reasons, among which the uncertainty regarding the question whether the EC had exclusive or shared competence to conclude the new Lugano Convention. On 7 February 2006, the ECJ ruled that the EC had exclusive competence to conclude the new agreement. *See* Opinion 1/03, *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 2006 E.C.R. I-1145. This meant that Switzerland, Norway, and Iceland had only one single contracting party – the EC – acting through the Commission, whilst the Member States enjoyed observer status.

<sup>12</sup> To ensure parallelism between the Brussels and the Lugano instruments, the revision of the Lugano Convention has been finalised in 2007 between the EU, Switzerland, Norway, Iceland, and Denmark. On 18 May 2009, the EC ratified the revised Lugano Convention with effect for all its Member States with the exception of Denmark. On 1 July 2009, the Kingdom of Norway ratified the Convention which was followed by Denmark's ratification on 24 September 2009. The revised Lugano Convention has thus entered into force between the EC and Norway on 1 January 2010. The ratifications of Iceland and Switzerland are still outstanding. The Swiss Ratification and Implementation Act has recently been adopted by the Parliament and the revised Lugano Convention is expected to enter into force for Switzerland on 1 January 2011. *See generally* M. Jametti-Greiner, *L'espace judiciaire européen en matière civile: la nouvelle Convention de Lugano*, in *La Convention de Lugano: Passé, présent et devenir* 11 (A. Bonomi, E. Cashin Ritaine & G. P. Romano eds., 2007); A. Markus, *La compétence en matière contractuelle selon le règlement 44/2001 "Bruxelles I" et la Convention de Lugano révisée à la suite de l'arrêt CJCE Color Drack*, in *La Convention de Lugano: Passé, présent et devenir*, *supra*, at 23 (both authors setting out the negotiations history that led to the signature of the revised Lugano Convention).

<sup>13</sup> *See* Brussels Convention, *supra* note 7, art. 1(4); Lugano Convention, *supra* note 5, art. 1(4); Brussels I Regulation, *supra* note 4, art. 1(2)(d).

<sup>14</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter *New York Convention*]. *See* Schöll, *supra* note 2, at 48.

that the drafters of the Brussels Convention, whilst bearing arbitration in mind, felt that the topic was satisfactorily governed by other instruments.<sup>15</sup>

However, what was clear at the time later led to controversies. With Denmark, the United Kingdom, and Ireland joining the EC in 1973, it appeared that the new Member States had a wider interpretation of the arbitration exclusion provision, considering that “all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration.”<sup>16</sup> Conversely, the original Member States “only regard[ed] proceedings before national courts as part of “arbitration” if they refer[red] to arbitration proceedings, whether concluded, in progress or to be started.”<sup>17</sup>

Nonetheless, the Schlosser Report prepared at the time engraved the prevailing consensus for a broad exclusion of arbitration from the scope of the Brussels Convention, noting that the Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, where it is invalid, ordering the parties to discontinue the arbitration proceedings.<sup>18</sup> But the report left open the question whether the exequatur of a State court decision on the merits could be refused if such a judgment was rendered in spite of the existence of a valid arbitration agreement in the State of recognition.<sup>19</sup>

The subsequent report prepared by Evrigenis and Kerameus for the Greek accession to the EC in 1982 brought its share of confusion. Whilst confirming the broad exclusion of arbitration from the Brussels Convention, the Evrigenis/Kerameus Report spread the seeds of the future *West Tankers* ruling by holding that “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.”<sup>20</sup>

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<sup>15</sup> See Schöll, *supra* note 2, at 46.

<sup>16</sup> *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice*, 1979 O.J. (C 59) 71, ¶ 61 [hereinafter *Schlosser Report*].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* ¶ 64. The Schlosser Report also excluded from the scope of the Convention “court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, [or] the extension of the time limit for making awards . . . .” *Id.* See also V. Veeder, *Another Look at the Arbitration Exceptions in the Brussels Regulation and the Lugano Convention*, ASA Bull. 4/2006, at 803, 806–07 (noting that Schlosser later qualified his earlier text as rapporteur and indicated that the Brussels Convention applied to all court proceedings related to arbitration).

<sup>19</sup> See Schöll, *supra* note 2, at 51.

<sup>20</sup> *Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 1986 O.J. (C 298) 1, ¶ 35 [hereinafter *Evrigenis/Kerameus Report*].

The question whether the exclusion of arbitration should be understood in a broad or narrow sense has continued to be the subject of a dispute between the common law and the continental European schools of law ever since.<sup>21</sup>

In turn, the EU-EFTA Working Group examined in 1999 the relationship between the future Brussels I Regulation, the revised Lugano Convention and arbitration, focusing more particularly on whether a valid arbitration agreement could be regarded as a ground for the non-recognition or non-enforcement of a foreign judgment in the State of recognition, in spite of pending arbitration proceedings or an arbitral award in that State.<sup>22</sup> However, at the time, no agreement was found and no material modification concerning arbitration resulted from the discussions.<sup>23</sup>

Relevant case law relating to the application of the arbitration exclusion has been rather scarce, as before *West Tankers* only two matters had been referred to the ECJ. A first step was taken in *Rich*,<sup>24</sup> where the ECJ stated in an *obiter dictum* that “[i]n 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.”<sup>25</sup> Then, in *Van Uden*,<sup>26</sup> the Court further considered provisional measures, the subject-matter of which related to a question falling within the scope *ratione materiae* of the Convention, as also falling within the scope of the Brussels Convention, even if the proceedings on the substance were to be conducted before arbitrators.<sup>27</sup> The ruling was motivated by the fact that provisional measures are in essence not ancillary but parallel to arbitration: “[t]hey concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by

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<sup>21</sup> Pursuant to the Anglo-Saxon view, arbitration agreements are subject exclusively to arbitration, irrespective of the substantive subject-matter. As a result, only the arbitral body and the courts at the seat of arbitration are entitled to examine the issue of jurisdiction. Conversely, the continental view takes account first and foremost of the substantive subject-matter. If that subject-matter falls within the Brussels I Regulation, a court which in principle has jurisdiction hereunder is entitled to examine whether the exclusion under Article 1(2)(d) of the Brussels I Regulation applies and, according to its assessment of the validity of the arbitration agreement, to refer the case to the arbitral body or adjudicate on the matter itself. See *Opinion of Advocate Gen. Kokott, West Tankers*, 2009 E.C.R. I-0000, ¶¶ 43-44.

<sup>22</sup> See A. Markus, *Revidierte Übereinkommen von Brüssel und Lugano*, 71 *Schweizerische Zeitschrift für Wirtschaftsrecht* [SZW] 205, 207 (1999).

<sup>23</sup> In this respect, it is not surprising that the revised Lugano Convention does not further address the scope of the arbitration exclusion nor reflects the debate that unfolded after *West Tankers*. Though the text of the Convention was finalised in 2007, the “deal” between the contracting parties as to the substantive part of the revision of the Convention had already been concluded in 1999. Any substantive modification now requires new negotiations.

<sup>24</sup> Case C-190/89, *Marc Rich & Co. v. Società Italiana Impianti PA*, 1991 E.C.R. I-3855.

<sup>25</sup> *Id.* ¶ 26.

<sup>26</sup> Case C-391/95, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, 1998 E.C.R. I-7091.

<sup>27</sup> *Id.* ¶ 48.

their own nature but by the nature of the rights which they serve to protect.”<sup>28</sup> In so doing, the Court made a distinction between proceedings which are directly concerned with arbitration as the principal issue – excluded from the scope of the Convention – and proceedings held in the presence of an arbitration agreement but related to rights covered by the Brussels Convention – falling within the scope of the Convention.

There remained, however, no clear definition of the scope of application of the arbitration exclusion. These decisions showed that for the Court – at least as far as provisional measures are concerned – the subject-matter of the proceedings, and more specifically the nature of the rights which the proceedings in question serve to protect, is the point of reference in determining whether a dispute fell within the scope of the Brussels regime.

### III. *West Tankers*

#### A. The Ruling

In *West Tankers*, the ECJ ruled in no more than sixteen paragraphs that it was “incompatible with [the Brussels I Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.”<sup>29</sup>

The dispute underlying this ruling is now well known. It arose in August 2000, when a vessel owned by West Tankers Inc. and chartered to Erg Petroli SpA collided with a jetty owned by Erg in Syracuse, Italy. A number of proceedings followed this accident. Among these, an anti-suit injunction was ordered by the High Court of London, which referred to arbitration the insurers who had initiated court proceedings in Syracuse based on the existence of an arbitration agreement in the charter-party. The insurers appealed that decision before the House of Lords, which decided to clarify whether anti-suit injunctions in favour of arbitration were consistent with the Brussels I Regulation and referred the question to the ECJ for a preliminary ruling.

Following *Rich* and *Van Uden*, the ECJ began its analysis by referring to the subject-matter of the dispute. More specifically, the Court held that the nature of the rights to be protected by the court proceedings at hand was the decisive criterion in order to determine whether a dispute should fall within

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<sup>28</sup> *Id.* ¶ 33.

<sup>29</sup> *West Tankers*, 2009 E.C.R. I-0000, ¶ 34.

the scope of the Brussels I Regulation.<sup>30</sup> The Court then decided that proceedings leading to the issuance of an anti-suit injunction in support of arbitration proceedings did not themselves fall within the scope of the Brussels I Regulation.

However, in a second step, the ECJ considered that even proceedings not falling under the scope of the Brussels I Regulation pursuant to the *Rich* and *Van Uden* tests might nevertheless have consequences undermining the effectiveness of the Regulation by “preventing the attainment of the objectives of unification of the rules in conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters.”<sup>31</sup> In so doing, the ECJ introduced an additional test when examining the scope of application of the Brussels I Regulation, namely the guarantee of the effectiveness of the European judicial system.<sup>32</sup> Accordingly, the ECJ focused on the proceedings brought before the Syracuse court by the insurers. It analysed whether such proceedings fell within the scope of the Brussels I Regulation and which effects the anti-suit injunction might have had on such proceedings. Considering that the subject-matter of the dispute pending before the Syracuse court pertained to a claim for damages, the ECJ concluded that the matter did fall within the scope of the Brussels I Regulation and, by the same token, that the British anti-suit injunction was incompatible with the Regulation. The ECJ stressed that “if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of [the Brussels I] Regulation, a preliminary issue concerning the application of an arbitration agreement, including in particular its validity, also comes within the scope of its application.”<sup>33</sup>

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<sup>30</sup> *Id.* ¶ 22. The ECJ largely followed the Advocate General’s opinion who, in the footsteps of *Rich* and *Van Uden*, considered that the point of reference for the assessment of proceedings interacting with the Brussels I Regulation was the proceedings against which the anti-suit injunction was aimed at. If these proceedings were affected by the injunction in any way inconsistent with the Brussels I Regulation, then the injunction should be prohibited. The Advocate General considered that the subject-matter of the dispute pending in Italy was a claim in tort, possibly also for contractual liability, both falling under the scope of the Brussels I Regulation. The existence and applicability of the arbitration agreement merely constituted a preliminary issue which the court seized had to address when examining whether it had jurisdiction. The Advocate General thus came to the conclusion that the case did not fall under the arbitration exclusion. See *Opinion of Advocate Gen. Kokott*, 2009 E.C.R. I-0000. Interestingly, aware of the risks of divergent decisions with regard to the scope of the arbitration agreement between an arbitral tribunal and a national court other than that of the seat of arbitration, the Advocate General concluded her opinion by suggesting the inclusion of arbitration in the scheme of the Brussels I Regulation by way of law.

<sup>31</sup> *West Tankers*, 2009 E.C.R. I-0000, ¶ 24.

<sup>32</sup> *Cf.* Mourre & Vagenheim, *supra* note 2, at 23 (considering this decision as “*motivée par des impératifs de politique jurisprudentielle*”).

<sup>33</sup> *West Tankers*, 2009 E.C.R. I-0000, ¶ 26. See also *Evrigenis/Kerameus Report*, *supra* note 20, ¶ 20.

## B. The Lessons

At least two lessons may be learned from the ECJ's ruling. First, as a practical consequence, the decision by which a State court decides incidentally on the existence or validity of an arbitration agreement in cases where the main subject-matter of the dispute falls within the scope of the Brussels I Regulation is now considered as falling entirely within the scope of the Brussels I Regulation and must therefore be recognised and enforced in any Member State,<sup>34</sup> the existence of a valid arbitration agreement not being regarded as a ground for the non-recognition or non-enforcement of a foreign judgment in the State of recognition.

Secondly, a two-step test must be applied in order to determine the scope of the arbitration exception under the Brussels I Regulation: (1) whether the court proceedings at hand fall within the scope of the Brussels I Regulation, and (2) whether the effects of such proceedings undermine the effectiveness of the system established by the Brussels I Regulation.

In sum, *West Tankers* represents a creeping extension of the scope of application of the Brussels and Lugano instruments to the detriment of arbitration.<sup>35</sup> As such, the decision reflects the order of priority in the EU political agenda, more concerned to strengthen "the effectiveness of the Brussels I Regulation, . . . the unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters" than to protect the interests of arbitration.<sup>36</sup> This ruling thus echoes the warning that prominent arbitration scholars had already formulated regarding the need to amend Article 1(4) of the Brussels/Lugano Conventions in order to coordinate and harmonise court decisions in arbitration matters within the European judicial area:

"Favoured for a long time because of the conditions of recognition and enforcement of awards according to the New York Convention, arbitration is today seriously competing, at least within the European Union, with the efficient regime of enforcement introduced by the Brussels and Lugano Conventions as well as by facilities for exclusive forum selection which binds the selected judge. This is in many cases a serious alternative to arbitration. The arbitration community must not

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<sup>34</sup> See Schöll, *supra* note 2, at 62.

<sup>35</sup> Bělohávek, *supra* note 2, at 663.

<sup>36</sup> *West Tankers*, 2009 E.C.R. I-0000, ¶ 24. Cf. Presidency Conclusions, Brussels European Council, EUCO 6/09, § III (Dec. 11, 2009) (stating that the Commission must prepare an Action Plan, to be adopted at the latest in June 2010, for implementing the Stockholm Programme, a multi-annual programme for the years 2010–2014 that will allow the further development of an area of freedom, security and justice, in particular the free movement of judgments in civil and commercial matters).

rest on its laurels, nor live in a closed system, but apply itself to remedy [its] gaps and imperfections.”<sup>37</sup>

### C. Critical Opinion

*West Tankers* leaves room for criticism from both a practical and a theoretical point of view.

From a practical perspective, the fact that this ruling opens the door to “torpedo” proceedings is problematic and runs counter to the very aims of the good order and expediency of justice. Indeed, by bringing proceedings on the merits – possibly in bad faith and in disregard of the existence of an arbitration agreement – in a Member State in which it believes it will obtain the invalidation of the arbitration agreement, a party would be able to “torpedo” arbitration proceedings. Since the ensuing judgment would fall under the scope of the Brussels regime, it would *prima facie* be capable of recognition and enforcement in all Member States with the consequence of possibly derailing the arbitration proceedings at the seat of the arbitration or resisting enforcement of the award in other Member States. This would effectively lead to a race to obtain and enforce an award before the court dealing with a claim on the merits would rule on the validity of the arbitration agreement.

Theoretically, even though the way the British courts sought to exercise their influence on the Italian courts is questionable from a public international law standpoint,<sup>38</sup> the ECJ’s decision is not without posing important questions of systematic legal interpretation as regards the scope of the Brussels I Regulation. As a decision exclusively related to arbitration, the English anti-suit injunction is undoubtedly excluded from the scope of the Brussels I Regulation and so is the examination of the jurisdiction issue in the Italian proceedings. In this respect, the ECJ’s opinion according to which the validity of the arbitration agreement should be verified as an incidental question pursuant to the Brussels I Regulation appears problematic.<sup>39</sup>

Indeed, under the Brussels/Lugano regime, the determination of jurisdiction is strictly confined to the examination of the competence *ratione loci* – both internationally and locally. The question whether a dispute is subject to an arbitration agreement is not and should not be considered as a

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<sup>37</sup> J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* ¶ 1031 (2d ed. 2007). See also A. Mourre, *Should Arbitration Stay Excluded from the Scope of Application of Regulation 44/2001?*, ASA Bull. 4/2006, at 800; Veeder, *supra* note 18, at 808.

<sup>38</sup> Oberlandesgericht Düsseldorf [Court of Appeals] Jan. 10, 1996, Case 3 VA 11/95 (F.R.G.).

<sup>39</sup> See *West Tankers*, 2009 E.C.R. I-0000, ¶¶ 25, 27; *Van Uden*, 1998 E.C.R. I-7091, ¶ 34; *Rich*, 1991 E.C.R. I-3855, ¶ 26.

preliminary question to the determination of the competence *ratione loci*. Rather, it is a process entirely independent from the Brussels I Regulation,<sup>40</sup> to which courts must answer, under Article II(3) of the New York Convention, without any further reservation and independently from the Brussels I Regulation. In this regard, the process is comparable to the examination by a State court of its jurisdiction when faced with the question of the defendant's sovereign immunity; such issue has nothing to do with the question of competence *ratione loci*. With *West Tankers*, the ECJ appears to extend its determination regarding the competence *ratione loci* to aspects which are clearly not covered by the Regulation.<sup>41</sup>

It is worth noting that *West Tankers* is not necessarily a consequence of the two preceding ECJ decisions rendered on the arbitration exclusion. Indeed, *Rich* merely addressed the issue at stake in an *obiter dictum*, while *Van Uden* dealt with the specific case of provisional measures, making it clear that the arbitration agreement gives rise to an exception only with regard to main proceedings but not with regard to provisional measures, mainly because parties must be able to resort to State courts since arbitral tribunals do not have the necessary power to enforce provisional measures themselves.<sup>42</sup>

## IV. The Aftermath of *West Tankers*

### A. The Commission's Report and the Green Paper

On 21 April 2009, the EU Commission issued its Report assessing the application of the Brussels I Regulation,<sup>43</sup> as well as a Green Paper suggesting possible evolutions with respect to the issues mentioned in the Report.<sup>44</sup> As a result of *West Tankers*, one point of review focused explicitly

<sup>40</sup> Cf. *Van Uden*, 1998 E.C.R. I-7091, ¶ 32 (stating the exclusion from the scope of the Brussels Convention of proceedings determining the validity of an arbitration agreement).

<sup>41</sup> *West Tankers*, 2009 E.C.R. I-0000, ¶ 27. The Evrigenis/Kerameus Report could be at the origin of this confusion by incorrectly referring, in the context of the determination of the competence, to a so-called "incidental question" to the application of the Brussels Convention. See *Evrigenis/Kerameus Report*, *supra* note 20, ¶ 35; *West Tankers*, 2009 E.C.R. I-0000, ¶ 26. Insofar, the situation is different from, *Turner v. Grovit* which concerns anti-suit injunctions ordered in support of court – not arbitration – proceedings. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565.

<sup>42</sup> G. Walter, *Internationales Zivilprozessrecht der Schweiz* 529–30 (4th ed. 2007).

<sup>43</sup> *Commission's Report*, *supra* note 10. The Report was largely based on a study conducted by three professors of the University of Heidelberg – the so-called Heidelberg Study – on the working of the Brussels I Regulation. *Report on the Application of Regulation Brussels I in the Member States* (Sept. 2007), available at [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/study_application_brussels_1_en.pdf) (last visited Jan. 3, 2010).

<sup>44</sup> *Green Paper*, *supra* note 3.

on the problems arising out of the interface between the Brussels I Regulation and arbitration, and, among others, the danger of parallel proceedings and inconsistent judgments under the existing regime.<sup>45</sup>

The Commission seized the opportunity of the Green Paper for a public consultation on the measures to be taken at the Community level to (1) strengthen the effectiveness of arbitration agreements, (2) ensure a good coordination between judicial and arbitration proceedings, and (3) enhance the effectiveness of arbitration awards.

In brief, the Commission proposed the following amendments to the Brussels I Regulation:

- to delete partially the arbitration exclusion, thus bringing court proceedings in support of arbitration within the scope of the Brussels I Regulation;
- to grant exclusive jurisdiction on court proceedings in support of arbitration to the courts of the Member State of the seat of the arbitration, determined according to a uniform criterion, and possibly subject to an agreement between the parties;
- to give priority to the courts of the Member State where the arbitration proceedings take place to decide on the existence, the validity and the scope of an arbitration agreement;
- to introduce a uniform conflict of laws provision regarding the validity of arbitration agreements in favour of the law of the State of the seat of the arbitration;
- alternatively or additionally, to introduce a rule granting exclusive competence to the State of the seat of arbitration to certify the enforceability of an award and its procedural fairness, thus ensuring a “freedom of circulation” of arbitral awards within the EU;

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<sup>45</sup> See *Commission’s Report*, *supra* note 10, at 9, pointing out the following issues:

- the possibility and risk of parallel court and arbitration proceedings when the validity of the arbitration agreement is upheld by the arbitral tribunal but not by the court;
- the incompatibility with the Brussels I Regulation of procedural devices existing under national law and aimed at strengthening the effectiveness of arbitration agreements, such as anti-suit injunctions, in case such devices unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Brussels regime;
- the absence of uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings;
- the uncertainty as regards the recognition and enforcement of judgments given by the courts in disregard of an arbitration agreement;
- the uncertainty as regards the recognition and enforcement of judgments on the validity of an arbitration agreement, setting aside an arbitral award, or judgments merging an arbitration award;
- the lack of efficiency of the New York Convention system as regards the recognition and enforcement of arbitral awards, in comparison to the recognition and enforcement of judgments.

- alternatively, to introduce a separate EU instrument taking advantage of Article VII of the New York Convention to facilitate the recognition of arbitral awards at the EU level.<sup>46</sup>

## B. The Arbitration Community's Reaction

The Commission's proposals in order to bring arbitration-related court proceedings within the scope of the Brussels I Regulation have been largely met with scepticism by the arbitration community already shaken by *West Tankers*.<sup>47</sup>

For many practitioners, these new developments are regarded as a threat to the operation of the New York Convention, in particular to the *compétence-compétence* principle, making EU Member States less attractive as seats of arbitration. Opposed to the proposal of granting exclusive jurisdiction to the courts located at the seat of arbitration, they argue that the correct application of the *compétence-compétence* doctrine must not allow any court, but only the arbitration tribunal itself, to decide on the validity of an arbitration agreement. Granting exclusive jurisdiction to the State courts at the place of arbitration would thus collide with established principles of arbitration law.<sup>48</sup> It is also argued that giving priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity and scope of the arbitration agreement means, in practice, that applying to the courts at the seat of arbitration will become a prerequisite to any arbitration proceedings in the EU.<sup>49</sup>

Another point of concern relates to the shift of power and the autonomy of States with respect to arbitration. Indeed, amending the Brussels I Regulation to encompass arbitration-related court proceedings would grant the EU an external competence over arbitration matters, either partly or totally. From then on, the Commission would be entrusted with the interests of the arbitration community, including with the representation of the Member States in arbitration matters at the international level – e.g.,

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<sup>46</sup> See *Green Paper*, *supra* note 3, at 9.

<sup>47</sup> All the opinions on the Commission's Report and the Green Paper can be found at [http://ec.europa.eu/justice\\_home/news/consulting\\_public/news\\_consulting\\_0002\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm) (last visited Jan. 3, 2010). See also P. Pinsolle, *The Proposed Reform of Regulation 44/2001: A Poison Pill for Arbitration in the EU?*, 12 Int'l. Arb. L. Rev. 62 (2009); Mourre & Vagenheim, *supra* note 2. See also the heated debate by way of several blog postings between Burkhard Hess and Alexis Mourre, respectively for and against the inclusion of arbitration within the scope of the Brussels regime, <http://conflictoflaws.net/2010/hess-and-mourre-on-the-arbitration-exception-rejoinder> (last visited, Mar. 23, 2010).

<sup>48</sup> See U. Magnus & P. Mankowski, *Joint Response to the Green Paper on the Review of the Brussels I Regulation*, at 15, *supra* n. 47.

<sup>49</sup> See E. Gaillard, *Response to the Green Paper on the Review of the Brussels I Regulation*, *supra* n. 47.

before UNCITRAL. Such a prospect is not welcome in the arbitration community because “[a]rbitration simply is not litigation and would call for a specific regulatory effort.”<sup>50</sup>

The existing tensions between the arbitration world and the EU judicial system, alongside the possible dangers arising from a change in the current equilibrium, highlight the need for a careful and well thought out action. As mentioned, the Commission has already taken steps to tackle the situation regarding the Brussels I Regulation, but what about the Lugano instruments and Switzerland?

## V. *West Tankers* and its Aftermath: A Swiss Approach

### A. The Swiss Regime

As a State party to the New York Convention, Switzerland is bound by its Article II(3) which has found its – almost – corresponding expression in Article 7 of the Swiss Private International Law Act (PILA) providing that:

“[i]f the parties have concluded an arbitration agreement covering an arbitrable dispute, the Swiss court seized of an action shall decline its jurisdiction unless:

- a. The defendant has proceeded with its defence on the merits without raising any objection;
- b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, or
- c. The arbitral tribunal cannot be constituted for reasons manifestly attributable to the respondent.” (unofficial translation)<sup>51</sup>

It seems, however, that neither scholars nor practitioners agree on the degree of power that should be left to State courts to determine whether an arbitration agreement exists or not. While some advocate for a full examination of the effectiveness of the arbitration agreement by State courts,

<sup>50</sup> Magnus & Mankowski, *supra* note 48, at 14.

<sup>51</sup> Loi fédérale sur le droit international privé [LDIP] [Private International Law Act] Dec. 18, 1987, RS 291 (Switz.) (regulating the matter in the domestic context). See generally J.-F. Poudret, *Exception d'arbitrage et litispendance en droit suisse: Comment départager le juge et l'arbitre?*, 25 ASA Bull. 2/2007, at 230. It is also worth mentioning Article 61 of the future Swiss Code of Civil Procedure, holding that a State court seized of a dispute shall decline its jurisdiction if an arbitration agreement in connection with an arbitrable dispute was concluded by the parties, provided the State court does not establish that the arbitration agreement is manifestly invalid or inapplicable. Code de procédure civile [CPC] [Code of Civil Procedure] Dec. 19, 2008 (due to enter into force on 1 January 2011) (Switz.), available at <http://www.admin.ch/ch/f/ff/2009/21.pdf>.

others would like such examination to be limited to a *prima facie* verification.<sup>52</sup> Moreover, Swiss law does not provide for a rule establishing the chronological priority of arbitral tribunals over State courts, nor does such rule arise from Article II(3) of the New York Convention. Article 186(1bis) of the PILA merely allows the arbitrators to continue arbitration in case of *lis pendens* even when the proceedings before State courts have been introduced prior to the arbitration proceedings.<sup>53</sup>

For the time being, the Federal Supreme Court has decided that, when the seat of arbitration is in Switzerland, Swiss courts must only carry out a *prima facie* review of the validity of an arbitration agreement when considering a claim of lack of jurisdiction, leaving to the arbitral tribunal the task of considering the validity of the arbitration agreement in full – this is the so-called negative effect of the *compétence-compétence* principle. By contrast, when the seat of arbitration is outside Switzerland, Swiss courts have to carry out a full review of the arbitration agreement pursuant to Article II(3) of the New York Convention.<sup>54</sup>

The debate over this issue has been brought one step further by the submission of a parliamentary initiative in 2008 aimed at engraving the negative effect of the *compétence-compétence* principle in the Swiss legal order.<sup>55</sup> This would eliminate the current distinction between arbitration proceedings with a seat in Switzerland and those with a seat abroad.

It is also worth noting that Switzerland has no tradition of State court interference in existing parallel proceedings, whether in support of arbitration or in favour of court proceedings.<sup>56</sup> Hence, anti-suit injunctions are alien to the Swiss legal order. In this respect, *West Tankers* is of no practical relevance for Swiss courts. By contrast, the power of arbitral tribunals sitting

<sup>52</sup> See generally D. Girsberger & N. Voser, *International Arbitration in Switzerland* ¶ 380 & n.115 (2008); B. Berger & F. Kellerhals, *Internationale und interne Schiedsgerichtbarkeit in der Schweiz* ¶¶ 315–17 (2006); Poudret & Besson, *supra* n. 37, ¶ 1031.

<sup>53</sup> See A. Markus, *Internationale Schiedsgerichtsbarkeit der Schweiz: Vom Forum Running zum Judgment Running?*, in *Aus der Werkstatt des Rechts: Festschrift zum 65. Geburtstag von Heinrich Koller* 441 (Fed. Office of Justice ed., 2006); B. Berger, *Erste Revision im 12. Kapitel IPRG über die internationale Schiedsgerichtsbarkeit: Lis pendens vor Schiedsgerichten in der Schweiz künftig kein Sistierungsgrund mehr*, 143 *Zeitschrift des Bernischen Juristenvereins [ZBJV]* 151 (2007); M. Liatowitsch, *Schweizer Schiedsgerichte und Parallelverfahren vor Staatsgerichten im In- und Ausland* (2002); S. Besson, *The Relationships Between Court and Arbitral Jurisdiction: The Impact of the New Article 186 (1bis) PILS*, in *New Developments in International Commercial Arbitration 2007*, at 57 (Christoph Müller ed., 2007). See also Girsberger & Voser, *supra* note 52, ¶ 423.

<sup>54</sup> See Tribunal Fédéral [TF] [Supreme Court] Apr. 29, 1996, ATF 122 III 139, 142 (Switz.).

<sup>55</sup> Parliamentary Initiative No. 08.417 (Christian Lüscher), *Modification de l'article 7 de la loi fédérale du 18 décembre 1987 sur le droit international privé [Modification of Article 7 of the PILA]*, Mar. 20, 2008 (Switz.), available at [http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch\\_id=20080417](http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch_id=20080417).

<sup>56</sup> See, e.g., M. Scherer & W. Jahnle, *Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective*, 12 *Int'l Arb. L. Rev.* 66, 66 (2009).

in Switzerland to issue anti-suit and anti-arbitration injunctions now seems well-established.<sup>57</sup> This power will not be affected by *West Tankers*, which only puts limits on State courts and not on arbitral tribunals.

## B. The Brussels/Lugano Regime: Parallelism of Case Law

Despite its EU origin, *West Tankers* is still likely to have an effect on Switzerland. This is because, as part of the case law of a Lugano Convention Contracting Party, this decision, in principle, cannot be ignored by the other Contracting Parties, including Switzerland.

Indeed, Protocol 2 of the revised Lugano Convention – and of the Lugano Convention – provides for a specific mechanism aimed at maintaining a strict parallelism in the interpretation of the Lugano and the Brussels instruments. Protocol 2 not only commands a uniform interpretation of the Lugano Convention and the revised Lugano Convention among their Contracting Parties, it also calls for a coordinated interpretation of the revised Lugano Convention and the Brussels I Regulation.<sup>58</sup>

This mutual alignment process of case law operates as follows. First, the Contracting Parties to the revised Lugano Convention must “be aware” of the ECJ’s case law regarding the Brussels Convention and the Brussels I Regulation as of 30 October 2007 – the date of signature of the revised Lugano Convention – as well as of the case law of the courts of the Contracting Parties to the Lugano Convention until this date – in particular that of the EFTA States.<sup>59</sup> These decisions are to be considered as authentic interpretation of the revised Lugano Convention. Additionally, Article 1(1) of Protocol 2 of the revised Lugano Convention foresees that, from the date of signature of the Convention, the adjudicating authorities of the EFTA Member States as well as the ECJ have the obligation to demonstrate a reciprocal consideration of their judicatures.<sup>60</sup>

<sup>57</sup> *Id.* at 70.

<sup>58</sup> See TF Sept. 26, 1997, ATF 123 III 414, 421; TF Dec. 15, 2004, ATF 131 III 227, 229–30. See also T. Schmidt-Parzefall, *Die Auslegung des Parallelibereinkommens von Lugano* (1995); A. Furrer, *Das Lugano-Übereinkommen als europarechtliches Instrument: Das Luganer Konvergenzsystem auf dem Prüfstand von Praxis und Politik*, 6 Aktuelle Juristische Praxis [AJP] 486 (1997); A. Markus, *Tendenzen beim materiellrechtlichen Erfüllungsort im internationalen Zivilverfahrensrecht* 123 (2009).

<sup>59</sup> See revised Lugano Convention, *supra* note 6, Protocol 2, pmb1. The same obligation exists under the Lugano Convention as regards past ECJ’s case law going until the signature of the instrument in 1988. See Lugano Convention, *supra* note 5, Protocol 2, pmb1.

<sup>60</sup> As was already the case under the Lugano/Brussels Conventions, the new system places no importance on the hierarchical rank of the adjudicating authority or the size of a State. What matters is the force of the arguments brought forward. See S. Berti, *Zum Ausschluss der Schiedsgerichtsbarkeit aus dem sachlichen Anwendungsbereich des Luganer Übereinkommens*, in *Beiträge zum schweizerischen und internationalen Zivilprozessrecht: Festschrift für Oscar Vogel* 10 (I. Schwander

Currently, with the revised Lugano Convention still not in force, Protocol 2 of the Lugano Convention and its corresponding declarations are not directly applicable to the Brussels I Regulation. However, given the close connection *ratione materiae* existing between the two instruments – Lugano Convention and revised Lugano Convention – the Federal Supreme Court has decided to apply by analogy the same coordination rules to the provisions showing a parallel wording, which would make *West Tankers* relevant to Swiss courts.<sup>61</sup> But, according to the Federal Supreme Court, the obligation to consider case law does not apply to European legislation other than the Brussels Regulation and the Brussels Convention,<sup>62</sup> this excludes in particular case law interpreting the Rome Treaty.<sup>63</sup> Now, given that the principle of trust on which the ECJ based its reasoning in *West Tankers* – i.e., “the trust which the Member States accord to one another’s legal systems and judicial institutions”<sup>64</sup> – does not directly pertain to the Brussels instruments or their case law – but rather derives from the Rome Treaty as one of its founding principles – an argument can be made that the ruling should not be taken into consideration by Swiss courts.<sup>65</sup>

Despite the currently restrictive approach of the Federal Supreme Court, it cannot be excluded that *West Tankers* could have negative consequences on Swiss case law as a precedent in favour of the duty to recognise and enforce a foreign decision denying a valid arbitration agreement.<sup>66</sup>

### C. The Brussels/Lugano Regime: Parallelism of Texts

Not only case law but also legislative proposals, such as the Green Paper, are the subject of a constant effort to maintain a strict parallelism

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& W. Stoffel eds., 1991). In this respect, it is worth mentioning that Article 2(2) of Protocol 2 of the revised Lugano Convention in connection with Article 23 of the Protocol on the Statute of the Court of Justice of the European Communities gives a right of intervention before the ECJ, in specific cases, to non-EU Member States. To a certain extent, this can be considered as a balancing mechanism to the direct competence of the ECJ to issue case law.

<sup>61</sup> See ATF 131 III at 229–30. This obligation is already foreseen in Article 1 of Protocol 2 of the Lugano Convention.

<sup>62</sup> ATF 131 III at 230.

<sup>63</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Rome Treaty].

<sup>64</sup> *West Tankers*, 2009 E.C.R.I-0000, ¶ 30.

<sup>65</sup> In this sense, the principle of trust is less a consequence of the Brussels/Lugano regime rather than a prerequisite to be part of the system. See revised Lugano Convention, *supra* note 6, art. 62; Lugano Convention, *supra* note 5, art. 62 (providing explicitly for an examination of the judiciary of States from outside the EU and EFTA circle in view of a possible accession).

<sup>66</sup> Markus, *supra* note 22, at 207.

between the Brussels and the Lugano instruments. This strong motor for the judicial cooperation between Switzerland and the EU has been reaffirmed with regard to the revision of the Brussels and Lugano Conventions – i.e., the Brussels I Regulation and the revised Lugano Convention.

More than merely a sign of political goodwill, the parallelism of texts has been engraved in the mechanism of the revised Lugano Convention. Pursuant to Article 2 of Protocol 3 of the revised Lugano Convention, an amendment of the Lugano instrument must be contemplated as soon as the organs of the EU envisage the adoption of a legislative act which entails provisions that would be contradictory to the revised Lugano Convention. In particular, the Standing Committee,<sup>67</sup> or the convening of experts,<sup>68</sup> are competent to give advice on a possible revision.

Any change concerning the arbitration exclusion definitely falls under such legislative act. Consequently, the Commission's willingness to include arbitration within the scope of the Brussels I Regulation, as a result of *West Tankers*, would need to be discussed in the aforementioned fora where the Commission would most likely face the opposition of the revised Lugano Convention Contracting States. As for a possible revision of the Brussels/Lugano regime concerning the arbitration exclusion, it would obviously have to be decided in international negotiations between all the parties concerned.

Despite the strong willingness to maintain a parallelism between the two instruments, the last word still belongs to the Lugano States which remain free to incorporate or not the corresponding amendments of the Brussels I Regulation within the Lugano Convention.<sup>69</sup>

## **D. Revising the revised Lugano Convention?**

### **1. A Swiss Perspective**

Obviously, the status quo prevailing before *West Tankers* and the publication of the Green Paper was preferable to the situation that has emerged since this Pandora's Box was opened. As noted above, the revised Lugano Convention will likely escape the effects of this ruling although the courts of its Contracting Parties are in principle obliged to consider case law regarding the Brussels I Regulation. The questions nonetheless remain

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<sup>67</sup> See revised Lugano Convention, *supra* note 6, Protocol 2, art. 4.

<sup>68</sup> See revised Lugano Convention, *supra* note 6, Protocol 2, art. 5.

<sup>69</sup> See revised Lugano Convention, *supra* note 6, Protocol 3, art. 3.

whether and to which extent the Brussels Regulation will be amended and whether it is worth considering revising the “revised” Lugano Convention.

According to the Swiss Federal Office of Justice (FOJ), *West Tankers* seems right from both a theoretical and a practical view point.<sup>70</sup> However, the justification advanced by the FOJ quite strongly diverges from the goal of harmonisation and promotion of the cooperation in civil and commercial matters stressed by the ECJ in *West Tankers*, and proclaimed by the EU.<sup>71</sup> For the FOJ, it is rather the competition between the different legal orders with their different conceptions and appreciations of arbitration that should prevail.<sup>72</sup> Moreover, as regards possible amendments of the Brussels/Lugano instruments in relation to arbitration proceedings, the FOJ envisages the possibility to have more stringent rules for proceedings of recognition. It has, nonetheless, explicitly excluded the extension of the Brussels/Lugano instruments to arbitration.<sup>73</sup>

Notwithstanding the FOJ’s opinion, the arbitration exclusion set out in Article 1(2)(b) of the Brussels I Regulation/Lugano Convention should be interpreted as a wider exclusion of arbitration from the scope of these instruments, rather than the contrary. In other words, the integration of arbitration within the Brussels/Lugano regime should be considered with great reservation. Whilst this system is sound and highly effective for State court jurisdiction, it is ill-fitted for arbitration.<sup>74</sup> Indeed, as explained, the rationale behind the provisions regulating the jurisdiction of State courts *ratione loci* differs considerably from that pertaining to proceedings in support of arbitration or regarding the determination of the validity of arbitration agreements.<sup>75</sup> Arbitration and court proceedings are different from their very nature to their expression. Moreover, by contrast with court proceedings, arbitration is highly flexible and largely delocalised geographically, easily exceeding the regional borders of Europe.<sup>76</sup> Consequently, only a wider exclusion from the European jurisdictional system can guarantee the unaffected and unhindered functioning of

<sup>70</sup> See Swiss Federal Office of Justice [FOJ], *Stellungnahme zum Grünbuch zur Verordnung (EG) Nr. 44/2001 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*, at 8, *supra* n. 47.

<sup>71</sup> *West Tankers*, 2009 E.C.R. I-0000, ¶ 24.

<sup>72</sup> FOJ, *supra* note 70, at 8.

<sup>73</sup> *Id.* at 9.

<sup>74</sup> See *supra* Part IV.B. See also P. Mankowski, *Article 1*, in *Europäisches Zivilprozessrecht: Kommentar* 46, ¶ 29 (T. Rauscher ed., 2004).

<sup>75</sup> See *supra* Part III.C.

<sup>76</sup> The problem of international instruments constrained by their geographical scope of application is well illustrated by the limited impact of the European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349.

arbitration and the application of the New York Convention. *West Tankers* unfortunately points exactly in the opposite direction.<sup>77</sup>

## 2. The Brussels/Lugano Regime and the New York Convention: A Threatening Conflict

As mentioned, the EU-EFTA Working Group has not been able to agree on the introduction of a new ground for the non-recognition and non-enforcement of a foreign judgment rendered in spite of a valid arbitration agreement.<sup>78</sup> As a result, the predominant reading of the Brussels/Lugano regime, according to which a valid arbitration agreement or pending arbitration proceedings are not a ground for non-recognition or non-enforcement of a State court judgment rendered with regard to the same parties and the same subject-matter in the State of recognition, gives rise to problems.<sup>79</sup> It allows a party to escape the effect of an arbitration agreement by filing proceedings before the State courts of one of the alternative fora provided by the Brussels/Lugano regime. A court decision invalidating the arbitration agreement will thus generally be binding upon all other Member States, with the consequence that arbitration proceedings will be sensibly hampered.

This is the consequence of a wrong interpretation – which is here criticised – of the Brussels/Lugano instruments as containing a limited list of grounds for refusing recognition and providing that the examination of the indirect competence is exclusively foreseen in these specific cases. In reality, though, the existence of an arbitration agreement is totally alien to the question of indirect competence.

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<sup>77</sup> Admittedly, this does not mean that there is no need to adjust arbitration to the practical reality of today's globalised world in which the interactions and confrontations with State court litigation have increased and even escalated to the result proclaimed in *West Tankers*. To that extent, the points raised by the Commission are certainly worth considering. Cf. Veeder, *supra* note 18, at 808 (exposing the dilemma regarding the inclusion of arbitration within the scope of the Brussels/Lugano regime).

<sup>78</sup> See Berti, *supra* note 60, at 354–55; F. Dasser, *Article 1*, in *Kommentar zum Lugano-Übereinkommen* 15, ¶ 97 (F. Dasser & P. Oberhammer eds., 2008). Cf. Markus, *supra* note 22, at 207 (favouring the introduction of such a new ground for non-recognition and non-enforcement in conjunction with a clear delimitation rule clarifying the relationship between arbitration and the Brussels/Lugano instruments); *National Navigation Co v. Endesa Generacion SA (Wadi Sudr)*, [2009] EWHC (Comm) 196, *rev'd*, [2009] EWCA Civ 1397 (Eng.). *But cf.* Mourre & Vagenheim, *supra* note 2, at 24 (raising serious doubts as to the possibility to invoke public policy as a ground for non-recognition of a judgment in spite of a valid arbitration agreement given the restrictive interpretation made by the ECJ, which considers that an infringement would have to constitute a manifest breach of a rule of law or a right regarded as fundamental within the legal order of the State in which enforcement is sought).

<sup>79</sup> See Case 145/86, *Hoffmann v. Krieg*, 1988 E.C.R. 645; *Zellner v. Philipp Alexander Securities & Futures Ltd.*, [1997] I.L.Pr. 730 (Eng.); J. Kropholler, *Europäisches Zivilprozessrecht: Kommentar zu EuGVO, Lugano-Übereinkommen und europäischem Vollstreckungstitel* art. 1, ¶ 47 (8th ed. 2005); L. Radicati di Brozolo, *Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation*, 30 *Praxis des Internationalen Privat- und Verfahrensrechts* [IPRax] 121, 125 (2010).

A foreign decision which concludes preliminarily to the invalidity of an arbitration agreement cannot be recognised under the Brussels/Lugano regime, for three reasons. First, since such decision relates to arbitration, it clearly falls outside the scope of the Brussels/Lugano instruments. Secondly, a large number of procedural systems – like in Switzerland – consider such question as preliminary only with the consequence that a decision on such question cannot be subject to recognition at all.<sup>80</sup> Thirdly and most importantly, this reading of the Brussels/Lugano Conventions contravenes Article II(3) of the New York Convention which obliges State courts to refer the parties to arbitration when faced with a valid arbitration agreement. This provision applies not only to the courts called upon to decide the dispute on the merits, but also to the courts competent for the issue of recognition.<sup>81</sup> In other words, in this context, the predominant interpretation of the Brussels/Lugano instruments gives rise to a true conflict of international instruments which should be resolved in favour of the *lex specialis*, i.e., the New York Convention.<sup>82</sup>

### 3. *West Tankers*: A Declared Conflict

The above (wrong) interpretation of the Brussels/Lugano instruments is unfortunately considerably strengthened by *West Tankers*, as illustrated by the recent decision of the Court of Appeal of England and Wales in the *Wadi Sudr* case.<sup>83</sup> While at first instance the court had refused to recognise a Spanish State court decision rendered in spite of the existence of an arbitration agreement, on grounds of violation of public policy, the Court of Appeal considered such conclusion in contradiction with *West Tankers*. It further held that Article 33(1) of the Brussels I Regulation imposed on Member States a legal duty to recognise the judgments of other Member States, subject only to the terms of the Regulation itself. The Spanish judgment, as falling within the scope of the Brussels I Regulation, was therefore binding on the English court even though these proceedings were arbitration proceedings and fell outside the Brussels I Regulation.

In view of this unfortunate decision, one can only regret that the proposal to revise the list of grounds for non-recognition and non-

<sup>80</sup> See Kropholler, *supra* note 79, art. 33, ¶ 11. See also University of Berne, *Stellungnahme zum Grünbuch zur Verordnung (EG) Nr. 44/2001 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*, at 14, *supra* n. 47; Markus, *supra* note 53, at 447–48.

<sup>81</sup> See Markus, *supra* note 53, at 448; J.-M. Vulliemin, *Litispendance et compétence internationale indirecte du juge étranger*, ASA Bull. 3/2001, at 439, 447–48.

<sup>82</sup> See University of Berne, *supra* note 80, at 13. See also Markus, *supra* note 53, at 448–49; Dasser, *supra* note 78, ¶ 97.

<sup>83</sup> See *Wadi Sudr*, [2009] EWHC (Comm) 196.

enforcement of judgments foreseen in the Brussels/Lugano regime by adding a new ground regarding a foreign judgment rendered in spite of a valid arbitration agreement was rejected during the revision of the Brussels and Lugano Conventions.<sup>84</sup>

#### 4. A Peaceful Alternative

In the aftermath of *West Tankers* it would thus be advisable to include both in the Brussels I Regulation and in the revised Lugano Convention – preferably by an additional protocol – an explanatory declaration on Article 1(2)(d) to the effect that the existence of a valid arbitration agreement in the State of recognition or, consequently, the existence in such a State of pending arbitration proceedings should prevent recognition of a foreign State court decision, in conformity with Article II(3) of the New York Convention.<sup>85</sup> This would have the advantage of neutralizing the problematic interpretation of *West Tankers*, as set out above, without further need to formally amend the text of the Brussels/Lugano instruments.

As explained above, regulating arbitration and the competence of State courts within the same instrument does not appear to be a good idea given the intrinsic nature of each system. Furthermore, the proposals of the Green Paper entail a high danger of creating a process which would excessively narrow the regime applicable to arbitration, with the consequence of hampering rather than supporting arbitration and possibly even disregarding the New York Convention. In any event, further solutions or clarifications concerning arbitration should rather – to the extent necessary – take place within the framework of an instrument fitted to arbitration – e.g., as an amendment to the New York Convention.<sup>86</sup> There should be no need to formally amend the texts of the Brussels/Lugano regime on this point.

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<sup>84</sup> The ECJ's ruling could have even further consequences on the interface between arbitral awards and State courts judgments. Until now, it has been considered – rightly so but not without criticism – that under the Brussels/Lugano system an award rendered or recognised in the State of recognition before another State court judgment excluded the recognition of the subsequent State court judgment. A consistent application of *West Tankers*, pursuant to which conflicts between the Brussels/Lugano Conventions and the New York Convention are resolved in favour of the former, would however seriously question this interpretation. Yet, a situation whereby existing arbitral awards could be undermined at any time by a State court judgment would be strikingly unfortunate. The related proposal of the Green Book to coordinate court decisions and arbitral awards is insofar welcome. The original problem of bringing arbitration within the scope of the Brussels/Lugano regime though remains. Cf. Markus, *supra* note 53, at 450–51.

<sup>85</sup> For the Brussels I Regulation, inclusion of an additional recital could also be considered.

<sup>86</sup> *Contra* Mourre & Vagenheim, *supra* note 2, at 26 (favouring a status quo). The problem of *lis pendens* between arbitral and State court proceedings is not necessarily to be solved in an instrument common to both fields, as shown by Article 186(1bis) of the PILA.

As to the revised Lugano Convention, it is worth stressing, as noted,<sup>87</sup> that if the Commission was to amend the Brussels I Regulation by including arbitration within its scope of application rather than leaving such operation to the realm of the New York Convention, there would be neither an obligation *stricto sensu* nor a substantial need to adjust the text of the revised Lugano Convention to the Brussels text in either direction.<sup>88</sup> In such a scenario, the resulting discrepancy could even give a competitive advantage to the non-EU Lugano States on which territory the arbitration exclusion would remain and would be likely to make Switzerland a more favourable place of arbitration compared to EU Member States.<sup>89</sup>

## VI. Conclusion

In the light of the above, four conclusions can be drawn as to the impact of the *West Tankers* decision on the Lugano regime and more specifically on Switzerland.

First, applying Protocol 2 of the Lugano and revised Lugano Conventions, there is probably no obligation of Swiss courts to take due account of *West Tankers* at all.

Secondly, in any event, *West Tankers* will be of no practical relevance for the current practice of Swiss State courts and for arbitral tribunals with a seat in Switzerland as to their competence to issue anti-suit or anti-arbitration injunctions. However, *West Tankers* complicates matters, notably the demarcation between arbitration and the Brussels/Lugano system, thus aggravating the issue of *exequatur* in the State of recognition of court judgments which have disregarded a valid arbitration agreement. But as pointed out, while *West Tankers* primarily hits the Brussels Regulation, it should concern only marginally – if at all – the Lugano Convention as well as the revised Lugano Convention.

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<sup>87</sup> See *supra* Part V.C.

<sup>88</sup> See Int'l Bar Ass'n [IBA], Arbitration Comm., *Working Group on the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee (COM(2009) 174 FINAL) and the Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters Submission to the European Commission*, at 2, *supra* n. 47, (noting that "a deletion of the arbitration exception in the [Brussels I] Regulation might give rise to inconsistent outcomes depending on which instrument applies" – i.e., the Brussels I Regulation or the Lugano Convention).

<sup>89</sup> This discrepancy could go even beyond the territory of the revised Lugano Convention Contracting States – i.e., the EU, Switzerland, Norway, and Island – since the Convention provides the possibility for other States to join the Lugano regime. It is thus conceivable that the Lugano regime could one day extend to, e.g., Japan, the Russian Federation, or Turkey.

Thirdly, given the current constellation, the Commission's attempts should not be aimed at including arbitration in the Brussels/Lugano regime but rather at properly excluding arbitration from it, in order to neutralize the negative impact of *West Tankers*.

Finally, it should be borne in mind that the Lugano Contracting States have their say in any legislative initiative regarding the arbitration exclusion. Including arbitration within the scope of the Brussels I Regulation alone would not seal the fate of the revised Lugano Convention. In fact, if not properly coordinated, this process could even turn out to the advantage of arbitration within the territory of the Lugano States and among them Switzerland, which could well reject such changes.

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