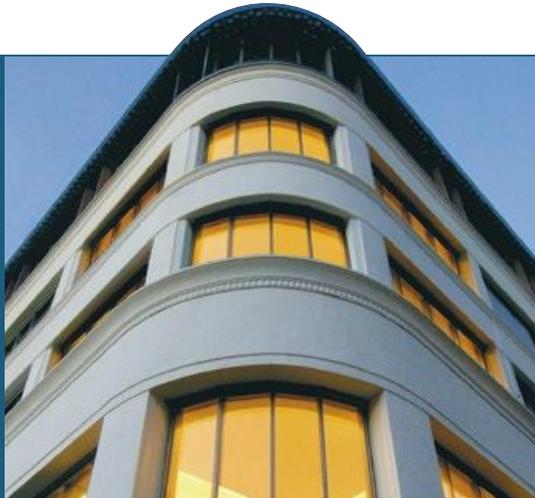


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Brussels I Recast: What about arbitration?

IBA Litigation Conference
Hot Topics in European Cross-Border
Commercial Disputes

Sandrine Giroud

Milan, 11-12 September 2014

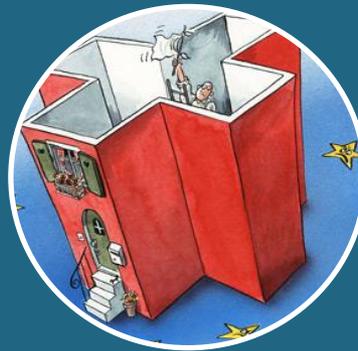
Outline

- I. The Arbitration Exception
- II. Brussels I Recast & Arbitration
- III. What Recital 12 Says and Does Not Say?
- IV. Outstanding Issues
- V. What About the Lugano Convention?
- VI. Conclusion

The Arbitration Exception (1/5)



1968 Brussels
Convention



1981/2007
Lugano
Convention



2001 Brussels I
Regulation
44/2001

Article 1(2)(d): *The Convention/Regulation shall not apply to:*
(...) **arbitration**

The Arbitration Exclusion (2/5)

- **1958 Treaty establishing the EC (Article 220)**

Simplification recognition and execution of **judicial decisions & arbitral awards**



- **1968 Brussels Convention: Arbitration exclusion**
 - Arbitration is already regulated by many instruments (e.g. 1958 New York Convention)
 - Project of a European Convention providing for the uniform law on arbitration and its Protocol on recognition and enforcement of arbitral awards

The Arbitration Exception (3/5)

Marc Rich
1991

- **Scope of the arbitration exclusion:** The exclusion of arbitration must be interpreted widely, so as to apply to proceedings brought before national courts in relation to arbitration such as the appointment of an arbitrator

Van Uden
1998

- **Provisional measures:** Where the subject-matter of an application for provisional measures relates to a question falling within the scope of the Brussels Convention, that Convention is applicable, including provisional measures, even where proceedings are to be conducted before arbitrators

The Arbitration Exception (4/5)

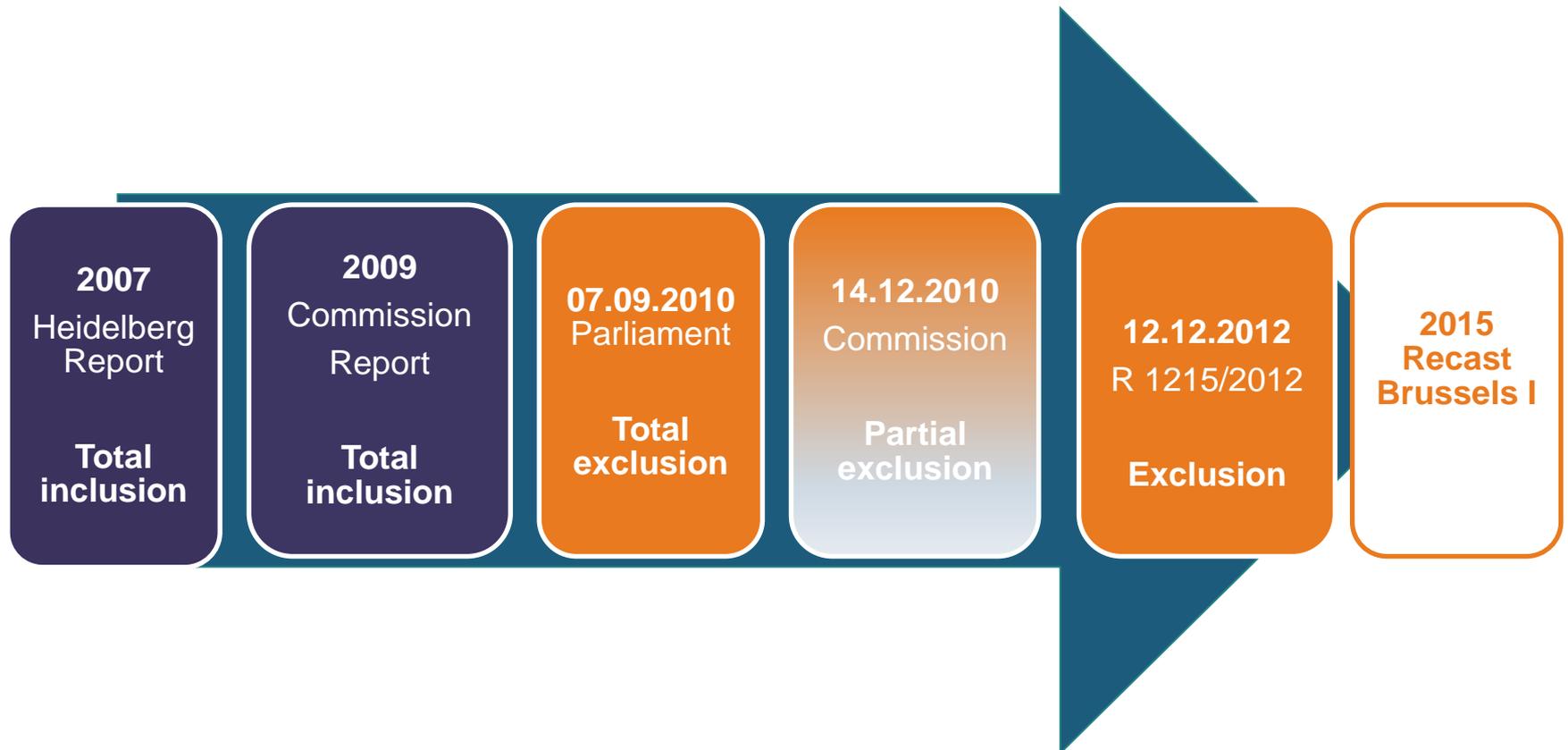
West Tankers 2009

- **Effectiveness of RB I:** unification of rules on jurisdiction & free movement of decisions
- **Decision on the validity of an arbitration agreement:** If the subject-matter of the dispute come within the scope of RB I, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, is also in scope
- **Anti-suit injunctions:** It is incompatible with RB I for a court of a MS to make an order to restrain a person from commencing or continuing proceedings before the courts of another MS on the ground that such proceedings would be contrary to an arbitration agreement

The Arbitration Exception (5/5)

- Risk of parallel proceedings
- Risk of conflicting decisions
- Issues of enforceability of a judgment rendered in violation of a valid arbitration clause

Brussels I Recast & Arbitration (1/2)



Brussels I Recast & Arbitration (2/2)

- Art. 1(2)(d)
*The Regulation shall not apply to:
(...) **arbitration***
- Art. 73(2)
*This Regulation should not affect the
application of the 1958 NY Convention*
- Preamble **Recital 12**



What Recital 12 Says and Doesn't Say (1/5)

- **Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation**

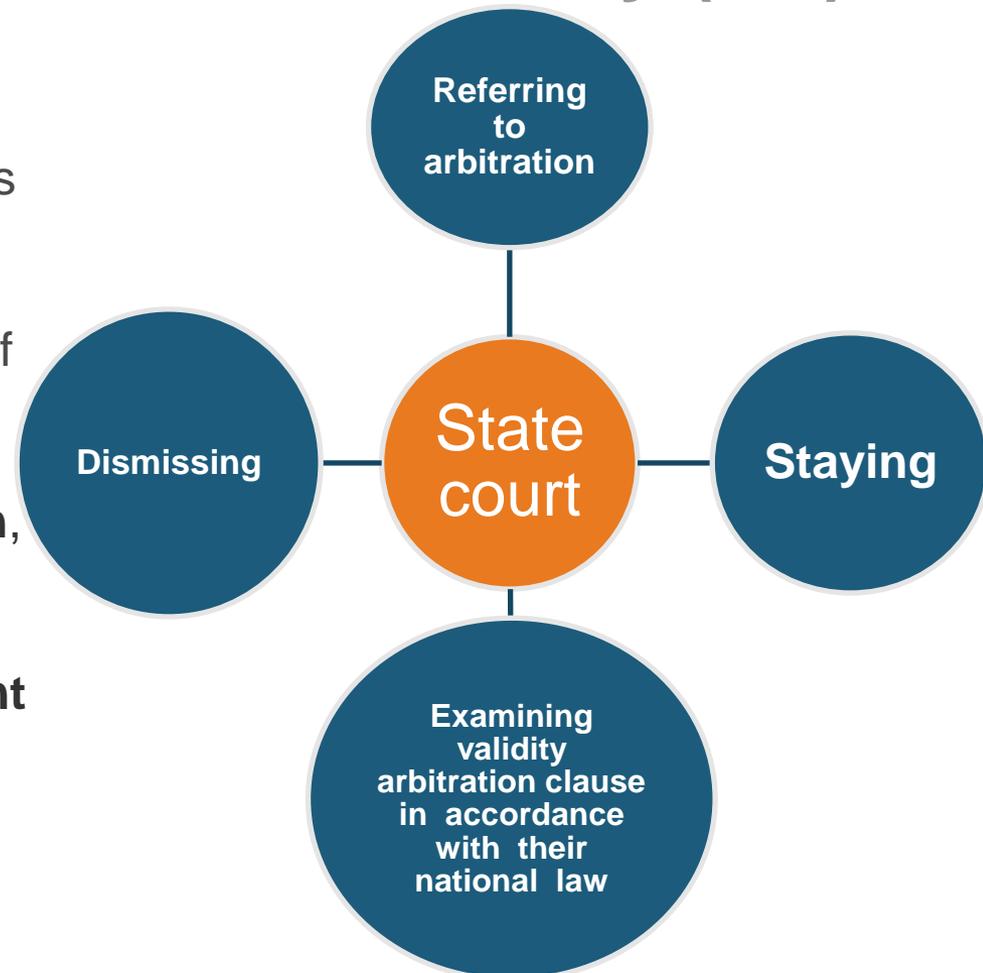
*The purpose of the recitals is to set out **concise reasons for the chief provisions** of the enacting terms, without reproducing or paraphrasing them. They shall **not contain normative provisions** or political exhortations.*

→ Inform, explain, justify

- Use of conditional tense

What Recital 12 Says and Doesn't Say (2/5)

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



What Recital 12 Says and Doesn't Say (3/5)

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



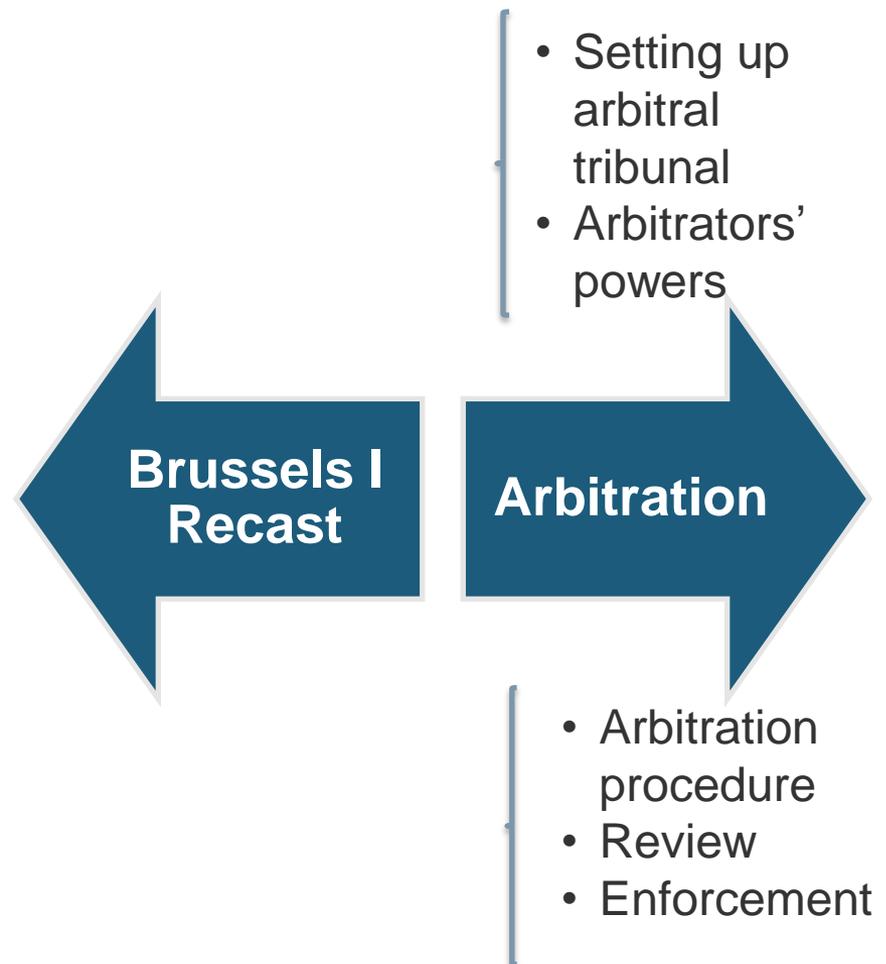
What Recital 12 Says and Doesn't Say (4/5)

#3 On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, **has determined that an arbitration agreement is null and void, inoperative or incapable of being performed**, this should not preclude that **court's judgment on the substance** of the matter from being **recognised** or, as the case may be, enforced in accordance with this Regulation. This should be **without prejudice** to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the **NY Convention** which **takes precedence** over this Regulation.



What Recital 12 Says and Doesn't Say (5/5)

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



Outstanding Issues (1/4)

West Tankers?

Enforcement of decisions rendered in violation of an arbitration clause?



Anti-suit injunctions?

Conflicts between court decisions & awards?

The End of *West Tankers*?

- **#1** State court *may* refer the parties to arbitration
- **#2** No enforcement of a preliminary decision on the validity of an arbitration clause (to be determined under national law)
- **BUT**
 - No normative change
 - State court may also decide to seize the matter
 - Still risks of parallel proceedings and conflicting decisions

Any Future for Anti-Suit Injunctions?

- **#1** State court may refer the parties to arbitration
 - State court has no obligation to seize the matter under RB I
 - End *rationale* for prohibiting anti-suit under *West Tankers*
- **BUT**
 - State court may retain jurisdiction
 - CJEU very reticent as regards anti-suit

Enforcement of decisions in violation of an arbitration clause?

- **#1** State court may refer the parties to arbitration
- **#2** Preliminary decision on the validity of an arbitration clause is not enforceable
- **#3** Decision on the merits considering an arbitration clause as invalid may be enforced without prejudice of parallel enforcement of an award
- Manifestly contrary to public policy under Art. 45 RB I?
- Violation of public order under national law?
- Violation of public policy under Art. V(2)(b) NY Convention
- *Res judicata* based on Art. III NY Convention?

What about the Lugano Convention?



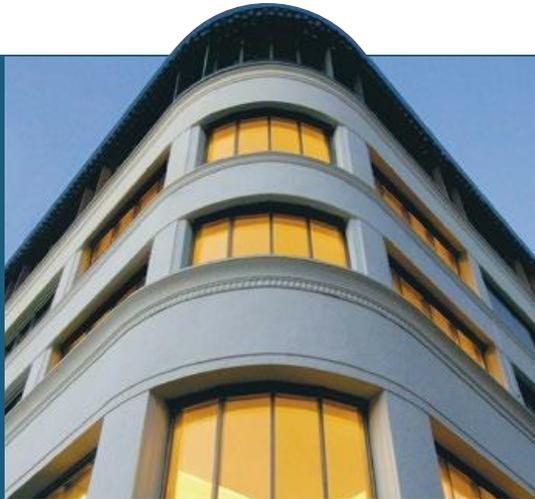
- **Protocol II to the Lugano Convention**
 - Uniform interpretation of case law
- **Vienna Convention on the Law of Treaties (Art. 31)**
 - Value of a recital when no modification on the substance of a provision?
 - Need for subsequent Parties' agreement

Conclusion

- Much about nothing?
- Conflicting interpretations to be clarified by case law
- Bright future for lawyers



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Thank you

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