

# **Judgments Relating to Arbitral Awards and The European Union's Principle of Mutual Trust**

A reflection on the enforcement of nullified arbitral awards  
and the delocalization theory of international arbitration from  
a European perspective



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LL.M. Thesis

International Commercial Arbitration Law, 30 credits

Spring Term 2016

## DEDICATION

To Alexius and Elaine, my loving parents.

## ACKNOWLEDGMENTS

I would like to express my deepest gratitude to my parents for all of their love, support and encouragement, which made everything possible. I am very grateful to my supervisor, Professor Christina Ramberg for her patient reading of my drafts and valuable input, for her availability and her advice during the redaction of my thesis. I am grateful to Professor Patricia Shaughnessy for her encouragement towards excellence, her enthusiasm, and for holding the lesson, which ignited my interest in the topic of delocalization of arbitration and the enforcement of annulled awards. I would also like to thank James Hope for his insights and views at the beginning of my thesis-writing project and his valuable input and advice to get started. I am grateful to José Rosell for his views and the patience to answer my questions. Special thanks to Gustaf Laurell, for his continuous support and love from beginning to end, for reading my draft and challenging my ideas, which was of considerable help for the achievement of this work. I would also like to thank Nao Ma and Hannes Ingwersen, for their comments, views and criticisms of my draft. I am also thankful to Fabricio Fortese, for his support and advice. Last but not least, I am thankful to my Vis Moot friends Maria Oikonomou, Carolina Morandi and Jonas Thierens, for their encouragement, friendship and collegiality throughout the LL.M. program and in preparing this work.

Finally, I would like to emphasize that I consider this thesis the beginning of my reflections on this challenging and fascinating research area, rather than my final word on it.

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## ABSTRACT

- 1 The European Union (“EU”) is a form of co-operation between its Member States. Mutual trust describes, legitimizes and orders this co-operation.<sup>1</sup> The Brussels regime of the EU provides the framework for the co-operation in recognizing and enforcing EU Member State judgments within the EU. The result is free circulation of judgments, predictability, legal certainty and efficiency. A similar co-operation is missing for arbitral awards
- 2 This thesis reflects on the arbitration exclusion of the Brussels regime and the possibility to enforce annulled awards under the New York Convention, which allows for multiple and conflicting interpretations. A specific problem analyzed in the thesis is the enforcement of annulled awards, which has caused controversy in international arbitration. The thesis critically analyzes the practice of courts to enforce annulled awards and identifies an incompatibility of such practice to the principle of mutual trust in the EU. The thesis concludes that the exclusion of arbitration from the Brussels regime undermines the EU’s objective in achieving a harmonized area of justice and that the principle of mutual trust ought to apply to post-award judgments, specifically annulment decisions.
- 3 The thesis makes a suggestion for the future development of the EU co-operation in cross-border arbitration. It suggests the establishment of a new EU Court for international commercial arbitration to achieve a deeper integration and harmonization.

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<sup>1</sup> See Matthias Weller, “Mutual Trust: In Search of the Future of European Union Private International Law” (2015) 11 *Journal of Private International Law* 64, 73.

# CHAPTER ONE: INTRODUCTION

## I. INTRODUCTION: THE ENFORCEMENT OF NULLIFIED AWARDS FROM A EUROPEAN PERSPECTIVE

- 4 In the EU, international arbitration has to co-exist, with national procedural law in each jurisdiction and with EU procedural law.<sup>2</sup> Arbitration has not been regulated within the EU but the European Parliament requested a study on international arbitration in the EU and Switzerland, which was published last year.<sup>3</sup>
- 5 Generally, when parties make an arbitration agreement they contract out of the national court system and court judges no longer decide their disputes. Court involvement before, during and after the arbitral process, however, may still occur. After arbitration proceedings have been concluded, the losing party may want to challenge the award at the seat of arbitration.<sup>4</sup> The winning party may want to start an enforcement action in a country where the losing party has assets, whereby the courts of that state will enforce the arbitral award under the United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”).<sup>5</sup>
- 6 If the court at the seat of arbitration sets aside the award, is the winning party thereby secured against enforcement in all of the 156 countries that are signatories to the New York Convention? Not necessarily so. The court at the place of enforcement has discretion to disregard the annulment decision and enforce the award,<sup>6</sup> whereby the party succeeding in the setting aside procedure, ends up winning the battle but losing the war and is possibly left with a more costly, more time-consuming and less satisfactory dispute resolution than if it had opted for litigation.

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<sup>2</sup> See Juliette Huard-Bourgois and Swati Tripathi, “Recast Brussels Regulation: A Brighter Future for Arbitration in the EU” <<http://www.chinalawinsight.com/2015/08/articles/global-network/recast-brussels-regulation-a-brighter-future-for-arbitration-in-the-eu/>> accessed May 4, 2016.

<sup>3</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” (*Directorate General for Internal Policies, Legal Affairs*, 2015) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL\\_STU\(2015\)509988\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf)> accessed May 5, 2016.

<sup>4</sup> That is, if national arbitration law offers this possibility and neither party has waived their right to challenge the award.

<sup>5</sup> If it is a state other than the one where the arbitration took place and the state is a signatory to the New York Convention. The New York Convention has furnished arbitrators powers beyond those of national court judges since arbitral awards can be enforced in 156 countries that are signatories to the New York Convention. However, party autonomy has its limits, the limits are specifically those imposed by mandatory rules applicable in the seat of arbitration and those at the place of enforcement. The latest addition is Andorra on 17 August 2015, see “Signatories to the New York Convention” <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)> accessed May 4, 2016.

<sup>6</sup> See Chapter Two I.B.1.

- 7 When an award is set aside by a court decision, it logically does not exist anymore. However, there is increasing jurisprudence from courts around the world recognizing and enforcing awards that have been set aside by a national court of a signatory state to the New York Convention.
- 8 The practice of courts enforcing annulled awards results in the problem of “floating awards”: awards that have been set aside but lack any effect in the countries of enforcement, obliging the party succeeding in the setting aside procedures to wait for enforcement measures in different countries to occur without having any power to respond by challenging the recognition of the award in each jurisdiction.<sup>7</sup> A party succeeding in setting aside proceedings therefore has no certainty when it comes to the enforcement of its “non-existent” award.
- 9 This development is contrary to the actions gradually taken by the EU to build the trust necessary for businesses and consumers to enjoy a single market that works like a domestic market.<sup>8</sup> Under the Brussels regime, a judgment in one Member State is recognized and enforced in another Member State without intermediary procedures. Judgments relating to arbitration, however, are excluded from this regime.<sup>9</sup>
- 10 The arbitration exclusion of the Brussels regime prevents the creation of an efficient single market. The EU aims to create an area of access to justice on equal terms in all Member States. Mutual trust is the foundation upon which EU justice policy is built.<sup>10</sup> Enhancing mutual trust is a core objective of the EU.<sup>11</sup>
- 11 Mutual trust improves legal certainty, which is of social concern. The EU wants to enhance the overall functioning of its internal market by maintaining peace and safety in a harmonized European area of justice whose core principal is the trust Member State grant each other.
- 12 Conflicting judgments regarding arbitral awards leaves a *lacunae* in the European area of justice that should be remedied, so that international arbitration can function more smoothly and predictably. The arbitration community has a legitimate interest in incentivizing parties to seek out arbitration. The growing uncertainty as regards the standards applied by national courts in determining whether to annul or enforce an award, goes hand in hand with a perceived lack of predictability and efficiency. The result is legal uncertainty as regards the fate of annulled awards in countries of enforcement, which diminishes the role of arbitration as a preferred method of dispute resolution.

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<sup>7</sup> See Emmanuel Gaillard, “The Enforcement of Awards Set Aside in the Country of Origin” 16, 40.

<sup>8</sup> See “EU Justice Agenda for 2020” COM(2014) 144 final.

<sup>9</sup> Art. 1 (2) lit. d of Brussels I and Recital 12 of the Recast Recast Brussels I Regulation.

<sup>10</sup> See “EU Justice Agenda for 2020” COM(2014) 144 final.

<sup>11</sup> As outlined by the European Commission in its communication on the “EU Justice Agenda for 2020” COM(2014) 144 final.



## **II. PURPOSE AND AIM OF THE STUDY**

- 13 The purpose of the thesis is to identify existing conflicts between the practice of enforcing annulled awards and the principle of mutual trust in a EU law context. The aim is to give a new impetus to the relationship between EU law and arbitration.
- 14 The question how courts treat annulled awards from other state courts has attracted much attention and involves the fundamental underlying nature of international arbitration as localized or delocalized. Whether a court will take into consideration an annulment decision in its determination to enforce an arbitral award is largely influenced by the general stance of a jurisdiction towards delocalization of arbitration. National courts deal with the matter in different ways and the academic writings suggest different approaches. A thorough analysis of this issue in a EU law context is missing to date, which is the reason for the topic of this thesis.

## **III. STUDY RESEARCH INQUIRIES**

- 15 The primary research inquiries are: Does the delocalization theory of arbitration and the enforcement of nullified awards contradict the EU law principle of mutual trust? If so, how can this be remedied?
- 16 The starting point to answer these inquiries is to explore the relationship between EU law and international arbitration. This thesis will examine the arbitration exclusion of the Brussels regime and investigate why judgments regarding arbitral awards are treated differently from judgments relating to other civil and commercial law matters. The legal theories of delocalization and localization of international arbitration are explained. To this explanation, a European angle will be added. The compatibility of the EU's mutual trust principle with the delocalization theory of international arbitration will be analyzed. The quest of this paper is to identify contradictions in the EU's handling of arbitration matters and to find a harmonized approach to judgments regarding arbitral awards. In order to answer the main inquiry, sub-questions are relevant, such as:
  - What is the effect of a court's decision to set aside an arbitral award?
  - Should the EU strive for a harmonious approach, in order to facilitate the free circulation of judgments relating to arbitral awards?

#### IV. SCOPE AND LIMITATION

- 17 There are many open questions in the interaction between arbitration and EU law. This text focuses on the relationship between international commercial arbitration law and EU law in the specific area of judgments relating to arbitral awards made, annulled and enforced within the EU. The study is therefore limited to arbitration within a EU context. This thesis exclusively deals with international and EU procedural law and the underlying notions of arbitration as being localized or delocalized. This paper does not attempt to explore all jurisdictions' arbitration laws within the EU.
- 18 The question is if the practice of courts that enforce annulled awards, and by that demonstrate their inclination towards delocalized arbitration, is incompatible with the EU's objective of integration. Though closely related to the delocalization debate, this paper does not deal with the issue of *lex mercatoria* as it concerns the substantive law and whether arbitrators may base an arbitral award on transnational rules rather than the law of a particular state. The main point of critical analysis of this thesis is the principle of mutual trust within the EU with respect to enforcement of annulled awards.
- 19 Although, there are more cases regarding conflicting arbitration-related judgments and parallel proceedings, which deserve attention and scrutiny under the principle of mutual trust, this thesis is uniquely focused on the disparate approaches of EU Member State courts when it comes to enforcing set aside awards.
- 20 The main international instrument to be considered is the New York Convention.<sup>12</sup> Suggestions on how to modify or improve the New York Convention are not advanced. Proposals on future development are limited to a EU context and how change can be achieved with EU instruments and mechanisms.
- 21 The relationship between EU law and the dispute resolution mechanisms contained in the numerous bilateral and multilateral treaties on the protection of investments is outside the scope of this thesis. This thesis therefore does not cover investment arbitration issues.

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<sup>12</sup> In force in all Member States; the 1961 Geneva Convention has not been ratified by the following Member States: Cyprus, Estonia, Greece, Ireland, Lithuania, Malta, The Netherlands, Portugal, Sweden and the United Kingdom.

## V. METHODOLOGY AND MATERIALS

### A. General remarks

- 22 The method used in this thesis is the traditional legal method (also called the legal dogmatic method). The legal questions are answered by using an established system of internally coherent norms. The traditional legal method aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyzes the relationship between these principles, rules and concepts with a view to solving ambiguities and gaps in the existing law.<sup>13</sup>
- 23 In accordance with the legal dogmatic method, legal authorities are used to determine the prevalent legal position and describe the existing law (*de lege lata*) in a way that is as neutral and consistent as possible in order to ascertain what the law is.<sup>14</sup> Smits explains that legal doctrine is not limited to a mere description and understanding of the existing law since it is always complemented by a more prescriptive approach directed towards legal decision makers such as legislatures and courts.<sup>15</sup> When the law is uncertain, this thesis searches for practical solutions that fit the existing system best.
- 24 Both a *de lege lata* and a *de lege ferenda* perspective will be applied and the analysis *de lege lata* will serve as groundwork for formulating solutions *de lege ferenda*. Crucial for the legal-dogmatic approach is that it is able to adjust to new developments such as recent case law and legislation against the background of societal change,<sup>16</sup> thereby turning into a living system that aims to achieve both consistency and change in the development of the law.<sup>17</sup> By making use of a coherent system, a change of the law will be suggested if the change fits in with the system itself.
- 25 The challenge in applying the legal-dogmatic method in the field of international arbitration is that there is no clear hierarchical order of sources, making it a methodically challenging field of law. Sources are spread transnationally, influence crosses borders, and law is not only created by the state but primarily by private organs, such as arbitrators and arbitral institutions. Guidelines created by legal associations, such as by the IBA regarding various arbitration related topics can also become influential and form soft law. It is important to keep in mind

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<sup>13</sup> See Jan M Smits, "What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research" [2015] Maastricht European Private Law Institute Working Paper No. 2015/06 1, 5 <<http://ssrn.com/abstract=2644088>>.

<sup>14</sup> See Smits 8. See also Jan M. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing Limited 2012).

<sup>15</sup> See Smits 10.

<sup>16</sup> See Smits 7.

<sup>17</sup> See Smits 7.

that law does not only exist at a certain point in time but is evolutionary, even more so in the area of international arbitration.

- 26 The EU is also a complex construct, which replaced the “European Communities” and is vested with a legal personality, capable of signing international agreements with third states. EU law takes priority over the Member States’ national laws. In order to not create confusion and inconsistencies, the term European Union (law) or its abbreviation “EU” (law) is used throughout the thesis - also in the historical background sections of Chapter One - notwithstanding its origins from the European Coal and Steel Community (“ECSC”) and the European Economic Community (“EEC”).
- 27 The area of arbitration is left to the Member States to regulate and significant differences can therefore occur. However, many Member States have adopted the UNCITRAL Model Law or have closely relied on the provisions of the Model Law when drafting their national arbitration law provisions and all Member States have signed the New York Convention.

## **B. De lege lata**

- 28 A *de lege lata* perspective will be applied when discussing the general framework of arbitration regarding the challenge and enforcement procedure for arbitral awards and the notions and principles guiding the EU in its aim to form a European area of justice. A historical method will briefly be applied in this context when talking about the prevalent treaties for both arbitration and EU law. A *de lege lata* aspect will further be relevant when analyzing the specifics of enforcing annulled awards.
- 29 Seven types of legal authorities in international arbitration can be identified, namely: “[i]nternational conventions and treaties; [n]ational laws; [a]rbitral rules; [l]aw of the dispute (procedural orders and agreements between the parties); [a]rbitral awards; [c]ase law; and [s]cholarly work”.<sup>18</sup> These sources will form the basis for a doctrinal system upon which this thesis will attempt to determine the prevalent legal position and describe the relationship between EU law and arbitration, the principle of mutual trust, and the theories of delocalization and localization (territoriality) of arbitration as well as the practice of courts to enforce annulled awards.
- 30 International conventions and treaties carry weight due to their binding nature once they have been signed and ratified by a signatory state. Since all EU Member States are signatories to the

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<sup>18</sup> SI Strong, “Research in International Commercial Arbitration: Special Skills, Special Sources” (2009) 20 *The American Review of International Arbitration*, 119, 131.

New York Convention governing the recognition of arbitration agreements and the enforcement of foreign arbitral awards - as an example of one such international convention - it will be studied in more detail. Having regard to the research inquiries of this thesis, the New York Convention – being the backbone of the international arbitration system – forms a central legal source. Another important treaty in the context of the EU, is the European Convention on International Commercial Arbitration of 21 April 1961 (“**EuCICA**”).

- 31 EU law is a form of supra-national law. Of major importance is the Treaty Establishing the European Economic Community (“**EEC Treaty**”),<sup>19</sup> which paved the way to today’s Treaty on European Union (“**TEU**”) and the Treaty on the Functioning of the European Union (“**TFEU**”).
- 32 Other conventions used as materials are the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (“**Brussels Convention**”),<sup>20</sup> replaced by the Regulation 44/2001 of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“**Brussels I Regulation**”) and the Regulation No 1215/2012 of the Parliament and Council of 12 December 2012 (“**Recast Brussels Regulation**”).<sup>21</sup>
- 33 A regulation is applicable in all EU Member States directly and does not need to be transformed by each Member State into national law. These are important in the context of this study since they deal with the jurisdiction, recognition and enforcement of judgments in civil and commercial matters. It will be necessary to explore and discuss the arbitration exclusion and Recital 12 of the Recast Brussels I Regulation. EU law is binding on all EU Member States and forms a sort of supranational legal order.
- 34 Explanatory reports, which are commentaries to Conventions, and as such do not form part of the hard law, are relied upon equally in this study. Examples are the **Jenard Report** to the Brussels Convention and the **Schlosser Report** to the Convention of Accession to the Brussels Convention. These reports give an insight into the rationale behind certain provisions and serve as guides when interpreting the provisions contained in the Brussels Convention. Other

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<sup>19</sup> Treaty Establishing the European Economic Community (1957). The EEC Treaty, signed in Rome in 1957, brought together France, Germany, Italy and the Benelux countries in a community whose aim was to achieve integration via trade with a view to economic expansion. After the Treaty of Maastricht the EEC became the European Community, reflecting the determination of the Member States to expand the Community's powers to non-economic domains. For further information, see “EEC Treaty - Original Text (Non-Consolidated Version)” <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Axy0023>> accessed June 15, 2016.. The EEC Treaty paved the way to today’s Treaty on European Union (TEU), 1992 O.J. C 191/1 (July 29, 1992). and the Treaty on the Functioning of the European Union (TFEU), 2010 O.J. C 83 (Mar. 30, 2010).

<sup>20</sup> Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, 1972 O.J. (L 299) 32.

<sup>21</sup> Brussels I - Regulation 44/2001 of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. L 12/1 and Recast Brussels I Regulation - Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters O.J. L 351/1 2012.

- relevant EU soft law sources are: The Commission White Papers which are documents containing proposals for EU action in a specific area, in some cases they follow a Green Paper published to launch a European level consultation process.<sup>22</sup> Another interesting source as regards the EU's objectives are Communications (**COM**) issued by the European Commission.
- 35 The study requested by the Committee of Legal Affairs of the European Parliament on "Legal Instruments and Practice of Arbitration in the EU" published in 2015 is an insightful source in the context of the present study. It does not present hard nor soft law but gives a description of the *status quo* of the law regarding arbitration in a European context and makes suggestions for future development. Therefore, it is particularly relevant for answering the research inquiries of this thesis and will be used as a source as well.
- 36 Since the main focus of this study lies on whether enforcing annulled awards within EU Member States implicates (and even contradicts) EU principles, much attention is directed towards the principles within the EU. These can be found in the treaties of the EU as well as in CJEU's<sup>23</sup> decisions reinforcing certain principles. The CJEU hears applications from national courts for preliminary rulings, annulment and appeals. A specific characteristic in CJEU cases is that Advocate General opinions may be included. Advocate generals give an independent opinion on how a matter should be resolved after the hearing. These opinions have no binding force but can serve as an interpretative tool for the court and the CJEU may follow it or not.
- 37 International arbitration case law will be included in the doctrinal system and examined for their reasoning, their interpretation of the New York Convention (specifically Art. V(1)(e)) and their logic in the context of the system as a whole. The cases under scrutiny are those where awards that have been set aside were enforced within the EU. The two jurisdictions that will be examined are France and Germany for being EU Member States with very disparate approaches.
- 38 Soft law and guidelines instruments are generally perceived positively in international arbitration.<sup>24</sup> Such instruments are seen to supplement existing rules and laws, and provide guidance where little or none exists.<sup>25</sup> A soft law instrument used in this study, which is not binding or coherent the same way that hard law is, is the ICCA's Guide to the Interpretation of the 1958 New York Convention.

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<sup>22</sup> See "European Commission White Papers" <[http://ec.europa.eu/white-papers/index\\_en.htm](http://ec.europa.eu/white-papers/index_en.htm)> accessed June 12, 2016.

<sup>23</sup> Informally known as the European Court of Justice ("EJC").

<sup>24</sup> See "White & Case and Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (2015) <<http://www.arbitration.qmul.ac.uk/research/2015/>> accessed June 13, 2016.

<sup>25</sup> See "White & Case and Queen Mary University of London, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration."

39 Academic literature forms another source material in this study. Scholarly work serves as a help to understand the underlying rationale for the rules and the various concepts in the hard law. It should be noted that practitioners publish much of the legal literature in arbitration law. Thus, the literature focuses largely on the appropriate solution in practice, without references to the hard sources of law and often without a basis in a *de lege lata*-analysis. Therefore legal literature should be applied carefully. A number of legal commentaries have been used in this thesis, such as Redfern and Hunter on International Arbitration, Comparative International Commercial Arbitration by Lew, Mistelis and Kröll, also the commentary by Fouchard Gaillard Goldman on International Commercial Arbitration, and International Commercial Arbitration by Born.<sup>26</sup>

### C. De lege ferenda

- 40 The method in this study is not purely to ask “what is the law?” (*de lege lata*), but also to ask “what should the law be?” (*de lege ferenda*). The law in the field of international arbitration is an evolutionary state, always adapting to new demands and trends. The challenge of the topic of this thesis is that EU law finds itself in a similar position: in a state of evolution. When these two areas meet, there are a lot of uncertainties, like an open field, new phenomena occur which the law fails to address or the law has not adapted quickly enough to meet these new tendencies.
- 41 This study sheds light on a particular aspect where the arbitration exception of the Brussels regime is problematic: the principle of mutual trust clashes with the practice of courts to disregard annulment decisions and enforce awards, which have been set aside. This study does not end with identifying that the arbitration exception poses a risk to the EU’s single market and therefore needs to be reconsidered but develops further. This thesis critically analyzes from a *de lege ferenda* perspective the identified gaps and inconsistencies of the law as is and suggests legal development in an effort to further harmonization within the EU.
- 42 First, the need to regulate is discussed, considering the limits of the EU’s mandate to regulate in the area of arbitration. Second, a proposal is advanced in regards to an improved functioning between arbitration and EU law. Change is suggested by way of introducing a new organ (EU court for international arbitration).

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<sup>26</sup> See Strong, “Research in International Commercial Arbitration: Special Skills, Special Sources” 151. Strong categorizes these as excellent treatises within the field of international arbitration.

## VI. STRUCTURE OF THE THESIS

- 43 The thesis is divided into five chapters. The previous sections are part of **Chapter One** and provide an introduction into the topic and define the scope, purpose, limits and research inquiries of the study. They also give an overview of the methodology and materials used.
- 44 **Chapter Two** outlines the legal framework and the relationship between EU law and international commercial arbitration. The main focus lies on the Brussels regime and the New York Convention. The delocalization and localization theories of arbitration are explored in order to systemize court decisions when it comes to the issue of enforcing nullified awards.
- 45 **Chapter Three** explains the clash of the EU's principle of mutual trust with the enforcement of nullified international arbitral awards. The principle of mutual trust and the cases in which nullified awards were enforced are examined in more detail. This chapter concludes with a critical analysis.
- 46 **Chapter Four** explores the way forward. It specifically explains the EU's power to regulate in the area of arbitration. One proposal for the future development is advanced in this chapter: the establishment of a European Court for international commercial arbitration.
- 47 **Chapter Five** is the last chapter and concludes the study with an overall conclusion, spanning all issues touched upon as a whole and bringing the various findings into a meaningful context.

## CHAPTER TWO: THE LEGAL FRAMEWORK AND THE RELATIONSHIP BETWEEN EUROPEAN UNION LAW AND INTERNATIONAL COMMERCIAL ARBITRATION

### I. INTRODUCTION: EU LAW AND INTERNATIONAL ARBITRATION

- 48 EU law and arbitration are two legal regimes that have advanced mostly untouched by each other, occupying their own separate worlds with their own distinctive logics.<sup>27</sup> The relationship between these two regimes has been described rather negatively as being one of “mutual indifference” and “co-existence”,<sup>28</sup> even as “schizophrenic”.<sup>29</sup> Coincidentally, 1958 is a

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<sup>27</sup> See George A. Bermann, “Navigating EU Law and the Law of International Arbitration” (2012) 28 *Arbitration International* 397–398. See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

<sup>28</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186. Bermann 398.

<sup>29</sup> See Massimo V. Benedettelli, “Communitarization’ of International Arbitration: A New Spectre Haunting Europe?” (2011) 27 *Arbitration*



milestone year for both the EU and international commercial arbitration. Not only did the Treaty Establishing the European Economic Community (“**EEC Treaty**”) come into force that year, but also the New York Convention entered into force.<sup>30</sup>

- 49 Efforts in regulating and harmonizing EU law, from the very beginning, encompassed constitutional and administrative law with some domains such as agriculture, fisheries, and competition law.<sup>31</sup> Through treaty amendments more subjects fell within the scope of EU law regulation and the objective of achieving an internal market and harmonizing law across the EU brought virtually any field, also core fields of private law, into the EU’s radar.<sup>32</sup>
- 50 The field of private international law was traditionally kept at a distance.<sup>33</sup> And arbitration, widely regarded as a branch of private international law, was not historically part of the EU’s core concerns.<sup>34</sup> The development of the European harmonization in the area of private international law has been described as being relatively slow with a *de facto* legislative inactivity.<sup>35</sup>
- 51 This changed when the Member States eventually entered into the Brussels Convention.<sup>36</sup> The original exclusion of private international law from the European process of regulation further changed with the enactment of the Rome II<sup>37</sup> and Rome I Regulations,<sup>38</sup> which establish a uniform set of conflict of laws rules for contractual and non-contractual obligations.
- 52 From a more practical perspective, arbitration can be regarded as serving EU law purposes for it offers an independent, alternative system to litigation, which is important for the implementation of Art 101 TFEU<sup>39</sup> (formerly Art 81 EC Treaty) in accordance with the

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International 583.

<sup>30</sup> See Bermann 400. The EU was established by the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1; 31 I.L.M. 247 (1992) (“**TEU**”). The TEU changed the name of the EEC Treaty in Treaty establishing the European Community (“**EC Treaty**”). The treaties were amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340). United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (“**New York Convention**”).

<sup>31</sup> See Bermann 401.

<sup>32</sup> See Bermann 401.

<sup>33</sup> See Bermann 401.

<sup>34</sup> See Bermann 401.; Gary B Born, *International Commercial Arbitration* (2d edn, Kluwer Law International 2014) 216.

<sup>35</sup> See Christoph Schmon, “Convergence between the European Regulations Brussels I & Rome I on the Example of Consumer Contracts, Stanford-Vienna European Union Law Working Paper No. 4” 17.

<sup>36</sup> Bermann 401.; Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, 1972 O.J. (L 299) 32.

<sup>37</sup> Rome II - Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, 2007 O.J. (L 199) 40.

<sup>38</sup> Rome I - Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6.

<sup>39</sup> Art. 101 TFEU: “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. [...]

Commission White Paper<sup>40</sup> and to share the load of cases concerning competition disputes.<sup>41</sup> Even the European Court of Human Rights (“ECtHR”) has approved arbitration as such, confirming the uniformity of arbitration with the right to judicial remedies and the right to fair trial.<sup>42</sup> Therefore, the ECtHR asserted arbitration as being in line with the European Convention of Human Rights.<sup>43</sup>

- 53 There are, however, conflicts between the interests of the EU and arbitration. Part of the EU’s process of European integration is the establishment of a European area of justice for the adjudication of civil and commercial disputes.<sup>44</sup> Arbitration enables parties to step outside the European area of justice, as disputes are resolved privately by an arbitral tribunal and not by Member State courts.<sup>45</sup> Arbitration, therefore, may hinder the EU’s goals of harmonization if justice delivered in private disregards specific substantive law, for example.<sup>46</sup> Moreover, inconsistency as regards the treatment of arbitral awards by Member State courts create inefficiency and unpredictability and leaves a desynchronized landscape of judicial involvement in arbitration.<sup>47</sup>
- 54 The question of how to balance the amount of influence of EU law on commercial arbitration is important. Too much influence may undermine the utility of arbitration, and may strip it of its advantages and benefits to the European business community.<sup>48</sup> Too little, however, may risk undermining the EU’s harmonization efforts. This balance can only be found once it is understood what place arbitration has taken in the EU and which theory of arbitration ultimately has to prevail in a EU context.

## II. THE LEGAL FRAMEWORK: A HISTORY OF CO-EXISTENCE

### A. European Union law: The Brussels regime and its arbitration

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<sup>40</sup> The Commission’s White Paper on “Modernisation of the Rules of Arts. 85 and 86 (then Arts. 81 and 82 EC Treaty)” was published on 28 April 1999 and recommended the role Member States would play in modernizing the rules and enhancing the role in the implementation of EC competition law. The Commission, in the Modernisation Regulation, passed over arbitration in silence. See Phillip Landolt, *Modernised EC Competition Law in International Arbitration* (Kluwer Law International Sold and distributed in North, Central and South America by Aspen Publishers 2006) 41.

<sup>41</sup> See Georgios I Zekos, “Antitrust/Competition Arbitration in EU versus U.S. Law” (2008) 25 *Journal of International Arbitration* 1, 29.; Bermann 400.

<sup>42</sup> See *Osmo Suovaniemi and Others v Finland*, Application no. 31737/96, Decision of 23 February 1999; see also “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

<sup>43</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), was adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental freedoms.

<sup>44</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

<sup>45</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

<sup>46</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

<sup>47</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

<sup>48</sup> See “Legal Instruments and Practice of Arbitration in the EU (Study)” 186.

## exclusion

### 1. The Brussels Convention

- 55 The Brussels Convention was the basis for creating a harmonized regime of jurisdiction, recognition and enforcement of judgments in civil and commercial matters for EU Member States. The Brussels Convention had been signed on the basis of Art. 220 of the EEC Treaty,<sup>49</sup> in which the Contracting States of the Treaty (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands) declared that they would ensure “the simplification of formalities governing the **reciprocal recognition and enforcement of judgments** of courts or tribunals and of **arbitration awards**.”<sup>50</sup> This article therefore required the Member States to enter into negotiations for a treaty aimed at harmonizing their domestic laws in the area of mutual recognition and enforcement of arbitral awards.
- 56 Art. 1 (2) no. 4 of the Brussels Convention, however, excluded arbitration from its scope:  
“This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to: [...] (4) arbitration.”
- 57 As apparent from the *Jenard Report*,<sup>51</sup> arbitration was excluded for two reasons. First, it was established that the main aim of Art. 220 of the EEC Treaty had been satisfied through the Member State’s accession to the New York Convention.<sup>52</sup> Second, at that time it was expected that the European Convention providing for a Uniform Law on Arbitration would be ratified.<sup>53</sup>
- 58 The *Schlosser Report*<sup>54</sup> notes that the interpretation of this “arbitration exclusion” was not clear and created two divergent basic positions, impossible to reconcile.<sup>55</sup> On the one hand, the United Kingdom had expressed the view that the provision covered all disputes which the parties had agreed should be settled by arbitration, including any secondary disputes connected

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<sup>49</sup> Treaty of Rome establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>50</sup> Emphasis added.

<sup>51</sup> “Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1979”, see Jenard Report, 1979 O.J. (C 59) 13. Its rapporteur, Mr P. Jenard, Directeur d’Administration in the Belgian Ministry for Foreign Affairs and External Trade, wrote the explanatory report.

<sup>52</sup> See Jenard Report, 1979 O.J. (C 59). 13. Except for Luxembourg and Ireland, who were not Member States of the New York Convention but had expressed their intent to ratify at a later stage.

<sup>53</sup> See Jenard Report, 1979 O.J. (C 59). 13. This convention never entered into force as it was only ratified by one state, Belgium in 1973. A minimum of three ratifications were needed. See “Chart of Signatures and Ratifications of the European Convention Providing a Uniform Law on Arbitration” <[http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/056/signatures?p\\_auth=gK0JbgXz](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/056/signatures?p_auth=gK0JbgXz)> accessed June 11, 2016.

<sup>54</sup> Report on the Convention of Accession, 22 O.J. EUR. COMM. No. C 59/ 71 (1979). This report was published by a committee of experts who were responsible for drafting the Convention of Accession. Its rapporteur was Dr. Peter Schlosser, Professor of Law at the University of Munich.

<sup>55</sup> See Schlosser Report, 1979 O.J. (C 59) 92.

with the agreed arbitration.<sup>56</sup> On the other hand, the original Member States of the EEC's point of view was that the provision only regarded national court proceedings as covered by the arbitration exception if they referred to arbitration proceedings.<sup>57</sup> Although this controversy existed, the text was not amended.

- 59 This seemingly simple "arbitration exclusion" therefore gave rise to a series of uncertainties, *inter alia*, (i) the uncertainty as to which arbitration related court actions fall under the EU jurisdiction rules or national law; (ii) the possibility of starting court proceedings to neutralize the arbitration process (so-called "Torpedo actions"); and (iii) the impossibility of obtaining anti-suit injunctions in favor of arbitration.<sup>58</sup>
- 60 Furthermore, since decisions concerning the annulment of arbitral awards are outside the Brussels Convention, inconsistencies as regards the recognition of judgments that deal with arbitral awards in an otherwise harmonized area of European justice are made possible. While one country may be in favor of enforcing an annulled award, another one might not be, resulting in a disharmonized area of law as compared to other judgments in civil and commercial matters within the EU.
- 61 The Brussels Convention was the starting point for a European regime of jurisdiction, recognition and enforcement of judgments in civil and commercial matters and paved the way to the Brussels I Regulation.

## 2. Brussels I Regulation

- 62 The Brussels I Regulation (or "Brussels I")<sup>59</sup> replaced the Brussels Convention.<sup>60</sup> It is the EU's central instrument for harmonizing European civil procedure.<sup>61</sup> The objective is to create a EU area of justice with no parallel court proceedings and free circulation of judicial decisions.<sup>62</sup> Its rules originate from the Brussels Convention, under which a European system of jurisdiction and enforcement was first established,<sup>63</sup> and have been interpreted by the CJEU. Since Brussels I is a regulation it is applicable in all Member States directly and does not need to be

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<sup>56</sup> See Schlosser Report, 1979 O.J. (C 59) 92.

<sup>57</sup> See Schlosser Report, 1979 O.J. (C 59) 92.

<sup>58</sup> See Huard-Bourgois and Tripathi. Anti-suit injunctions aim to protect and give effect to the arbitration agreement, whereas judicial review and enforcement proceedings of arbitral awards are ancillary to arbitration.

<sup>59</sup> Brussels I - Regulation 44/2001 of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. L 12/1.

<sup>60</sup> The Lugano Convention had been established as a parallel instrument of the Brussels Convention for the EFTA-States, see 1988 O.J. (L 319) 9. For the revised official version, see 2007 O.J. (L 339) 3.

<sup>61</sup> See Bermann 400.; See also Dietmar Czernich, *Europäisches Gerichtsstands- Und Vollstreckungsrecht EuGVVO Und Lugano-Übereinkommen, VO-Zuständigkeit in Ehesachen ("Brüssel-IIa-VO")*; *Kurzkommentar* (LexisNexis 2009) 17.

<sup>62</sup> See Huard-Bourgois and Tripathi.

<sup>63</sup> See Schmon 18.

transformed by each Member State into national law. It is a system for the determination of both the jurisdiction of Member State courts in civil and commercial matters and provides for unified provisions on the recognition and enforcement of their judgments in other EU States.<sup>64</sup>

63 The “arbitration exclusion” of Art. 1 (2) no. 4 of the Brussels Convention was restated *verbatim* at Art. 1 (2) lit. d of Brussels I. There was uncertainty as to which of the following types of arbitration-related court proceedings were meant to be excluded from the Brussels Regulation:<sup>65</sup>

1. actions relating to the validity of the arbitration agreement or its scope;
2. actions ancillary to arbitration including actions for the appointment of the arbitral tribunal or the challenge of an arbitrator;
3. actions relating to the enforcement – or annulment – of an arbitral award; and
4. actions relating to the enforcement of a court judgment recognizing the validity of an arbitration agreement.

64 There is a perceived lack of clarity, which was already noted in the *Schlosser Report*.<sup>66</sup> The Brussels I Regulation itself did not provide any answers. As a result the CJEU has tried to reduce the inherent unpredictability over the years, without great success.<sup>67</sup> More clarity was achieved later through the recast of the regulation.

### 3. Recast Brussels I Regulation

65 After several years of the Brussels I Regulation being in force, the European Commission led a wide consultation, following which the EU Parliament and the Council have adopted a new version of the Brussels Regulation, in which the drafters attempted to clarify the arbitration exclusion: the Recast Brussels Regulation in order to improve the conduct of cross-border litigation within the EU.<sup>68</sup> The EU has from the beginning abstained from intervening in the Member States’ arbitration laws. This is clearly evidenced by the decision of the drafters of the Brussels I Regulation, to exclude arbitration from its scope of application.<sup>69</sup>

66 Recital 12 to the Preamble of the Recast Brussels Regulation brought clarification as regards the scope of the arbitration exclusion and confirms that all the above-mentioned arbitration-related actions are excluded from the Brussels regime. As regards point 3 mentioned above,

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<sup>64</sup> See Schmon 18.

<sup>65</sup> Huard-Bourgois and Tripathi.

<sup>66</sup> See Schlosser Report, 1979 O.J. (C 59) 92.

<sup>67</sup> See Huard-Bourgois and Tripathi.

<sup>68</sup> See Huard-Bourgois and Tripathi.

<sup>69</sup> See Benedettelli 586–587.

which is the focus of this thesis, “actions relating to the enforcement – or annulment – of an arbitral award”, Recital 12 clarifies in its last paragraph that:

“This Regulation should not apply to [...] **any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.**”<sup>70</sup>

67 Moreover, the new Art. 73.2 states that “[t]his Regulation shall not affect the application of the 1958 New York Convention”. Recital 12 asserts that the obligations of the EU States under the Recast Brussels Regulation should not prejudice their competence to decide on the enforcement of arbitral awards under the New York Convention. In addition, Recital 12 affirms the supremacy of the New York Convention by stating that it “takes precedence over this Regulation”, meaning that any shortcomings of the New York Convention would be automatically transferred to the European scene of justice.

## **B. International commercial arbitration law: The New York Convention and important concepts in arbitration**

### **1. The New York Convention**

68 The New York Convention is an international convention whose signatories are under the obligation to recognize arbitral agreements and foreign arbitral awards. It has a wide scope of application and facilitates the recognition and enforcement of foreign arbitral awards in the territories of any of its 156 signatory states.<sup>71</sup>

69 National courts in the signatory countries are obliged to enforce foreign awards unless none of the handful of procedural and substantive grounds for objecting to enforcement are met.<sup>72</sup> Originally, the New York Convention replaced the 1927 Geneva Convention, for the states that are parties to both conventions,<sup>73</sup> and the 1923 Geneva Protocol. It is considered to be an improvement and was appraised for being “the single most important pillar on which the edifice of international arbitration rests”.<sup>74</sup> Leaving certain deficiencies of the New York

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<sup>70</sup> Emphasis added.

<sup>71</sup> See Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 11.37.

<sup>72</sup> See Blackaby and others 11.37.

<sup>73</sup> See Art. VII(2) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

<sup>74</sup> See Gillis Wetter, “The Present Status of the International Court of Arbitration of the ICC: An Appraisal” [1990] *Am Rev Intl Arb* 91, 93.

Convention aside that are the exception to the norm, it has proven to be a success story. This is why, for now, there is a hesitancy to modernize the Convention's existing text.<sup>75</sup>

70 Art. I (1) of the New York Convention adopts an international attitude but clearly makes reference to the territory of states:

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the **territory of a State** other than the State where the recognition and enforcement of such awards are sought [...] It shall also apply to arbitral awards not considered as domestic awards **in the State** where their recognition and enforcement are sought.”<sup>76</sup>

71 The grounds for refusal of recognition and enforcement are enumerated exhaustively in Art. V of the New York Convention and are almost identical to those set out in the UNCITRAL Model Law (Arts. 35 and 36). The opening sentence of Art. V(1) of the New York Convention is of relevancy for this thesis, and especially the fifth ground for refusal in point (e) has been the source of a lot of controversy:

“Recognition and enforcement of the award **may** be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...]

(e) The award has not yet become binding on the parties, **or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.**”<sup>77</sup>

72 The term “may” instead of a more mandatory language such as “shall” or “must”, has been taken by some to mean that Art. V(1) of the New York Convention gives the state courts discretion whether to refuse enforcement or still recognize and enforce a foreign award even if it has been set aside at the seat of arbitration.<sup>78</sup> In some countries, courts have reportedly taken this view, which leads to the situation that an annulled award, which is unenforceable in its country of origin, may still be enforced in another country.<sup>79</sup>

73 The judicial review of an arbitral award is subject to local law requirements. It has been suggested to give such local annulments only local effect and disregard them internationally.<sup>80</sup>

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<sup>75</sup> See Blackaby and others 11.40.; but see Albert Jan van den Berg, “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note” [2009] 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series.

<sup>76</sup> Emphasis added.

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<sup>78</sup> See Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Schulthess Verlag 2016) 437–438. Blackaby and others 11.89.

<sup>79</sup> See Blackaby and others 11.89.

<sup>80</sup> See Blackaby and others 11.91.; Derains, “Foreword”, in ICC (Ed.) *Hommage À Frédéric Eisemann* (ICC, 1978), 13, Translated in Jan Paulsson, “The Case for Disregarding Local Standard Annulments under the New York Convention” (1996) 7 *Am. Rev. Int'l Arb.* 99.

A former secretary-general of the ICC Court noted that this impedes the “true internationalization of arbitration” since “in the awards’ country of origin all means of recourse and all grounds of nullity [...] may be used to oppose recognition abroad [...]”.<sup>81</sup> Some courts have therefore regarded the annulment at the country of origin as being insufficient to impede the enforceability of an “international arbitral award”.<sup>82</sup>

74 The explanation for this can be found on the one hand, in the permissive language of Art. V(1) of the New York Convention, and on the other hand in Art. VII (1) of the New York Convention’s recognition of more favorable provisions for the recognition and enforcement of awards.<sup>83</sup>

## 2. Judicial review of the arbitral process and the problem of possible “double review”

75 Judicial review of the arbitral award has existed as long as arbitration has been an alternative to litigation.<sup>84</sup> However, court review mostly occurred during enforcement proceedings.<sup>85</sup> Nowadays, it is widely recognized that the courts at the seat of arbitration have jurisdiction to review the arbitral process and it is a generally accepted principle that the courts at the country of origin enjoy exclusive competence as regards setting aside actions.<sup>86</sup>

76 Although users to arbitration expect a final award, they also want to make sure that there is a possibility to review the arbitral process, meaning that parties do not want to be wholly outside the legal framework of national courts.<sup>87</sup> This is evidenced by a decline of arbitrations conducted in a particular state after it has abolished judicial review of arbitral awards. In this regard, the “Storme amendment” passed in Belgium is particularly insightful.<sup>88</sup> It shows the attempt of a state to exclude judicial review of arbitral awards and introduce *de facto* “delocalized” international arbitration within its borders.<sup>89</sup> Under this amendment, parties with

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<sup>81</sup> Blackaby and others 11.91.; Derains.

<sup>82</sup> Courts in France, Belgium, Austria and the United States, for example; see Blackaby and others 11.90.

<sup>83</sup> See Blackaby and others 11.93.;

<sup>84</sup> See Albert Jan van den Berg, “Should the Setting Aside of the Arbitral Award Be Abolished?” [2014] ICSID Review 3.

<sup>85</sup> See van den Berg, “Should the Setting Aside of the Arbitral Award Be Abolished?” 3.

<sup>86</sup> See Blackaby and others 3.81.; van den Berg, “Should the Setting Aside of the Arbitral Award Be Abolished?” 4.; See also Art. V(1)(a) and (e) New York Convention; Art. 36(1)(a)(i) and (v) UNCITRAL Model Law.

<sup>87</sup> See Bruno Leurent, “Reflections on the International Effectiveness of Arbitration Awards” (1996) 12 *Arbitration International* 272.; Andrew Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford University Press 2007) para 7.84.; Roy Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration” (2001) 17 *Arbitration International* 19, 30.

<sup>88</sup> The law passed 27 March 1985 and added a provision to Art. 1717 of the Belgian Judicial Code, which provided in its para. 4: “The Belgian Court can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium, or a legal person formed in Belgium or having a branch [...] or some seat of operation [...] there.” It is often cited as a model for delocalization.

<sup>89</sup> See Blackaby and others 3.81.



no connection to Belgium in an international arbitration were barred from having their arbitral award reviewed by Belgian courts.<sup>90</sup>

- 77 Although it has been noted that the aim of the amended law was to establish Belgium as a “paradise for international arbitration”,<sup>91</sup> exactly the opposite was attained as a result: less international arbitrations took place in Belgium. As a consequence, Belgium in 1998 amended the law again, giving parties the choice to opt out of setting aside proceedings, similar to the Swiss provision.<sup>92</sup> Switzerland can be seen as another example of a jurisdiction that has adopted nuances of delocalization of arbitration. Parties in an arbitration seated in Switzerland may opt out of judicial review, if they so wish.<sup>93</sup>
- 78 Swiss commentators estimate that foreign parties rarely make use of that option under the Swiss Private International Law Act (SPILA).<sup>94</sup> Along with the Swiss and Belgian legislators, other jurisdictions have followed suit and give parties the option to opt out of annulment proceedings, such as the Swedish<sup>95</sup> and the French legislators.<sup>96</sup>
- 79 While it can be reckoned that parties generally do not want the arbitral process to be entirely removed from judicial review, they neither want judicial review to give rise to a multitude of proceedings, resulting in higher costs, and risks of conflicting decisions.<sup>97</sup> National court involvement and national legislation has the purpose to secure a minimum standard of objectivity and fairness in the proceedings,<sup>98</sup> which is of utmost importance to parties in

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<sup>90</sup> See Leurent 272.

<sup>91</sup> See, e.g., Marcel Storme, “Belgium: A Paradise for International Commercial Arbitration Marcel” (2016) 14 Int’l Bus. Law. 294. Alain Vanderelst, “Increasing the Appeal of Belgium as an International Arbitration Forum? - The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards” (1986) 3 Journal of International Arbitration 77.

<sup>92</sup> See Julian M Lew, Loukas A Mistelis and Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) paras 25–70. The new Art. 1717 (2) of the Belgian Judicial Code reads as follows: “The parties may, by an express statement in the arbitration agreement or by a subsequent agreement, exclude any application to set aside the arbitral award where none of the parties is either an individual of Belgian nationality or residing in Belgium, or a legal person having its head office or a branch there.”

<sup>93</sup> The Swiss opting out provision contained in Art. 192 PILA reads as follows: “(1) If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2). (2) If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.” The Swiss Supreme Court held in its judgment 4A\_238/2011 that Art. 192 (1) PILA is fully consistent with Art. 6 (1) EHRC, because renouncing any appeal is the logical and necessary consequence of party autonomy, which is compatible with Art. 6 (1) EHRC (unless the consent is vitiated of course). See also “Swiss Supreme Court Holds That Opting out Agreements pursuant to Art. 192 PILA Are Fully Consistent with Art. 6 (1) EHRC (Case Comment 4A\_238/2011)” <<http://www.swissarbitrationdecisions.com/swiss-supreme-court-holds-that-opting-out-agreements-pursuant-to>> accessed May 7, 2016.

<sup>94</sup> See Leurent 273.

<sup>95</sup> Art. 51 of the Swedish Arbitration Act provides that “[w]here none of the parties is domiciled or has its place of business in Sweden, such parties may in a commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award as are set forth in section 34. An award which is subject to such an agreement shall be recognised and enforced in Sweden in accordance with the rules applicable to a foreign award.”

<sup>96</sup> Art. 1522 of the French Code of Civil Procedure, applicable to international arbitrations, provides that “by way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside”. For further information, see, e.g., Daniella Strik and Justus Hoefnagel, “Growing Number of Countries Allowing Exclusion Agreements with Respect to Annulment Warrants Greater Scrutiny of Arbitration Clauses” <<http://kluwerarbitrationblog.com/2012/01/11/growing-number-of-countries-allowing-exclusion-agreements-with-respect-to-annulment-warrants-greater-scrutiny-of-arbitration-clauses/>> accessed May 7, 2016.

<sup>97</sup> See Leurent 273.

<sup>98</sup> See Jan Ramberg, “Skiljedom Eller Dom ? Om Effektivitet Och Rättssäkerhet I Dömande Verksamhet” [1997] Juridisk Tidskrift 638–639.

international arbitration.<sup>99</sup> In securing that standard, courts can be seen to play a dual controlling role at the end of the procedure, in the setting aside as well as in the enforcement procedure, since the grounds for setting aside and refusal of enforcement are limited and usually similar to each other.<sup>100</sup>

80 A critique to the current framework is that there is a possibility to have “double review” and that this may lead to conflicting decisions by different courts. This potential of double control is due to the award being reviewed on similar grounds in annulment and enforcement proceedings.<sup>101</sup> Gaillard notes that although double review does not amount to double exequatur, which the New York Convention wanted to abolish, it “is undoubtedly a step backwards.”<sup>102</sup> It may seem that the arbitration framework becomes somewhat arbitrary. The question that arises in this regard is whether it is efficient to have a setting aside procedure and an enforcement procedure separately from each other.

### **3. A balancing act between the seat of arbitration and party autonomy and the relevance of annulments at the seat of arbitration - Is arbitration localized or de-localized?**

81 The debate on whether arbitral proceedings and the resulting arbitral awards are “localized” or “delocalized” concerns the influence of national laws and courts when an international arbitration takes place. Delocalized views originate from the opposition to judicial interference with party autonomy. The movement towards delocalization of the arbitral process and the arbitral award seems to have been developed in the 1980s by leading French scholars,<sup>103</sup> followed by strong support from other prominent international authorities, such as William W. Park<sup>104</sup> and Jan Paulsson.<sup>105</sup> To-date the issue of delocalization still remains unsettled.

82 The debate centers around the principle of territoriality and the concept of party autonomy. According to the principle of territoriality, a state is sovereign within its own borders and its

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<sup>99</sup> See SI Strong, “Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration” [2012] *Journal of Dispute Resolution* 10.

<sup>100</sup> See Jacomijn J van Haersolte- Van Hof and Erik V. Koppe, “International Arbitration and the Lex Arbitri” [2014] *Grotius Centre Working Paper* 2014/033-IEL 1999, 8.

<sup>101</sup> See van den Berg, “Should the Setting Aside of the Arbitral Award Be Abolished?” 3.

<sup>102</sup> Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 33.

<sup>103</sup> See Goode 21. It has been reported that the Greek scholar, Professor Charambalos N. Fragistas was the first to have suggested the idea. See Francis A Mann, “Lex Facit Arbitrum” in Pieter Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (1957) 158. French scholars include: Professors Rene David, Berthold Goldman and Philippe Fouchard. Further supporters: Jan Paulsson, Professors Pierre Lalive and Arthur von Mehren.

<sup>104</sup> See William W Park, “The Lex Loci Arbitri and International Commercial Arbitration” (1983) 32 *International and Comparative Law Quarterly* 21.

<sup>105</sup> See Jan Paulsson, “Delocalisation of International Commercial Arbitration: When and Why It Matters” (1983) 32 *International and Comparative Law Quarterly* 53, 53.; see generally Jan Paulsson, “Arbitration Unbound: Award Detached From the Law of Its Country of Origin” (1981) 30 *International and Comparative Law Quarterly* 358.

law and courts have the exclusive right to determine the legal effect of acts done.<sup>106</sup> Party autonomy establishes that the binding authority of an award stems from the agreement of the parties.<sup>107</sup> Depending on how much force is given to either of these two concepts, different models of localization and delocalization are possible.<sup>108</sup>

*a. The view of localized international arbitration*

- 83 The localization theory was widely accepted in the 1940s and 1950s.<sup>109</sup> The notion of localization is based on the principle that any contract that is not a contract between states in their capacity as subjects of international law is based on the law of some country.<sup>110</sup> The state is the ultimate authority over a contract, regardless whether it is domestic or international and there is a presumption that a contract cannot float independent of any national system of law.<sup>111</sup> In addition, the New York Convention places great emphasis on municipal law as regards the validity of the arbitral award, and the procedural law to be applied to the conduct of the arbitration proceedings.<sup>112</sup>
- 84 One of the foremost proponents of localized arbitration is F.A. Mann who stated that if “the arbitrator is [...] allowed and even ordered by municipal legislators to accept the commands of the parties, this is because, and to the extent that, the local sovereign so provides.”<sup>113</sup> He even goes so far as to call the term “international arbitration” a “misnomer” since “[i]n the legal sense no international commercial arbitration exists”, because “[j]ust as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law”.<sup>114</sup> Mann further stated in particular that “[e]very arbitration is necessarily subject to the law of a given state. No private person has the right or the power to act on any level other than that of municipal law. [...]”<sup>115</sup>
- 85 Critics argue that this theory is contrary to party autonomy since parties will automatically be subject to the laws of the state in which they choose to have their arbitration conducted.<sup>116</sup>

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<sup>106</sup> See Goode 24.

<sup>107</sup> See Goode 24.

<sup>108</sup> See, e.g., Goode 24. Goode identifies at least six possible models, arranged in ascending order of delocalization.

<sup>109</sup> See Jarrod Wiener, “The ‘Transnational’ Political Economy: - A Framework for Analysis.” 13 <lexmercatoria.org>.

<sup>110</sup> See Wiener 15 et seqq.

<sup>111</sup> See Wiener 15 et seqq.

<sup>112</sup> See Wiener 14.

<sup>113</sup> Mann 157.

<sup>114</sup> Mann 157, 159.

<sup>115</sup> Mann 157.

<sup>116</sup> See, e.g., Blackaby and others 2.01, 3.78. There are cases, where parties chose another *lex arbitri* to govern their proceedings than the

Proponents of the localization theory argue that party autonomy, however, has to be integrated in a legal framework, which gives it legal meaning and effect and cannot by its virtue elevate arbitration to be detached from any national legal order. The argument is that localized arbitration is not against party autonomy since the parties implicitly chose the *lex arbitri* to govern the proceedings by choosing the seat of arbitration. In this regard Professor Weil's statement seems appropriate that "[t]he principle of pacta sunt servanda and that of party autonomy do not float in space; a system of law is necessary to give them legal force and effect"<sup>117</sup>

86 Under the localization theory, it is not possible to enforce annulled awards since the seat country is seen to have the role of reviewing the arbitral process, which took place under the supervision of its national legal system.<sup>118</sup> If the award is annulled it does not exist anymore. Professor Park noted that "annulment standards are matters for the place of arbitration, to be addressed in statutes interpreted by local judges."<sup>119</sup> Under the territorial approach, therefore, once an award was set aside, there is no longer an award which can be enforced.

#### ***b. The view of delocalized international arbitration***

87 The theory of localized arbitration is not accepted universally, and some commentators and even court decisions advocate so-called "floating" or delocalized arbitration.<sup>120</sup> The theory of delocalization considers arbitration to be delocalized from the seat of arbitration with the rationale that international arbitration has "no forum".<sup>121</sup> Proponents of the delocalization theory argue based on party autonomy and that international arbitration is an autonomous legal order detached from any national legal system.<sup>122</sup>

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proper *lex arbitri* of the seat of their arbitration. An example is, *Union of India v McDonnell Douglas Corp* (Queen's Bench Division (Commercial Court) [1993] 2 Lloyd's Rep. 48) where parties agreed to an arbitration clause which provided that arbitration was to be "conducted" in accordance with the procedure provided by the Indian Arbitration Act 1940, with the "seat" of the arbitration to be London. Once the arbitration was initiated, the question arose whether Indian law or English law, as the place of the seat, was to govern the proceedings. The court held that although integrally unsatisfactory, it was open to the parties to agree on a procedure other than that of the place of arbitration. And that by the use of the word "seat", the parties had chosen English law to govern the arbitration proceedings and the reference to "conducted" had the effect of contractually importing from the Indian Act those provisions which were concerned with the internal conduct of their arbitration and which were not inconsistent with the choice of English arbitral procedural law.

<sup>117</sup> Translation in Blackaby and others 3.80. FN93 making reference to Weil, "Problèmes relatifs aux contrats passés entre un état et un particulier" 1969, 128 Hague Recueil 95, 181.

<sup>118</sup> See, e.g., Tweeddale 13.85. AJ van den Berg, "Enforcement of Annulled Awards" (1998) 9 The ICC International Court of Arbitration Bulletin 15.

<sup>119</sup> William W Park, "Quis Custodiet Ipsos Custodes?," *Arbitration of International Business Disputes* (2d edn, Oxford University Press 2012) 144.

<sup>120</sup> See Jacomijn J Van Haersolte-van Hof and Erik V Koppe, "International Arbitration and the Lex Arbitri" [2015] *Arbitration International* 30. See Paulsson, "Arbitration Unbound: Award Detached From the Law of Its Country of Origin" 358. See also Park, "The Lex Loci Arbitri and International Commercial Arbitration" 24–28.

<sup>121</sup> See Tweeddale 7.72.; Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard and John Savage eds, Kluwer Law International 1999) para 1181. Jurisdictions that follow this approach are, for example, France, the Netherlands, Portugal, Switzerland, Egypt, Algier.

<sup>122</sup> See Hof and Koppe 30.

- 88 First seeds of the notion of delocalization appeared in the 1950s when Frédéric Eisemann, who participated in the drafting of the New York Convention, promoted this idea.<sup>123</sup> In the course of the 1980s practitioners and scholars, such as Jan Paulsson,<sup>124</sup> argued in favor of delocalization of international arbitration.<sup>125</sup> The movement towards delocalization was grounded on the parties' and practitioners' frustration with the interference by state courts.<sup>126</sup> Supporters of this theory argued that there was no reason why an international commercial arbitration had to be attached to a state's national law.<sup>127</sup>
- 89 International arbitration, however, always had to coexist with national laws resulting from private consent and public power.<sup>128</sup> And historically, tensions have always existed between state control of arbitration and national law, on the one hand, and party autonomy and independence of arbitration, on the other hand.<sup>129</sup> Proponents of the delocalization theory suggest that greater influence must be given to party autonomy. There has been a trend of restricting involvement by national courts in the arbitral process, adopted by most modern arbitration legislations.<sup>130</sup>
- 90 Since the delocalization theory distances itself from the *lex loci arbitri*, it detaches international arbitration (or rather international arbitral awards) from the mandatory laws of the seat of arbitration.<sup>131</sup> As one commentator has noted: “[I]n the eyes of the de-localist, a nation's willingness to nullify an award frustrates the objectives of autonomous international commercial arbitration – after crafting the arbitral proceeding and engaging in a generally time-consuming and expensive endeavor, the winners might find themselves in a national court, starting over from scratch.”<sup>132</sup>
- 91 Under the delocalization theory the arbitration agreements as well as arbitral awards should be recognized and enforced by national courts with little to no review and the arbitral award may

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<sup>123</sup> See Julian Lew, “Achieving the Dream: Autonomous Arbitration” (2006) 22 *Arbitration International* 179, 179.

<sup>124</sup> See Paulsson, “Arbitration Unbound: Award Detached From the Law of Its Country of Origin.”

<sup>125</sup> In his article, Heiskanen notes that the delocalization debate is analogous to the controversy between conceptualists and modernists in conflicts of laws: “Just as the conceptualists, Mann [referring to F.A.Mann and his “Lex Facit Arbitrum” article] focuses on the link between a ‘category’ (international arbitration proceedings) and a particular jurisdiction (the seat of the tribunal), whereas Paulsson, like the modernists, focuses on a ‘weighing’ of the substantive public policies of the seat and the place where recognition and enforcement of the arbitral award is sought.” See Veijo Heiskanen, “And/Or: The Problem of Qualification in International Arbitration” (2010) 26 *Arbitration International* 441, 454 FN31.

<sup>126</sup> See Tweeddale 7.75.

<sup>127</sup> See Tweeddale 7.75.

<sup>128</sup> See Lew 181.;

<sup>129</sup> See Lew 181.

<sup>130</sup> See Tweeddale 7.73. See, e.g., Art. 5 UNCITRAL Model Law limiting the courts' powers, it specifically states: “In matters governed by this Law, no court shall intervene except where so provided in this Law.”

<sup>131</sup> See Renata Brazil-David, “Harmonization and Delocalization of International Commercial Arbitration” (2011) 28 *Journal of International Arbitration* 445, 456. Park, “The Lex Loci Arbitri and International Commercial Arbitration” 24. See also generally Paulsson, “Arbitration Unbound: Award Detached From the Law of Its Country of Origin.”

<sup>132</sup> Theodore C. Theofrastous, “International Commercial Arbitration in Europe: Subsidiary and Supremacy in Light of the De-Localization Debate” (1999) 31 *Case W. Res. J. Int'l L.* 455, 459.; and its FN 15.

“float” free from the constraints of the national laws of the seat of arbitration.<sup>133</sup> International arbitration then derives its force solely from the agreement of the parties, being unconnected to any national legal order.<sup>134</sup> “Delocalists” are usually in favor of enforcing awards annulled at the seat if the enforcement country sees fit. The delocalized approach emphasizes the transnational nature of an award and courts recognizing this notion are therefore more likely to disregard the annulment of an award.

- 92 There are varying degrees of delocalization advocated, some take a more moderate view and recognize the importance of court involvement in assisting and supporting the arbitral process but are against courts intervening in the process. Others take a more radical view and completely disregard the importance of the seat of arbitration and proclaim that judicial review by the courts at the seat is irrelevant to enforcement procedures.
- 93 One of the main arguments in support of the delocalization theory is that parties to international arbitration often choose a seat of arbitration in one jurisdiction rather than another for its practicality, neutrality and convenience, which supposedly has nothing to do with the parties’ preference for the laws of that particular country.<sup>135</sup> It is argued that parties might not even be aware that by choosing a specific seat of arbitration they bind themselves to its mandatory laws.<sup>136</sup> Also Kaufmann-Kohler argues that the “national law [of the seat of arbitration] has less and less actual bearing on the arbitration proceedings”.<sup>137</sup>

### **III. CONCLUSION CHAPTER TWO**

- 94 The relationship between EU law and arbitration is complex. The Brussels regime has brought harmonization in the area of jurisdiction, recognition and enforcement of judgments relating to civil and commercial matters. Arbitration has been excluded from that regime because it was felt that judgments relating to arbitral awards were sufficiently dealt with under the New York Convention.
- 95 However, while there is a harmonious development and approach in EU law guaranteed by the CJEU, a single body, which has the ultimate competence for interpreting EU law, the same is not achieved in arbitration. In the area of judgments relating to arbitration Art. V(1)(e) of the New York Convention leaves room for interpretation. Courts all around the world have

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<sup>133</sup> See Lew 179. Park, “The Lex Loci Arbitri and International Commercial Arbitration” 24.

<sup>134</sup> See Goode 21.: “In other words, at the very moment of its birth, produced by the consensual coupling of the parties in die arbitration process, die award took off and disappeared into the firmament, landing only in most places where enforcement was sought.”

<sup>135</sup> See Brazil-David 456.; See also Lew 180.; Heiskanen 449–450.

<sup>136</sup> See Brazil-David 456.

<sup>137</sup> See Gabrielle Kaufmann-Kohler, “Globalization of Arbitral Procedure Reference Globalization of Arbitral Procedure” (2003) 36 Vanderbilt Journal of Transnational Law 1313, 1315.

discretion in interpreting the language as they see fit and are mandated to do so if faced with an annulled decision and an objection to enforcement under this particular provision. The rationale of the arbitration exclusion therefore stands on loose footing and undermines the objectives of a European area of justice.

- 96 Judicial review of the arbitral process is an important factor in arbitration, which involves courts at the seat of arbitration. Party autonomy and the seat of arbitration are important and well recognized concepts of international arbitration. In the specific area of the recognition or enforcement of annulled awards by national courts, the balance between party autonomy and the seat of arbitration may tip one way or the other.
- 97 Some scholars are of the opinion that recognition or enforcement of an annulled award should always be refused.<sup>138</sup> The argument is based on the “localized” view of arbitration: an award that has been set aside ceases to exist and as a result nothing is left to enforce (the balance tips towards the seat of arbitration). Others argue that the setting aside of an award should not prevent enforcement. This opinion is based on the notion that international arbitration is “delocalized”, i.e., arbitration is not linked to any national legal order. Arbitral awards are seen as part of a transnational legal order (the balance tips towards party autonomy).

## **CHAPTER THREE: THE CLASH OF THE EU’S PRINCIPLE OF MUTUAL TRUST WITH THE ENFORCEMENT OF NULLIFIED INTERNATIONAL ARBITRAL AWARDS**

### **I. INTRODUCTION: MUTUAL TRUST AND THE ENFORCEMENT OF ANNULLED AWARDS**

- 98 In this section the EU’s principle of mutual trust is analyzed and brought into context. The practice of courts to enforce annulled awards is a disposition towards delocalized arbitration and as such contradicts mutual trust: a Member State court does not trust the other Member State court’s judgment rendered but comes to a conflicting decision. While one Member State court may annul the award, another Member State court enforces it. Such situations are

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<sup>138</sup> See Maxi Scherer, “Effects of International Judgments Relating to Awards” 1, 639.

prevented under the Brussels regime for judgments relating to civil and commercial matters, however, not for such matters, which are the result of an arbitral proceeding.

- 99 One may attempt to define mutual trust as the confidence Member States ought to have in each other's legal system and courts, which results in the prohibition to review other state courts' decisions.<sup>139</sup> As has been shown above in the previous sections, due to the arbitration exclusion in the Brussels regime, annulment or enforcement actions by courts relating to arbitral awards are not within the scope of that regime. The actors, the courts of Member States called upon to exercise "mutual trust" in such scenarios, however, remain the same within a EU context.
- 100 It is argued that building a European area of justice based on the principle of mutual trust necessitates the application of that principle also in matters decided by Member State courts which are the result of an arbitral proceeding. It is submitted that it is against the EU's harmonization efforts to call for the Member State courts' trust in each others' judicial systems in one instance but not in another. Member State courts should not be allowed to step out of the mutual trust principle just because a judgment relates to arbitral proceedings.

## **II. THE PRINCIPLE OF MUTUAL TRUST IN THE EU**

- 101 The EU legal system is made up of certain fundamental principles, such as conferral, subsidiarity, proportionality and respect of international law obligations.<sup>140</sup> These principles would also be relevant in case of advancing arbitration in a EU context. A specific principle has taken a prominent position in the European area of justice in civil law matters having cross-border influences: the principle of mutual trust.
- 102 The principle of mutual trust is not clearly defined.<sup>141</sup> This principle has been adopted as the pillar for judicial cooperation in civil matters, and is specifically referred to in Arts. 67 (1), (4) and Art. 81 of the TFEU and Recitals 3 and 26 of the Recast Brussels I Regulation. Similarly, Art. 4(3) of the TEU embeds the notion of mutual respect in the cooperation and application of EU law.<sup>142</sup>

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<sup>139</sup> See Xandra E Kramer, "Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights" (2013) 60 *Netherlands International Law Review* 343, 364.

<sup>140</sup> See Benedettelli 583.

<sup>141</sup> See Kramer 364.

<sup>142</sup> See Kramer 364.



103 First, the principle of mutual trust will be explored from a theoretical point of view. Second, an analysis of the case law in which mutual trust has played a significant role will show this principle's immediate relevance and its application in the practice of the CJEU.

### A. EU Member States ought to trust each other

104 All EU Member States have signed treaties, according to which they share the same common values, to be found in Art. 2 of the TEU. Affording trust to the legal orders of other states is justified based on the common values underlying the legal orders of all states participating.<sup>143</sup>

105 Based on the values of “justice” and “rule of law”, the EU aims to fulfill its promise in Art. 3 (2) of the TEU to “[...] offer its citizens an area of freedom, security and justice without internal frontiers [...]”.<sup>144</sup> In addition, Art. 81 of the TFEU provides that “the European Union shall develop judicial co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases”.

106 As a legal principle of the EU's private international law, “mutual trust” became more relevant for the recognition of foreign judgments than for the choice of law.<sup>145</sup> Displaying mutual trust can be taken as an indication for further and deeper integration.<sup>146</sup>

107 Recital 26 of the Recast Brussels I Regulation explains that:

“Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognized in all Member States without the need for any special procedure. In addition, [...] a **judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.**”<sup>147</sup>

108 Thus, Recital 26 goes further in intensifying mutual recognition by removing any *exequatur* proceedings and fully equating judgments rendered by the courts of EU Member States with domestic judgments.<sup>148</sup> The principle of mutual trust in the Brussels regime therefore advocates for treating every national jurisdiction the same.<sup>149</sup>

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<sup>143</sup> See Weller 72.

<sup>144</sup> See Weller 74.

<sup>145</sup> See Weller 73.

<sup>146</sup> See Eva Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press 2008) 168.

<sup>147</sup> Emphasis added. As has the previous Brussels I Regulation, Recitals 16 and 17 explain that mutual trust in the administration of justice within the EU “justifies judgments given in a Member State being recognized automatically without the need for any procedure except in cases of dispute”.

<sup>148</sup> See Weller 82.; See also Kramer 364.

<sup>149</sup> See Spencer Wolff, “Tanking Arbitration or Breaking the System to Fix It? A Sink or Swim Approach to Unifying European Judicial Systems: The ECJ in *Gasser, Turner and West Tankers*” [2009] *The Columbia Journal of European Law Online* 68.

- 109 Viviane Reding, then EU Commissioner responsible for Justice, Fundamental Rights and Citizenship, explained that “a truly European Area of Justice can only work if there is trust in each other’s justice systems”.<sup>150</sup> In addition, the Commission declared that “the whole EU legal system [...] is based on mutual trust”.<sup>151</sup> The European Council affirmed that “the smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another’s justice systems should be further enhanced”.<sup>152</sup>
- 110 Also, the European Commission recognizes mutual trust as a key component in establishing the area of freedom, security and justice of the EU and that mutual recognition appears as the predominant practice of granting such trust.<sup>153</sup> In the EU Justice Agenda for 2020, the European Commission outlines the importance of enhancing mutual trust.<sup>154</sup> It states that “[w]hile the EU has laid important foundations for the promotion of mutual trust, it needs to be further strengthened to ensure that citizens, legal practitioners and judges fully trust judicial decisions irrespective of the Member State where they have been taken.”<sup>155</sup>
- 111 Critics describe mutual trust as a “myth” and as an “opaque and omnipresent buzzword”.<sup>156</sup> However, it is quite clear that the EU has built much of what is now considered the European area of justice on the principle of mutual trust, which it has used to justify and support deeper integration and judicial cooperation.<sup>157</sup> Mutual trust can therefore be considered an important underlying notion of EU law.

## B. Cases

- 112 A number of cases in the context of the Brussels regime within the EU have turned on an extensive interpretation in light of the underlying principle of mutual trust.<sup>158</sup> When identifying the principle of mutual trust and its importance for the advancement of the European area of justice, the following cases may serve as a demonstration of how the CJEU has applied this

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<sup>150</sup> “Towards a True European Area of Justice: Strengthening Trust, Mobility and Growth (European Commission Press Release)” <[http://europa.eu/rapid/press-release\\_IP-14-233\\_en.htm](http://europa.eu/rapid/press-release_IP-14-233_en.htm)> accessed June 15, 2016.

<sup>151</sup> European Commission, Press Release: Building Trust in Justice Systems in Europe: “Assises de la Justice” Forum to Shape the Future of EU Justice Policy, 21 November 2013. 2013.

<sup>152</sup> European Council of 26/27 June 2014, Conclusions 2014, para 11.

<sup>153</sup> See Weller 75.

<sup>154</sup> See “EU Justice Agenda for 2020” COM(2014) 144 final. In this communication, the European Commission sets out the political priorities that should be pursued in order to make further progress towards a fully functioning common European area of justice oriented towards trust, mobility and growth by 2020.

<sup>155</sup> “EU Justice Agenda for 2020” COM(2014) 144 final.

<sup>156</sup> According to Arts. 81 and 82 of the Treaty on the Functioning of the European Union (TFEU), 2010 OJ. C 83 (Mar. 30, 2010). and “the principle of mutual recognition” in the convention preceding the TFEU; see Weller 67, 100.

<sup>157</sup> Take note, however, that in criminal matters, the European legislator is far more careful and acknowledges that mutual trust is a sensitive long-term objective that has still to be worked on. For more information about this, see: Weller 85., FN91.

<sup>158</sup> Weller 101.

principle in practice. These cases are relevant and representative for what mutual trust in the EU stands for, and how the CJEU has used it as an interpretative tool.

### 1. C-116/02 - Gasser

- 113 The CJEU has used the notion of mutual trust for interpreting key provisions on mutual recognition for the first time in *Gasser*.<sup>159</sup> In this case, the defendant seized an Italian court in a debt collection dispute despite a contractual clause, which conferred jurisdiction on an Austrian court. Before the CJEU, Mr. Gasser cited the “excessive and generalized slowness of legal proceedings” in Italy<sup>160</sup> in an effort to return the case to the Austrian court and thereby carve an exception out of Brussels I.
- 114 The CJEU, however, rebutted that excessively lengthy proceedings could justify derogation from Brussels I. It held that a court, whose jurisdiction has been claimed under a jurisdiction agreement, that was seized second must stay proceedings according to Art. 27 of Brussels I until the court seized first has declared that it has no jurisdiction. The Austrian court should therefore trust in the Italian court respecting the parties’ choice-of-jurisdiction clause in favor of the Austrian court, even if this intermediary step could delay the proceedings for several years.<sup>161</sup> The Court reasoned based on mutual trust to justify the priority rule in Art. 27 of Brussels I:

“It must be borne in mind that the Brussels Convention is necessarily **based on the trust** which the Contracting States accord to each other’s legal systems and judicial institutions. It is that **mutual trust** which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.”<sup>162</sup>

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<sup>159</sup> *Case C-116/02 – Erich Gasser GmbH v Misat Srl* [2003] I–14693. Under the background that in the Brussels regime, a court second seized in a civil or commercial matter must of “its own motion stay its proceedings until such times as the jurisdiction of the court first seized is established,” and “where the jurisdiction of the court first seized is established, any [other] court [...] shall decline jurisdiction.” Brussels I - Regulation 44/2001 of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. L 12/1., Art. 27.

<sup>160</sup> See Pierre Véron, “ECJ Restores Torpedo Power” (2004) 35 *International Review of Intellectual Property and Competition Law* 641.

<sup>161</sup> Italian courts are famous for significant delays that paralyse or “torpedo” lawsuits for up to several years. It is a way for potential defendants in commercial litigation to essentially abuse the *lis pendens* rule found in the Brussels regime (and the Lugano Convention), which grants the first Member State court seized in a matter the right to retain exclusive jurisdiction; see Véron 638.

<sup>162</sup> *Case C-116/02 – Erich Gasser GmbH v Misat Srl*. [2003]., para. 72. Emphasis added.

## 2. C-159/02 - Turner

- 115 In *Turner*,<sup>163</sup> the Court made reference to its earlier decision in *Gasser*. An English court had issued anti-suit injunctions restraining a party from continuing proceedings in a Spanish court that had been commenced in “bad faith with a view of frustrating the existing proceedings.”<sup>164</sup> The Advocate General Ruiz-Jarabo noted that the
- “European judicial cooperation, in which the Convention represents an important landmark, is imbued with the **concept of mutual trust**, which presupposes that each State recognises the capacity of the other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration.”<sup>165</sup>
- 116 The CJEU held that an injunction restraining a party from commencing or continuing proceedings before another court of a Member State undermines the latter court’s jurisdiction to determine the dispute and is to be seen as an “interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.”<sup>166</sup>
- 117 The CJEU therefore rejected Mr. Turner’s and the United Kingdom Government’s view that the interference should be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. The CJEU stated that “[s]uch an assessment runs counter to the **principle of mutual trust** which [...] **underpins the Convention** and prohibits a court [...] from reviewing the jurisdiction of the court of another Member State.”<sup>167</sup>
- 118 Therefore, the CJEU ruled against one Member State Court issuing an injunction on another Member State court against a party, “even where that party is acting in bad faith with a view to frustrating the existing proceedings.”<sup>168</sup> Despite the inevitable delay, the English court was asked to trust in the Spanish court recognizing the bad faith nature of the proceedings brought before it and decline jurisdiction.

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<sup>163</sup> *Case C-159/02 – Turner v Grovit* [2004]. ECR I-3565

<sup>164</sup> *Case C-159/02 – Turner v Grovit* [2004]., para. 19.

<sup>165</sup> *Turner, Opinion of Advocate General Ruiz-Jarabo Colomer* [31], Emphasis added. In FN6, the Advocate General further illustrates this point by referring to the second recital in the preamble to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters states: “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”. The recital 17 adds: “By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation”.

<sup>166</sup> *Case C-159/02 – Turner v Grovit* [2004] [27].

<sup>167</sup> *Case C-159/02 – Turner v Grovit* [2004] [28]. Emphasis added.

<sup>168</sup> *Case C-159/02 – Turner v Grovit* [2004] [31].

### 3. Focus: Arbitration and mutual trust

119 The cases discussed in the previous section show how mutual trust has been applied in a broader context of the Brussels regime and how Member State courts are asked to trust each other and each other's judicial systems, regardless of comparatively excessive duration of proceedings and bad faith actions of a party. The following cases are at the intersection of mutual trust and arbitration and are therefore of particular importance in this study. The CJEU has again relied on mutual trust in justifying the outcome of its decision. The scope of the arbitration exclusion has played a prominent role.

#### a. C-185/07 - *West Tankers*

120 In the controversial decision of *West Tankers*,<sup>169</sup> the CJEU again invoked the principle of mutual trust and held that the court of a Member State (UK) is not allowed to award an injunction prohibiting a party from commencing proceedings before the court of another Member State (Italy) with regard to matters covered by an arbitration agreement. Art. 1(2)(d) of Brussels I generally excludes matters involving arbitration. From the outset, it seemed that the Regulation would not apply to the *West Tankers* dispute and the CJEU admitted as much stating that “the main proceedings, which lead to the making of an anti-suit injunction, cannot [...] come within the scope of Regulation No 44/2001.”<sup>170</sup>

121 It therefore seemed that the case only partly fell under Brussels I. Professor Pfeiffer proposed a solution in which the CJEU was to limit its decision on the compatibility of an anti-suit injunction with Brussels I only to the part of the proceedings actually covered by the Regulation.<sup>171</sup>

122 The House of Lords, which had referred the question to the CJEU, argued that the Brussels regime provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States, which must trust each other to apply those rules correctly, and referred to the judgments in *Gasser and Turner*.<sup>172</sup> Its view was that in the field of arbitration, which is excluded from the scope of the Regulation, there is no set of uniform rules, which is a

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<sup>169</sup> *Case C-185/07 – Allianz SpA et al v West Tankers Inc* [2009]. ECR I-663.

<sup>170</sup> *Case C-185/07 – Allianz SpA et al v West Tankers Inc* [2009] [22–23].

<sup>171</sup> See Professor Pfeiffer of the Institute for Comparative Law at Heidelberg University. Veronika Gaertner, “Pfeiffer on *West Tankers*” <<http://conflictoflaws.net/2009/pfeiffer-on-west-tankers/>> accessed May 5, 2016.; Jonathan Harris, Professor of International Commercial Law at the University of Birmingham (UK) also expressed amazement that the argument that “the proceedings [...] fall partly within and partly outside the Regulation has been rejected.” Martin George, “Harris on *West Tankers*” <<http://conflictoflaws.net/2009/harris-on-west-tankers/>> accessed May 5, 2016.

<sup>172</sup> *Case C-185/07 – Allianz SpA et al v West Tankers Inc* [2009] [14].

necessary condition in order to establish mutual trust between the courts of the Member States.<sup>173</sup>

123 The Advocate General acknowledged that the arbitration proceeding held in London and the Italian court proceeding dealt with the same issue.<sup>174</sup> She stated that “the principle of mutual trust can also be infringed by a decision of a court of a Member State which does not fall within the scope of the regulation obstructing the court of another Member State from exercising its competence under the regulation.”<sup>175</sup>

124 The CJEU in *West Tankers*, however, held that:

“[...] even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and **the free movement of decisions in those matters.**”<sup>176</sup>

125 The CJEU held that anti-suit injunctions by one Member State court issued in view of proceedings before the court of another Member State touch upon the relation between Member State courts and therefore upon mutual trust.<sup>177</sup> Despite that the main proceedings before state courts related to arbitration and regardless of the arbitration exception, the CJEU brought anti-suit injunctions under the scope of the Brussels regime based upon the mutual trust principle.

126 Ultimately not the court at the seat of arbitration but another court was seized with determining the validity of an arbitration agreement, upon which the English “seat” court issued an anti-suit injunction. The CJEU, however, held that this was against the principle of mutual trust.

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<sup>173</sup> *Case C-185/07 – Allianz SpA et al v West Tankers Inc [2009]* [15]. In his House of Lords opinion, Lord Hoffmann anticipated this principle that stands against the issuance of anti suit injunctions to enforce arbitration agreements: “In proceedings falling within the Regulation it is right . . . that courts of Member States should trust each other to apply the Regulation. But in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate.”

<sup>174</sup> See *West Tankers, Opinion of Advocate General Kokott.*, para. 17: “The main question in both cases is whether West Tankers can rely on the exclusion from liability for navigation errors in clause 19 of the charterparty or under the so-called Hague Rules.”

<sup>175</sup> *West Tankers, Opinion of Advocate General Kokott.*, para. 34

<sup>176</sup> *Case C-185/07 – Allianz SpA et al v West Tankers Inc [2009]* [24].; Emphasis added; in this regard criticizing, see Marta Requejo, “Rafael Arenas on West Tankers” <<http://conflictoflaws.net/2009/rafael-arenas-on-west-tankers/>> accessed May 5, 2016. “[e]very proceeding that could affect a proceeding within the scope of Regulation 44/2001 must be examined in order to determine if it is compatible with the Regulation. This is new and shocking”; see also: George. “[I]t is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings. Key cases such as Marc Rich and Hoffmann are glossed over; and one is left not altogether sure why the argument that the proceedings in Syracuse fall partly within and partly outside the Regulation has been rejected.”

<sup>177</sup> *Case C-185/07 – Allianz SpA et al v West Tankers Inc [2009]* [0–34].

Notwithstanding that the seat of arbitration was in London, therefore the *lex arbitri* was the English Arbitration Act 1996, which allows for anti-suit injunctions.

**b. C-536/13 - Gazprom**

- 127 In *Gazprom*,<sup>178</sup> the CJEU considered whether a Member State could refuse to enforce an arbitral award containing an anti-suit injunction because it was inconsistent with Brussels I.
- 128 *Gazprom* commenced arbitration against the Lithuanian state in Stockholm under the shareholders' agreement. It sought an order that the Lithuanian Ministry of Energy should withdraw the proceedings it had brought before domestic courts, since the matter ought to be arbitrated. The arbitral tribunal made such an award. *Gazprom* sought recognition of the tribunal's award before the Lithuanian Court of Appeal, which was rejected for non-arbitrability. This decision was appealed to the Lithuanian Supreme Court, which made a referral to the CJEU.
- 129 In his opinion on the case, Advocate General Wathelet aimed at limiting the implications of the *West Tankers* case. Although Recast Brussels I was not in force at that time, the Advocate General still heavily relied on its recitals to interpret Brussels I. He relied on Recital 12 (4) of Recast Brussels I, which states that the Regulation does not apply to an action or "ancillary proceedings relating to [...] the conduct of an arbitration procedure or any other aspects of such a procedure, nor to [...] the [...] recognition or enforcement of an arbitral award." In the Advocate General's opinion, recognition and enforcement of the decisions of arbitral tribunals fell exclusively within the scope of the New York Convention.
- 130 The CJEU decided that as the question submitted to it concerned the pre-recast regulation, Recital 12 did not apply and focused its decision on Art. 1(2)(d) of Brussels I, which simply states that arbitration does not fall within the scope of Brussels I. Thus the contours of Recital 12 of Recast Brussels I remain open to debate.
- 131 The CJEU recalls its decision in *West Tankers* that anti-suit injunctions are not compatible with Brussels I.<sup>179</sup> It distinguished this case, however, from *West Tankers* insofar as it was not a Member State court that issued the restraining order but an arbitral tribunal.<sup>180</sup>
- 132 It clarified that arbitration is excluded from the scope of the Brussels regime<sup>181</sup> and in particular held that:

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<sup>178</sup> Case C-536/13 - "*Gazprom*" OAO v Lietuvos Respublika [2015].

<sup>179</sup> Case C-536/13 - "*Gazprom*" OAO v Lietuvos Respublika [2015], para 32 et seq.

<sup>180</sup> Case C-536/13 - "*Gazprom*" OAO v Lietuvos Respublika [2015], para 35.

<sup>181</sup> See Case C-536/13 - "*Gazprom*" OAO v Lietuvos Respublika [2015], para 36.

“so far as concerns the principle of mutual trust [...], in the circumstances of the main proceedings, as the order has been made by an arbitral tribunal there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.”<sup>182</sup>

133 Therefore it was within the discretion of the Lithuanian Supreme Court whether to recognize or not the arbitral award since the CJEU held that the proceedings for the recognition and enforcement of an arbitral award were covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Brussels I.<sup>183</sup>

### C. Conclusion

134 The CJEU has repeatedly reinforced the importance of mutual trust between Member State courts. In *West Tankers*, the injunction issued by a Member State court prohibiting a party from commencing proceedings before the court of another Member State fell within the Brussels regime, and violated mutual trust, regardless of the fact that the injunction was issued in regards to arbitration. The CJEU observed that orders which touch upon the relation between Member State courts touch upon mutual trust.<sup>184</sup>

135 In *Gazprom*, since the restraining order originated from an arbitral award and not a Member State court’s judgment, the principle of mutual trust was not infringed and such orders did not fall within Brussels I.

136 Thus, an important conclusion can be drawn from the distinctions made above: when Member State courts enter the picture in relation to each other, mutual trust has to enter the picture as well, regardless of whether the main proceedings relate to arbitration or not.

## III. ENFORCEMENT OF ANNULLED ARBITRAL AWARDS

137 In this section the focus shifts to the enforcement of arbitral awards that have been set-aside at the seat. Schools of thought are essentially divided into two main camps: (i) the first camp (localized approach) places emphasis on the seat of arbitration and its predominant role in international arbitration. Jurisdictions that reject enforcing annulled award could be placed under this category; (ii) the second camp (delocalized approach) relies on party autonomy and

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<sup>182</sup> Case C-536/13 - “Gazprom” OAO v Lietuvos Respublika [2015]. para 37.

<sup>183</sup> See Case C-536/13 - “Gazprom” OAO v Lietuvos Respublika [2015]. para 41.

<sup>184</sup> Case C-185/07 – Allianz SpA et al v West Tankers Inc [2009] [0–34].



liberates international arbitration from any restrictions of the seat.<sup>185</sup> Jurisdictions that are ready to enforce an award notwithstanding the fate of that award in the country of origin, would fall under the second camp.

### **A. Discretion of courts to enforce annulled foreign awards**

138 There is a controversy whether a set aside arbitral award has effects outside of the seat of arbitration. Applying the principle of *ex nihil nihil fit* (nothing can come of nothing), one view is that the award as a result of the annulment does not exist and cannot be enforced.<sup>186</sup> The contrary view is that international arbitration awards are delocalized from the seat and therefore an annulment has no effects on the award.<sup>187</sup> Most countries assert their entitlement for setting aside an award for arbitrations taking place within their jurisdictions and may refuse to enforce awards that have been set aside at the seat under Art. V(1)(e) of the New York Convention.<sup>188</sup>

139 Professor Pieter Sanders, an extremely influential “founding father” of the New York Convention in 1959 offered his view that despite the New York Convention’s permissive text,<sup>189</sup> nullified awards must be refused enforcement as “enforcing a non-existing arbitral award would be an impossibility.”<sup>190</sup> However, several courts around the world have achieved the “impossible”, as can be seen in the cases shown below.

### **B. Cases**

140 The purpose of this section is to give a demonstration of the differing approaches to annulled awards or the relevance of the seat court’s judgments as perceived by state courts in the EU. The lack of a harmonious approach for post-award judgments undermines the advancement of the European area of justice and overshadows the Member State court’s expectations towards mutual trust. A complete analysis of all cases where such practice has occurred is outside the scope of this study. The French and German approaches are discussed in this study for two main reasons. First, both France and Germany are Member States of the EU. Second, their approaches are in complete contrast to each other and therefore serve as a good example of

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<sup>185</sup> See Bernardo M Cremades and David JA Cairns, “The Brave New World of Global Arbitration (El Arbitraje En La Encrucijada Entre La Globalización Y Sus Detractores)” [2002] *Revista de la Corte Espanola de la Arbitraje* 15, 181.

<sup>186</sup> See Tweeddale 13.85. Berg.

<sup>187</sup> See Tweeddale 13.85.

<sup>188</sup> See Tweeddale 7.77. See also ICCA’s Guide to the Interpretation of the 1958 New York Convention. 83.

<sup>189</sup> Art. V(1)(e) of the New York Convention can be interpreted as either permissive or mandatory, see Chapter Two B.1 above.

<sup>190</sup> Pieter Sanders, “New York Convention and the Recognition and Enforcement of Foreign Arbitral Awards” [1959] *Netherlands International Law Review* 43,55.

how disparate the positions by just two jurisdictions in the EU can be, which is comprised of 28 jurisdictions.<sup>191</sup>

### 1. The French approach

141 Two leading decisions are discussed below: *Hilmarton* and *Putrabali*. In these cases the French *Cour de Cassation* enforced awards that had been set aside at the seat of arbitration. French arbitration law disregards the New York Convention's ground for refusal of recognition and enforcement in Art. V(1)(e).<sup>192</sup> The French view adopts a strong stance towards delocalized arbitration and sees international arbitration as part of a transnational legal order, unattached to legal regime at the seat of arbitration.<sup>193</sup>

#### a. *Hilmarton*

142 In *Hilmarton*,<sup>194</sup> the award rendered in Switzerland was enforced in France although the Swiss Supreme Court set it aside. The French *Cour de Cassation* stated:

“ [...] the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.”

143 The arbitration agreement specifically stated that the “arbitration shall take place in Geneva under the law of the Canton of Geneva”.<sup>195</sup> The terms and the intentions of the parties could thus not have been any clearer.<sup>196</sup> The law the parties had chosen permitted judicial review of the arbitral award. In enforcing the annulled award the French court, relying on the concept of delocalization whose fundament is party autonomy, undermines the theory rather than supports it.<sup>197</sup> Then a second award was rendered in Switzerland, and the winning party (claimants) sought enforcement in France. The *Cour de Cassation*, however, held that enforcement could not be granted due to the issue being *res judicata*.

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<sup>191</sup> See “Member Countries of the EU” <[http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm)> accessed June 15, 2016.

<sup>192</sup> See Linda Silberman and Maxi Scherer, “Forum Shopping and Post-Award Judgments” 115, 122. making reference to the Code de procédure civile (CPC) arts. 1520, 1525. An English translation available at [http://www.iaiparis.com/pdf/FRENCH\\_LAW\\_ON\\_ARBITRATION.pdf](http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf). 26

<sup>193</sup> See Silberman and Scherer 122.

<sup>194</sup> *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* (1994) *Rev Arb* 327; *English excerpts in (1995) XXYBCA* 663. at 664.

<sup>195</sup> See Tweeddale 7.79.

<sup>196</sup> See Tweeddale 7.79.

<sup>197</sup> See Tweeddale 7.79.

**b. *Putrabali***

144 In *Putrabali*,<sup>198</sup> an award set aside in England was enforced in France. An Indonesian seller and a French buyer had entered into a contract for the sale of white pepper. A dispute arose and Putrabali asked for payment. An English arbitration was initiated at the end of which the arbitral tribunal found that there was no breach by Rena Holding and that no payment was due. An award in favor of the French party was therefore rendered.

145 The arbitration was held under particular shipping rules (IGPA Rules), which provided for internal appeal. The award was annulled in part by an English court on the basis of an error of law.<sup>199</sup> As a result, a second award was rendered, this time in favor of the Indonesian party and finding that a breach of the contract had occurred and that payment was due. Therefore, two arbitral awards with completely opposite outcomes were rendered. In the meantime, the French party sought enforcement of the first award in its favor in France (which had been set aside), and the Indonesian party also sought enforcement of the second award in its favor in France. The *Cour de Cassation* enforced the first nullified award and later refused the enforcement of the second award on the basis of *res judicata*, that the second award was precluded by the first. Notable is the French *Cour de Cassation*'s reasoning:

“[...] an international arbitral award, which does not belong to any state legal system, is an **international decision of justice** and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought.”<sup>200</sup>

146 The *Putrabali* decision outlines the French approach: arbitral awards are not anchored in any national legal order, but are “international decisions of justice”, judgments relating to such awards (outside of France that is) are irrelevant in France. The ground of refusal according to Art. V (1)(e) of the New York Convention can be seen as non-existent in France. Annulments proceedings conducted at the place of arbitration have very little to no relevance in France. The focal point of all actions is the award, set free from annulments.

147 Contrarily to the English Arbitration Act 1996, where under section 69 there is a possibility to appeal on a question of law, the French arbitration law does not provide such possibility. What is more, the French court did not enforce under the New York Convention but relied on Art. VII of the New York Convention according to which a more favorable domestic law may be applied, thus applying French national arbitration law to the enforcement of the award rendered in England.

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<sup>198</sup> *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507.

<sup>199</sup> Review of such questions have not been excluded under the English Arbitration Act 1996.

<sup>200</sup> Emphasis added.

148 Furthermore, a forum shopping strategy can be observed in this case, which was successful.<sup>201</sup> *Exequatur* of the first annulled award was sought to prevent subsequent enforcement in France of the second award.<sup>202</sup> Since the French approach is inclined towards delocalized arbitration, having no regard to the seat of arbitration and any annulment actions there, the French party succeeded in its endeavor.

## 2. The German approach

149 German courts take the completely contrary position to the French approach. Under the German view, the award is inseparably linked to the judicial regime of the seat of the arbitration.<sup>203</sup> Therefore, German courts tend to follow the determination of the seat court and refuse to enforce annulled arbitral awards. German law even specifically provides that courts may reverse its earlier decision to enforce an award if it is subsequently set aside at the seat of arbitration.<sup>204</sup> Although the cases shown below involve annulment judgments rendered by non EU Member States, they are insightful as to how Germany approaches this issue. It is argued that Germany would act in the same manner regarding annulment judgments rendered by EU Member State courts since the German approach is not primarily based on the jurisdiction from which the judgment annulling an award emerges.

### a. *German Supreme Court [BGH] 22 February 2001 - III ZB 71/99*

150 A German Higher Regional Court in 1999 refused to enforce an award, which was set aside in Russia.<sup>205</sup> The Russian Supreme Court, however, afterwards overturned the annulment decision and confirmed the award, which led the German Supreme Court to reverse the German Higher Regional court's decision, and deem the award enforceable.<sup>206</sup>

### b. *German Supreme Court [BGH] 24 October 2013 - III ZB 59/12*

151 A dispute between a German and an Ukrainian party arose about the enforcement of an Ukrainian arbitral award which had been annulled by the Ukrainian Courts.<sup>207</sup> After the Higher

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<sup>201</sup> See Silberman and Scherer 125.

<sup>202</sup> See Silberman and Scherer 125.

<sup>203</sup> See Silberman and Scherer 119.

<sup>204</sup> See Silberman and Scherer 119.

<sup>205</sup> See Silberman and Scherer 119. Oberlandesgericht [OLG] [Higher Regional Court] 28 October 1999.

<sup>206</sup> See Silberman and Scherer 119.

<sup>207</sup> See "Zur Vollstreckbarerklärung Eines Im Ursprungsstaat Aufgehobenen Schiedsspruchs" SchiedsVZ 2013, 229.

Regional Court had dismissed the application, the applicant filed an appeal to the Federal Court of Justice. The German Supreme Court ruled the appeal to be non-admissible.

- 152 The Supreme Court reasoned based on Art. V(1)(e) of the New York Convention, which it found to be applicable. Furthermore, according to Art. VII (1) of the New York Convention, the New York Convention's provisions shall not affect the validity of multilateral or bilateral agreements on recognition and enforcement of arbitral awards. One such treaty is the EuCICA.<sup>208</sup> Germany and Ukraine are signatories of both treaties.
- 153 Art. IX EuCICA delimits Art. V(1)(e) of the New York Convention to that effect that the annulment by the State of the arbitration's seat is enough to deny recognition and enforcement only when the annulment of the award was based on one of the reasons stated in Art. IX.1 a–d EuCICA. One of these reasons is the missing competence of the arbitral tribunal, but a violation of domestic ordre public is not included in the list.
- 154 The Higher Regional Court had based its ruling on the assumption that the award had been annulled by Ukraine not only because of a violation of the domestic ordre public but also because of the arbitral tribunal lacking the competence to hear and decide on the matter.
- 155 Furthermore, Art. V (1)(e) of the New York Convention and Art. IX EuCICA require the German court to recognize a foreign judgment, regardless of the German court's own determination whether any grounds for refusal in Art. V(1)(a) to (d) of the New York Convention are met.
- 156 Therefore, Germany's approach is to consistently rely on a set aside judgment from foreign courts.

### **C. Conclusion**

- 157 While it is recognized that the award does become a legal nullity within the jurisdiction where the annulment took place, the specific effects of such an annulment to enforcement procedures elsewhere are not coherent and consistent. There are instances in practice where awards are still enforced regardless of their annulment at the seat. There is a lack of clarity as to the status of an annulled award and the effects it has. It seems to depend largely on a case-by-case basis and the inclination of a jurisdiction towards delocalized arbitration, such as France, which has repeatedly shown its readiness to enforce annulled awards. The current framework gives the possibility for an annulled award to be enforced, lacking any predictability and legal certainty.

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<sup>208</sup> The European Convention on International Commercial Arbitration of 21 April 1961.

158 Notwithstanding decisions such as the ones discussed above, the enforcement of awards that have been set aside by the courts of the place of arbitration therefore remains controversial.<sup>209</sup> The mechanism of judicial review that is called “annulment” therefore does not give its name full justice, as the procedure does not automatically result in a legally null award in all jurisdictions and in every case.

## **IV. A CRITICAL ANALYSIS**

### **A. Reflection on mutual trust and arbitration – The arbitration exclusion of the Brussels regime**

159 In the previous sections, it has been shown that an important principle in the EU is mutual trust, aiming at the free circulation of judgments rendered by Member State courts, which should be treated as if they were domestic judgments.<sup>210</sup> The EU’s more general objective is to create a European area of justice on the basis of this principle of “mutual recognition of judicial and extra-judicial decisions”.<sup>211</sup> How does this relate to arbitration?

160 The arbitration exclusion was not enough to exclude anti-suit injunctions from the scope of the Brussels regime, although they had been issued in view of arbitral proceedings (see *West Tanekers*). When it comes to an arbitral tribunal’s restraining orders, these, however, do fall within the arbitration exclusion of the Brussels regime (*Gazprom*). Mutual trust does not need to apply between arbitral tribunals and Member State courts.

161 If a EU Member State court, however, issues a judgment annulling an arbitral award, and enforcement is sought in another EU Member State, mutual trust ought to apply since this constellation touches upon the relationship between two Member State courts. By enforcing an annulled award, a Member State court renders a conflicting decision, undermining the EU’s aim of creating an efficient single market. Recital 12 of Recast Brussels I specifically excludes judgments relating to arbitral awards, which cannot be seen as an effective measure to promote mutual trust between Member State courts.

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<sup>209</sup> See Blackaby and others 11.97.

<sup>210</sup> See Recital 26 of the Recast Brussels I Regulation.

<sup>211</sup> See Art. 67(1) and (4); and Art. 81 TFEU; Recitals 3 and 26 of the Recast Brussels I Regulation.

## **B. A departure from mutual indifference: The impact of the CJEU decisions on party autonomy and the seat of arbitration**

162 Although international arbitration is excluded from the Brussels regime, it is being affected within the EU by the decisions rendered by the CJEU and the practice of Member State courts. One could argue that the CJEU has not given effect to the parties' autonomy in the *West Tankers* decision and failed to recognize an important principle of international arbitration. The choice of the seat of arbitration has important ramifications with respect to the law to be applied to the dispute that may arise.<sup>212</sup> The parties submit to a legal order and to determined judicial authorities by the direct or indirect choice of the seat.<sup>213</sup> The CJEU, however, failed to recognize the notion of the seat of arbitration and what the parties' choice of a seat of arbitration entails. As reflected in Art. V(1)(e) of the New York Convention, the jurisdiction in which the seat of arbitration lies determines the *lex arbitri* to be applied, meaning that it is the seat court that will determine the existence, validity, and scope of the parties' arbitration agreement as well as conduct any annulment procedure. In addition, the choice of the seat also determines the tools available to a party to enforce arbitration agreements, among which are anti-suit injunctions.<sup>214</sup>

## **C. The principle of mutual trust and the enforcement of annulled awards repel each other**

163 This thesis suggests that the principle of mutual trust offers no place for enforcing annulled awards which is a manifestation of delocalized arbitration, unless the system of judicial review of arbitral awards was completely abolished. A Member State court that enforces an award, which has been set aside by a court of another Member State acts contrary to mutual trust.

164 There are three main issues that need to be considered:

(i) There is an unrealistic view of the state of courts in the EU: it is problematic to reinforce mutual trust in the European area of justice and advance the notion that all Member State courts are the same, whereas the general European standard of justice in reality is not the same (e.g. *Italien torpedo*);

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<sup>212</sup> See *West Tankers*; see also: Daniel Rainer, *The Impact of West Tankers on Parties' Choice of a seat of arbitration*, 2010, *Cornell Law Review* Vol. 95:431, p. 433

<sup>213</sup> See Jean-François Poudret and Sébastien Besson, "Recognition and Enforcement of Foreign Awards," *Comparative Law of International Arbitration* (2nd edn, 2016) para 929.

<sup>214</sup> See *Case C-185/07 – Allianz SpA et al v West Tankers Inc [2009]*; see also: Daniel Rainer, "The Impact of West Tankers on Parties' Choice of a Seat of Arbitration" (2010) 95 *Cornell Law Review* 433.

(ii) there is a lack of efficiency: anti-suit injunctions in favor of arbitration are not allowed, hindering thereby arbitration and making it necessary for parties to spend more time and costs in litigation proceedings (which in arbitration the parties intend to avoid); and

(iii) there is also an inherent inconsistency: Member State courts are called to trust each other regarding their judicial systems and their judgments rendered. While in the *West Tankers* decision the CJEU held that anti-suit injunctions with regard to matters covered by an arbitration agreement fall within the scope of the Brussels regime, annulment, recognition and enforcement procedure of arbitral awards fall outside the scope of the Regulation as specified by Recital 12 of Recast Brussels I.

165 Focusing on point (iii), there is a contradiction in the way the EU aims to deepen the integration, obscuring that this goal is not being fulfilled in the area of enforcement of arbitral awards that have been annulled, resulting in the possibility of having two contradicting judgments from two different EU Member States dealing with exactly the same matter.

166 According to the CJEU in *West Tankers*, whatever benefit parties obtained from the availability of anti suit relief from English courts is outweighed by the need for uniformity among EU Member States.<sup>215</sup> For more consistency, this thesis suggests that the same ought to apply to annulment vs. enforcement procedures in EU Member State courts regarding arbitral awards.<sup>216</sup>

167 The ultimate question is whether mutual trust should be exercised as regards the judicial review of arbitral awards in EU Member States. In international arbitration, “[t]he attachment arising from the choice of the seat will determine which courts will have jurisdiction: [...] above all – the parties expect – to verify the regularity of the arbitral process once the award has been made.”<sup>217</sup> The answer to this question, in the interest of the EU, is yes. The aim of the EU is to have each EU Member State court be essentially equal. If the enforcement court, however, enforces an award that has been annulled through a judgment in another EU Member State court, the objective of equality is not attained since the enforcing court would be exercising a kind of appeal function. And in any event, conflicting decisions cannot be in the interest of a harmonized internal market and an efficient European area of justice.

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<sup>215</sup> See *Case C-185/07 – Allianz SpA et al v West Tankers Inc [2009]*; see also: Rainer 460.

<sup>216</sup> See, e.g., Benedettelli 589–590, who states: “Should one take the rationale of *West Tankers* to its extreme conclusion, other judicial measures in support of arbitration — the grant of damages or other sanctions for breach of the arbitration agreement, the appointment of arbitrators in lieu of a defaulting party, even the enforcement of an arbitral award — could be considered to breach the principle of mutual trust, and to be therefore forbidden, whenever a judicial action relating to the same subject matter is already pending before the courts of another Member State.”

<sup>217</sup> Leurent 272.



168 The current Brussels regime excludes arbitration and clearly sets out that the New York Convention stands above it. Is it then not to be regarded as a conceptual flaw in the European area of justice that some court judgments fall under the regime, but others simply because they relate to arbitration do not? It opens up an incoherent approach in the fundamental principle of mutual trust. The intent of excluding arbitration from the Brussels regime was the fact that the New York Convention provided a framework for the recognition and enforcement of arbitral agreements and arbitral awards. However, the New York Convention leaves a gap that must be seen as contrary to the EU's main objective of creating a single functioning market for two main reasons. First, the arbitration exclusion of the Brussels regime was justified by the accession of Member States to the New York Convention, which was assumed to meet the original aim of Art. 220 of the EEC Treaty. The aim was “the simplification of formalities governing the **reciprocal recognition and enforcement of judgments** of courts or tribunals and of **arbitration awards.**”<sup>218</sup> This aim is presently not met as regards arbitration awards. There is no “reciprocal recognition and enforcement of arbitration awards”. Second, there is no uniform interpretation of the provisions of the New York Convention, unlike for the provisions of the Brussels I Regulation, which becomes problematic in regards to harmonizing this area within the EU.

## V. CONCLUSION CHAPTER THREE

169 On the one hand, the EU declares mutual trust in each other's judicial systems a fundamental principle in its area of justice, but on the other hand allows for conflicting decisions based on a notion of distrust. This is exactly what occurs if the seat court annuls the award and the court in the state where enforcement of the arbitral award is sought, disregards any judgment of annulment but instead enforces the annulled award (French approach). This practice is controversial and should be even more so in the EU. First, this solution increases the risk of contradicting decisions by enabling each state to decide differently than the annulment judgment rendered at the seat of arbitration.<sup>219</sup> Second, it creates legal uncertainty because it refuses to give the last word to the judge setting aside the award so that an award, even if it has

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<sup>218</sup> Emphasis added.

<sup>219</sup> See Poudret and Besson 929.

been successfully set aside before the judge of the seat, continues to pose a threat to the party who lost the arbitration.<sup>220</sup>

170 What is more, the Brussels regime has declared the New York Convention's supremacy, opening the floodgates to deficiencies of the New York Convention to invade the European area of justice, making it a little less harmonized.

## CHAPTER FOUR: THE WAY FORWARD

### I. THE EU'S POWER TO REGULATE IN THE AREA OF INTERNATIONAL ARBITRATION

171 The supranational legal order in place among EU Member States may provide a sound basis to improve the current system and achieve mutual acceptance of court decisions as regards challenge and recognition/enforcement procedures of arbitral awards. If harmonization as regards the treatment of arbitral awards is achieved in the EU, as a consequence, an international incentive to improve the New York Convention may follow.

172 Art. 81 TFEU gives the EU expressly the power to

“[...] develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.”<sup>221</sup>

173 Art. 81 (2)(a) TFEU states that the European Parliament and Council

“shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of **decisions in extrajudicial cases** [...]”<sup>222</sup>

174 Art. 67 (4) TFEU clarifies that “[t]he Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.” These extrajudicial cases and decisions are meant to include arbitration.<sup>223</sup>

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<sup>220</sup> See Poudret and Besson 929.

<sup>221</sup> “C 326/78 EN Official Journal of the European Union 26 October 2012”  
<[https://www.ecb.europa.eu/ecb/legal/pdf/c\\_32620121026en.pdf](https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf)> accessed May 4, 2016.

<sup>222</sup> Emphasis added.

<sup>223</sup> See Benedettelli 599. John Gaffney, “Should the European Union Regulate Commercial Arbitration?” [2016] *Arbitration International* 1,

- 175 Prof. Benedetelli observed that: “[t]here is no reason why arbitration should not be seen as a component of the administration of justice within Member States and should not also be subject to all these influences of EU law.”<sup>224</sup> Benedetelli further noted that arbitral proceedings are (a) functionally equivalent to judicial proceedings; and (b) do not take place in a vacuum, but necessarily interact with judicial proceedings.<sup>225</sup>
- 176 The Commission’s Green Paper regarding the Brussels I Recast proposal in particular points out that “[a]rbitration is a matter of great importance to international commerce”, the “1958 New York Convention is generally perceived to operate satisfactorily” and as such can be left “untouched or at least as a basic starting point for further action.”<sup>226</sup> The Green Paper further makes clear that this “should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.”<sup>227</sup>
- 177 The Commissions’ Explanatory Memorandum of the 2010 Proposal to the recast of the Brussels I Regulation in particular stated that:<sup>228</sup>
- “Member States cannot by themselves ensure that arbitration proceedings in their Member State are properly coordinated with court proceedings going on in another Member State because the effect of national legislation is limited by the territoriality principle. Action at EU level is therefore necessary.”
- 178 The New York Convention leaves open the possibility for signatory states to apply their own procedural rules for matters not regulated by the New York Convention as well as to adopt a more favorable internal regime for the free circulation of arbitral awards.<sup>229</sup>
- 179 The criterion that connects an international arbitration to a EU regulation in the area of arbitration could be that the parties have chosen the seat of the arbitral procedure to be in a EU Member State where that Member State’s court then have jurisdiction to assist the parties in e.g. setting up the arbitral tribunal, issue interim measures and set aside or enforce the arbitral award.
- 180 Although the New York Convention has achieved some form of harmonization, there still remains a risk of conflicting decisions and opportunistic forum shopping as has been illustrated

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13 <<http://arbitration.oxfordjournals.org/content/early/2016/03/11/arbint.aiw012.abstract>>.

<sup>224</sup> Benedetelli 599; Gaffney 13.

<sup>225</sup> Benedetelli 599.

<sup>226</sup> Green Paper - COM(2009) 175 final 8.

<sup>227</sup> Green Paper - COM(2009) 175 final.

<sup>228</sup> COM(2010) 748 final 11.

<sup>229</sup> See Benedetelli 600.

above in the cases where an award was enforced in one country and annulled in another country at the same time.<sup>230</sup>

- 181 In order to have free circulation of arbitral awards within Europe, it seems therefore reasonable to adopt measures at the EU level to further avoid or completely reduce such risks.<sup>231</sup> The EU has the means to enact uniform rules of international arbitration and neither the New York Convention nor the Geneva Convention stand in its way.<sup>232</sup>
- 182 In sum, the EU has the competence to regulate in the area of international arbitration and also has a real interest in doing so, the question, however, is to what extent such an intervention can limit Member States' sovereignty and parties' autonomy.<sup>233</sup>

## **II. EUROPEAN COURT FOR INTERNATIONAL COMMERCIAL ARBITRATION**

- 183 In order to achieve the kind of integration necessary to have a uniform European area of justice, this thesis proposes the formation of a whole new court: the "European Court for international commercial arbitration". This new European court would replace national court involvement in arbitration and would have exclusive and final jurisdiction over all matters concerning jurisdiction, setting aside and enforcement proceedings. With the formation of such a court, the need for a seat of arbitration would be removed, and at the same time independence from national courts would be achieved. As we have seen there are many uncertainties surrounding the standards applied by national courts in determining whether an arbitral award should be annulled or enforced and approaches adopted by EU Member State courts are not uniform when it comes to enforcing annulled awards. A European Court for international commercial arbitration would solve these inherent flaws and ambiguities.
- 184 The idea to create a unified international arbitration court has been advanced as early as 1958 in discussions leading up to the New York Convention and prominent jurists such as Albert Jan van den Berg, H.E. Judge Howard M. Holtzmann and Judge Stephen M. Schwebel are among the proponents of such a court.<sup>234</sup> Albert Jan Van den Berg identified a lack of efficiency in the current framework and suggested that "[i]f we really want to improve the current situation,

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<sup>230</sup> See Benedettelli 604.

<sup>231</sup> See Benedettelli 604.

<sup>232</sup> See Benedettelli 603.

<sup>233</sup> See Benedettelli 600, 615.

<sup>234</sup> See HE Judge Howard M Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards" in Martin Hunter, Arthur Marriott and V V Veeder (eds), *The Internationalisation of International Arbitration, The LCIA Centenary Conference* (Graham & Trotman / Martinus Nijhoff 1995); HE Judge Stephen M Schwebel, "The Creation and Operation of an International Court of Arbitral Awards"; van den Berg, "Should the Setting Aside of the Arbitral Award Be Abolished?"

States should transfer control over an international arbitral award to an independent international body. The body would have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all countries.”<sup>235</sup>

185 This idea is based on the ICSID model, where an *ad hoc* committee is responsible for annulment proceedings with universal effect and enforcement takes place “as if it were a final judgment of a court of that State”.<sup>236</sup> Also it has been suggested that “[i]nternational harmonization of solutions is indispensable to improve the effectiveness of arbitral awards, and it would seem at present that the way to such harmonization lies through concerted centralization of the reviews conditioning the effectiveness of awards.”<sup>237</sup>

186 The argument is that an international court would strip reliance from national courts and improve efficiency and certainty. A critique, however, is that the seat of arbitration is what gives jurisdictions the competitive advantage and the drive to always adapt and create better suited national arbitration legislations so that parties are stimulated to choose a particular seat.

187 Although the disparate approaches taken by courts regarding the enforcement of annulled awards and standards for annulling arbitral awards have been highly debated, the solution of creating an international court has not been seriously considered, as it would entail changing the success story that is the New York Convention. The question is whether such an international court could be established on the basis of a modified New York Convention or rather an entirely new convention, inspired by the challenge procedure of the ICSID convention. Changing the New York Convention, although entirely plausible, given that it came into force in 1958 and much has happened since then, is rather unlikely due to the necessary consent of the signatory states to accept such a change.

188 The idea of creating such an international court has been depicted as “vain and utopian”<sup>238</sup> and an “impossible dream.”<sup>239</sup> Within the EU, however, this dream can become very real for EU Member States. Similar to the ICSID Convention, where the decision by the *ad hoc* committee leads to automatic enforcement in all contracting states, the European Court for international commercial arbitration’s decision would lead to an automatic effect in all EU Member States, eliminating the possibility of a national court to review the grounds for refusing enforcement

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<sup>235</sup> van den Berg, “Should the Setting Aside of the Arbitral Award Be Abolished?” 25.

<sup>236</sup> Art. 54(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (“ICSID Convention”).

<sup>237</sup> Leurent 271.

<sup>238</sup> Blackaby and others 1.116.

<sup>239</sup> Pierre Lalive, “Enforcing Awards” (*Cour d’arbitrage CCI 60ème Anniversaire*, 1983) 2 <[http://www.lalive.ch/data/publications/12\\_-\\_Enforcing\\_Awards\\_International\\_Arbitration\\_60\\_years\\_on.pdf](http://www.lalive.ch/data/publications/12_-_Enforcing_Awards_International_Arbitration_60_years_on.pdf)> accessed May 14, 2016.

again, thus eliminating the problems associated with double review and parallel proceedings.<sup>240</sup>

189 Establishing such a new European court would not be in breach of Member States' obligations under the New York Convention seeing that Art. V(1) includes non-mandatory language and Art. VII, the more favorable provision, can be seen as a pathway into establishing this new court. As a result, such a European court would satisfy both the New York Convention's requirements and the EU's drive to harmonize its area of justice.

## CHAPTER FIVE: CONCLUSION

190 In view of the research inquiries specified in Chapter One, the conclusion can be drawn that the delocalization theory of arbitration and the enforcement of nullified awards contradicts the EU's mutual trust principle. This thesis identified a particular inherent conflict in the system of the European area of justice, and its underlying principle of mutual trust with delocalized arbitration and the enforcement of nullified awards.

191 This can largely be reasoned based on the parallel development of the European area of justice and international arbitration, which resulted in the arbitration exclusion of the Brussels regime. Due to this exclusion, judgments regarding arbitral awards are treated differently than judgments relating to other civil and commercial matters.

192 A uniform European regime on arbitration, however, would be beneficial to further integration in the EU.<sup>241</sup> A harmonious approach would facilitate the free circulation of judgments regarding arbitral awards, which can be considered an objective of the EU.

193 The Brussels I Regulation created an efficient judicial system, which is essential for the functioning of the internal market.<sup>242</sup> However, arbitration exists as a parallel system of adjudication, excluded from Brussels I and falling within the exclusive competence of Member States in its entirety. This cannot be considered an optimal solution from the EU's point of view as cooperation between EU Member State courts is important for a uniform application of mandatory EU law.<sup>243</sup>

194 For now, jurisdictions within the EU can still entertain the notion of international arbitration as a legal order detached from any national legal system. Member State courts - in their discretion

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<sup>240</sup> Art. 54(1) of the ICSID Convention provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

<sup>241</sup> See "Legal Instruments and Practice of Arbitration in the EU (Study)" 197.

<sup>242</sup> See "Legal Instruments and Practice of Arbitration in the EU (Study)" 197.

<sup>243</sup> See "Legal Instruments and Practice of Arbitration in the EU (Study)" 197.

- can disregard the seat court's annulment judgment based on the non-mandatory language of Art. V(1)(e) of the New York Convention, and enforce nullified arbitral awards. The seat of arbitration, being it in London, Paris or Stockholm, can retain its national peculiarities and give arbitration a "national flavour", even if within the EU.

195 The New York Convention has contributed to the dramatic rise in popularity of arbitration. Resistance from including arbitration in the Brussels regime, however, stems from caution and hesitancy to interfere with the functioning of the New York Convention, which may have the effect of decreasing independence of arbitral proceedings from the influence of national courts and reducing the appeal of Member States as seats of arbitration.<sup>244</sup>

196 A new European Court for international commercial arbitration would replace national court involvement in arbitration within the EU and have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all Member States. This way the conflict identified in this thesis between the principle of mutual trust and the enforcement of annulled arbitral awards could be resolved.

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<sup>244</sup> See "Legal Instruments and Practice of Arbitration in the EU (Study)" 197.

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