The Lugano Convention and Its Relevance for Arbitration

Laurent Killias*

I. Introduction

International commercial arbitration has seen a remarkable development in recent decades. This success story has various reasons. Without doubt, one of those reasons lies in the emancipation of international arbitration from the judicial control of the courts of the country in which arbitration takes place.[1] All major industrial States have adopted modern arbitration laws, which have strengthened the principle of party autonomy and the very concept of arbitration as a form of private dispute resolution distinct, to a significant extent, from court litigation.

However, private arbitration cannot exist in a legal vacuum, independent as it may be from the rules of procedure applicable to court litigation and from (forms of excessive) judicial review. Arbitration still lacks a significant number of enforcement mechanisms typically available to state courts and thus it inevitably depends on the support from state courts in more than one respect. The support which the law of arbitration enforced by state courts provides to arbitration covers a wide range of issues, ranging from the very constitution of the arbitral tribunal[2] to questions of recognition and enforcement of an arbitral award.

The recent emergence of arbitration as an autonomous method for the settlement of commercial disputes has inevitably caused certain tensions between private and state dispute settlement bodies.

---

* Dr. iur., LL.M., attorney-at-law, Zurich. This article is adapted from a paper presented at the international symposium on 'Zukunft des internationalen Verfahrensrechts' held in Basel on 7–8 June 2001 under the auspices of the University of Basel. The author wishes to thank Dr. Paolo Michele Patocchi, LL.M., attorney-at-law, Geneva, for his observations and critical review.

1 For a more comprehensive analysis see Bernardini, 'Arbitral Justice, Courts and Legislation', *Arbitration in the Next Decade, ICC International Court of Arbitration Bulletin* (Special Supplement) May 1999, pp. 13 et seq.

2 *See*, for example, Article 179(2) of the Swiss Private International Law Statute; §1035 and §1062(1) of the German Civil Procedure Act; and Sect. 18 of the English Arbitration Act 1996.

European Journal of Law Reform, Vol. 4, No. 1

In recent years, courts of the signatory states of the Brussels Convention and of the Lugano Convention (collectively 'the Conventions') have increasingly been called upon to resolve potential or true conflicts between arbitration on the one side and adjudication of disputes by state courts on the other.

These proceedings have also led to controversial discussions among scholars. A number of commentators have voiced strong concerns that such conflicts between arbitration and adjudication by civil courts may be so serious as to jeopardize the fundamental principle of equal protection under the law in Europe.[3]

The purpose of this paper is to survey some aspects of possible interferences between arbitration and the Lugano Convention. However, it would be bold to suggest that the following survey is exhaustive.

II. The Exclusion of Arbitration Proceedings from the Scope of Application of the Lugano Convention

Within a unified jurisdictional system such as that represented by the countries which are signatories of the Brussels and the Lugano Conventions, the same claims between the same parties must not be adjudicated upon by different courts, but ideally by one and the same court. Conflicts as to the jurisdiction to adjudicate give rise to the danger of different and potentially conflicting and contradictory decisions.[4]

The contracting states of the Brussels and Lugano Conventions were well aware of this problem. Hence the uniform rules on jurisdiction in these conventions, and the strict rules on *lis pendens* as well as recognition and enforcement of judgments made in a contracting state.[5]

However, the danger of different and contradictory decisions does not exist only as between the courts of the contracting states. If one or more arbitration proceedings have been conducted in different contracting states, the danger of conflicting and inconsistent decisions made in these proceedings is the same. An award made in a contracting state may thus conflict with an award and/or a judgment made in another contracting state.[6]

---

[3] *See* Poudret, 'Conflits entre juridictions étatiques en matière d'arbitrage international ou les lacunes des Conventions de Bruxelles et Lugano', *Festschrift Sandrock*, Heidelberg 2000, pp. 761 et seq.

[4] Such a result was called 'contraire à l'ordre publique' (contrary to public policy) by the Federal Supreme Court of Switzerland in its decision of 14 May 2001, BGE 127 III 283.

[5] *See also* the judgment of the European Court of Justice of 4 March 1982, Case 38/81, *Effer v Kantner*, 1982 ECR 825.

[6] Some aspects of this conflict are illustrated in the famous *Hilmarton* case, *see* only Kessedjian, 'Court Decisions on Enforcement of Arbitration Agreements and Awards', Journal of Int. Arb. 2001, pp. 8 et seq., with further references.

Yet Article 1(2) no. 4 of the Brussels and Lugano Conventions provides that neither of these conventions applies to arbitration proceedings. When these Conventions were being drafted, the contracting states decided to exclude arbitration proceedings in order to avoid possible overlap with other conventions on arbitration, whether already existing or planned.[7] By generally excluding arbitration proceedings, the contracting states hoped to avoid any collisions between decisions adopted by state courts and those adopted in arbitration.

The provision of Article 1(2)(4) of the Brussels and Lugano Conventions has been discussed repeatedly. Nevertheless, it was never amended either in one of the numerous accession agreements under the Brussels Convention,[8] in the Lugano Convention, or in Article 1(2)(d) of Council Regulation 44/2001 (the 'Regulation') which came into force on 1 March 2002 and which replaces the Brussels Convention.[9]

The following analysis will focus on the question whether the exclusion of arbitration from the scope of application of the Conventions does in fact avoid tensions and conflicts between arbitration and court litigation, as was intended by the drafters of those Conventions, or whether the opposite may be regarded as being closer to the truth.

The answer to this question depends first on the definition of 'arbitration' within the meaning of Article 1(2)(4) of the Conventions and Article 1(2)(d) of the Regulation, respectively.

III. The Case-law of the European Court of Justice on Article 1(2) (4) of the Brussels Convention

To date, the European Court of Justice ('ECJ') had only two occasions to interpret Article 1(2) (4) of the Brussels Convention.

---

[7] See the Report on the Convention on Jurisdiction and the Enforcement of Judgments of 27 September 1968 (the so-called Jenard Report), *OJ 1979 C 59 of March 1979*; with respect to Article 1, this report recalls in para. IV D that arbitration is already dealt with by numerous international agreements.

[8] The report attached to the accession agreement of 1978 discusses the scope of exclusion of arbitration. The opinions on the proper interpretation of Article 1(2)(4) were obviously irreconcilable. At the end, by way of compromise, it was agreed not to change the wording of the provision. See the Report on the Accession Agreement of 9 October 1978 (the so-called Schlosser Report), *OJ 1979 C 59 of 5 March 1979*, pp. 71 et seq., para. 61.

[9] *OJ 2001 L12 of 16 January 2001*. The Regulation amends and transforms the contents of the Brussels Convention into a European Community law instrument. However, in relation to Denmark the unamended Brussels Convention remains in force.

1. The Marc Rich Case

The meaning and the consequences of the exclusion of arbitration from the scope of application of the Brussels Convention arose for determination, for the first time in 1991, in the well-known Marc Rich Case.[10]

The Swiss-based Marc Rich Inc. bought crude oil from Società Italiana Impianti. The sales agreement contained a clause providing for arbitration in London. After accepting delivery, Marc Rich claimed that the oil had been polluted. Impianti reacted by bringing proceedings before an Italian court seeking a declaration that it had no liability towards Marc Rich. The latter challenged the jurisdiction of the Italian court relying on the arbitration clause as a defence. Marc Rich then initiated arbitration proceedings before the London Court of International Arbitration. As Impianti refused to participate in this arbitration, Marc Rich applied to the High Court in London for the appointment of an arbitrator on behalf of Impianti.

The High Court made a reference to the ECJ asking whether the appointment of an arbitrator by a state court was part of 'arbitration' within the meaning of Article 1(2) no. 4 and consequently excluded from the scope of application of the Brussels Conventions.

The ECJ answered this question in the affirmative. It held that the term 'arbitration' in Article 1(2) (4) was not limited to proceedings before arbitrators, but was also meant to exclude proceedings before state courts from the scope of application of the Brussels Conventions, provided that such judicial proceedings were 'part of the process of setting arbitration proceedings in motion'.[11]

As a consequence, the appointment of an arbitrator by the English High Court was not caught by the Brussels Convention.[12] The High Court was therefore entitled to decide on the basis of its own rules whether it had jurisdiction to appoint an arbitrator for Impianti. In making this decision, the High Court had to address the preliminary issue whether the parties had concluded a valid arbitration clause. In the opinion of the ECJ, this preliminary issue was not subject to the rules of the Brussels

---

[10] Judgment of the European Court of Justice of 25 July 1991 in Case C-190/189 *Marc Rich v Società Italiana Impianti*, 1991 ECR I–3855. *See also* Kaye, 'The Judgments Convention and Arbitration: Mutual Spheres of Influence', Arb. Int. 7 (1991), pp. 289 et seq.; and Kaye, 'The EEC and Arbitration: the Unsettled Wake of the Atlantic Emperor', Arb. Int. 9 (1993), pp. 27 et seq.

[11] 1991 ECR I-3855, at p. I-3901 (*supra* note 10), para. 19.

[12] This view was supported by the Schlosser-Report (*supra* note 8), at para. 64, according to which the Brussels Convention is not applicable to court proceedings which serve the purposes of arbitration, such as the appointment or removal of an arbitrator. Schlosser later changed his mind, *see* Schlosser, Stein/Jonas (eds), *Zivilprozessordnung* 20th ed., vor §1044 para. 61; and Schlosser, 'The 1968 Brussels Convention and Arbitration', Arb. Int. 7 (1991), at p. 227. According to his more recent opinion, Article 1(2) (4) should cover only pending arbitration proceedings and the enforcement of arbitral awards, Arb. Int. 7 (1991), pp. 238 et seq. *See also* Schmidt, 'Die Einrede der Schiedsgerichtsvereinbarung im Vollstreckbarerklärungsverfahren von EuGVÜ und Lugano-Übereinkommen', *Festschrift Sandrock*, Heidelberg 1995, pp. 208 et seq.

Convention either. Rather, the determination whether or not a case comes within the scope of application of the Brussels Convention has to be decided solely on the basis of 'the subject-matter of the dispute'.[13] Since the appointment of the arbitrator, as the main question arising for determination by the English High Court, was excluded from the scope of application of the Convention, the preliminary issue whether there had been a valid arbitration agreement in the first place, was also outside the scope of the Convention. Deciding otherwise would violate the principle of certainty of the law, as 'the applicability of the exclusion laid down in Article 1(4) of the Convention [would] vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.'[14]

2. The Van Uden Case

Recently, in the Van Uden Case,[15] the ECJ had another opportunity to interpret and construe the term of 'arbitration' in Article 1(2) (4) of the Brussels Convention. The background of the decision was a dispute between the German company Deco-Line and the Dutch company Van Uden. The parties had concluded a charter agreement which contained an arbitration clause. When Deco-Line failed to pay certain bills, Van Uden initiated arbitration proceedings in the Netherlands as provided under the charter agreement. As in the Marc Rich Case, the defendant apparently delayed the appointment of the arbitrators. Rather than applying to a state court for the appointment on behalf of Deco-Line, Van Uden sought interim relief from the Rotterdam court. In its application, it sought an order against Deco-Line for payment to cover debts due under the agreement.

Eventually, the Dutch Hoge Raad submitted a preliminary reference to the ECJ asking whether the competent Dutch court had jurisdiction to decide on the application for interim relief within the meaning of Article 24 of the Brussels Convention (Art. 31 of the Regulation) despite the fact that arbitration had already been initiated. As is well known, jurisdiction to grant provisional measures under Article 24 is limited to the areas of substantive law which are covered by the Convention itself.[16]

The analysis had to begin with the question of whether the proceedings for interim relief before the Rotterdam court were 'ancillary to arbitration proceedings' within the meaning of Article 1(2) (4) and were thus excluded from the scope of application of the Brussels Convention. If this question were to be answered in the affirmative,

---

[13] 1991 ECR I–3855, p. I–3902 (*supra* note 10), para. 26.

[14] Ibid., para. 27.

[15] Judgment of the European Court of Justice of 17 November 1998 in Case C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line and Another*, 1998 ECR I–7091.

[16] *See* 1998 ECR I–7091 (*supra* note 15), para. 30, with a reference to the judgment of the European Court of Justice of 27 March 1979 in Case 143/78, De Cavel, 1979 ECR 1055, para. 9.

jurisdiction for the provisional measures would not be subject to Article 24, but to the (national) rules on jurisdiction applicable in the Dutch courts.

In its judgment in the Van Uden Case, the ECJ first referred to its decision in the Marc Rich Case, according to which court proceedings were excluded from the scope of application of the Brussels Convention if they were 'ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards'.[17]

The ECJ then had to determine whether the application for provisional measures by Van Uden brought before the court had to be considered as 'ancillary to arbitration proceedings'. The Court answered this question in the negative. According to the judgment, provisional measures are 'not in principle ancillary to arbitration proceedings'. Rather, proceedings for provisional measures are 'ordered in parallel to such [arbitration] proceedings and are intended as measures of support'. When deciding whether a certain procedure concerns arbitration and is, therefore, excluded from the scope of application of the Convention, the ECJ will only look at the substance-matter of the dispute ('nature of the rights which they serve to protect'). According to the decision of the ECJ, the provisional measures requested by Van Uden do not concern arbitration as such. Instead, they are directed at the protection of the substantive claims of the applicant. Pursuant to the ECJ the main issue of the provisional measures were the support of the contractual claim at stake.[18]

It can be argued that the reasoning in the Van Uden Case is quite unfortunate and a clear distinction from the Marc Rich judgment is not evident.[19] In Marc Rich the Court decided that the appointment of an arbitrator is 'ancillary to arbitration proceedings' and consequently does not fall under the scope of application of the Brussels Convention. In Van Uden, by contrast, the Court decided that the proceedings for provisional measures before the Dutch court are 'in support' of arbitration and serving the substantive claims of the applicant (and are therefore not to be regarded as 'ancillary to arbitration'). The question whether court proceedings are 'ancillary to' or merely in 'support of' arbitration will often turn on semantics and cannot, in the author's opinion, be decisive as such. What appears to be more decisive, it is suggested, is whether or not court proceedings have a direct impact on the conduct of an arbitration. All judicial proceedings which have such a direct impact should be excluded from the scope of application of the Brussels Convention by way of Article 1(2) (4). An application for provisional measures aimed at securing substantive claims of the applicant does not have a direct impact on arbitration proceedings. This is quite obvious in the Van Uden Case. The substance of Van Uden's claim was not primarily to

---

[17] 1998 ECR I–7091 (*supra* note 15), para. 32.
[18] Ibid., para. 33, 34.
[19] *See also* van Haersolte-van Hof, 'The Arbitration Exception in the Brussels Convention: Further Comment', Journal of Int. Arb. 2001, p. 30.

activate the arbitration proceedings; rather, it was directed at securing the substantive claims of the applicant until such time as the arbitral award was made and would be enforceable.

Admittedly, the criterion of a 'direct impact' on the conduct of arbitration proceedings is not without difficulties. The provisional measures applied for by Van Uden could very well have had a direct impact on the arbitration proceedings. If granted, the interim relief could have caused the arbitration proceedings to be moot. This is particularly true for the provisional measures made available under Dutch law ('*kort geding*') and under French law ('*référé-provision*'). In practice, the main proceedings are often discontinued after these kinds of provisional measures are awarded in the Netherlands or in France.[20]

3. Interim Conclusions

On the basis of the case-law of the ECJ, not only arbitration proceedings as such, but also certain types of proceedings before State courts are excluded from the scope of application of the Conventions under Article 1(2) (4) and the Regulation under Article 1(2)(d), respectively. These exclusions cover proceedings before state courts which have a 'direct impact' on the conduct of arbitration proceedings. An example would be a state court proceeding for the appointment of an arbitrator.

By contrast, proceedings before state courts which – on the basis of the applicant's claim – do not directly concern the conduct of a (parallel) arbitration, are within the scope of application of the Conventions and the Regulation, respectively. An example would be a court proceeding for provisional or protective measures aimed at securing the substantive claims of the applicant.

With this interpretation of the term 'arbitration' in Article 1(2) (4) of the Convention, the ECJ is ready to accept the possibility of (parallel) proceedings and hence the danger of conflicting and inconsistent decisions.[21]

The Marc Rich Case illustrates how complicated things can become. As a consequence of the ruling of the ECJ, the English courts had to decide on the basis of their own law on the appointment of an arbitrator. As a preliminary issue they had to determine whether the parties had concluded a valid arbitration clause in the first place. Had the High Court answered this question in the affirmative, it would have appointed the arbitrator and the arbitral tribunal would have had jurisdiction to decide on the claims of Marc Rich.

At the same time, the Italian court had to decide on the negative declaration requested by Impianti. As a preliminary issue the Italian court also had to decide whether the parties had concluded a valid arbitration clause. According to Article II

---

[20] *See* the opinion of Advocate General Léger in the Van Uden Case, ECR 1998 I–7091 (*supra* note 15), p. 7114, para. 109 et seq.

[21] *See* Yoshida, 'Lessons from the Atlantic Emperor: Some Influence from the Van Uden Case', Arb. Int. 15 (1999), pp. 369 et seq.

(3) of the 1958 New York Convention,[22] the Italian courts must honour and enforce a valid arbitration clause. However, the 1958 New York Convention does not make provision as regards the system of law which has to be applied in order to determine whether an arbitration clause is valid. Had the Italian courts held that the arbitration clause was invalid, they would have paved the way to exercise their jurisdiction over the substantive claims. As a consequence, parallel proceedings could have been conducted in London and in Italy and there would have been a concrete danger of conflicting decisions on the same claims between the same parties.[23]

The ECJ had so far to deal only with the two specific aspects of the exclusionary effect of Article 1(2)(4) of the Brussels Convention which were mentioned above.

The remainder of this paper will consider, in the light of the existing case-law, to what extent the Lugano Convention (and the Regulation, respectively) contains suitable rules for the avoidance – or at least the reduction – of conflicts between private and state dispute settlement mechanisms.

In this context, the questions to be discussed are in particular (i) whether Articles 21 et seq. on *lis pendens* of the Convention (Articles 27 et seq. of the Regulation) (*infra* IV.) and (ii) whether Articles 27 et seq. on recognition and enforcement of the same convention (Articles 34 et seq of the Regulation) can be applied and whether their application would in fact resolve the problems addressed in this paper.

IV. Application of the Rules on *Lis Pendens*?

The most effective way of preventing unnecessary parallel proceedings and conflicting decisions is by a strict application of the rules on *lis pendens*.[24] The Lugano Convention provides such rules in Articles 21 et seq. With respect to the question of whether these rules apply to the cases under consideration at present, two situations may have to be distinguished.

1. Parallel Proceedings Before Arbitration Tribunals and State Courts

The rules on *lis pendens* in Articles 21 et seq. of the Lugano Convention are directed

---

[22] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

[23] In the case at issue the conflict was avoided because Marc Rich eventually entered an appearance in the Italian court and did not pursue the arbitration proceedings in London any longer; *see* Hascher, 'Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Conventions', Arb.Int. 13 (1997), pp. 43 et seq. *See also* Haas, 'Der Ausschluss der Schiedsgerichtsbarkeit vom Anwendungsbereich des EuGVÜ', IPRax 1992, pp. 292 et seq.

[24] *See* Jenard and his opinion on the Marc Rich-Case, Arb. Int. 7 (1991), p. 249.

exclusively at the state courts of the contracting parties. They are not binding upon arbitral tribunals. Furthermore, the courts of the contracting parties are not bound by Articles 21 et seq. of the Lugano Convention to stay their proceedings merely because proceedings involving the same cause of action and between the same parties have already been brought in an arbitration.[25] In the relationship between courts and arbitral tribunals, *lis pendens* is governed by national rules, not by the Convention. These national rules of the contracting parties provide for different solutions to the problems raised for this kind of parallel proceedings.[26]

As a consequence, parallel proceedings (and conflicting decisions) cannot be excluded under the present state of the law. This would not really change even if a provision were included in the Convention directing the courts to apply Articles 21 et seq. also in cases where the court first seized is an arbitral tribunal, as long as a mirror-image rule was not also adopted for the staying of proceedings by arbitral tribunals.

2. *Parallel Proceedings Before Courts*

The rules on *lis pendens* in the Lugano Convention are generally applicable only where the question of prior proceedings involving the same cause of action and between the same parties arises before the courts of two states.

However, the fact alone that proceedings are brought by the same parties – albeit in reversed roles of plaintiff and defendant – in state courts of different contracting parties does not suffice for the application of Articles 21 et seq. of the Lugano Convention. These provisions are relevant only if both proceedings come within the

---

[25] *See*, for example, Geimer/Schütze, *Europäisches Zivilverfahrensrecht*, München 1997, 2. A., Art. 21 N. 21; Gottwald, *Münchener Kommentar zur Zivilprozessordnung*, Band III, München 2001, Art. 21 N. 2.; Van Haersolte-van Hof (*supra* note 19), p. 34. For an opposing view, *see* Jenard (*supra* note 24), p. 249, and Berti, 'Zum Ausschluss der Schiedsgerichtsbarkeit aus dem sachlichen Anwendungsbereich des Luganer Übereinkommens', *Festschrift Oscar Vogel*, Zurich 1991, pp. 349, 356, who would have parallel arbitration proceedings fall under the scope of Articles 21 and 22 and oblige the state courts to stay their proceedings and eventually decline jurisdiction if arbitration proceedings have been brought earlier.

[26] The Federal Supreme Court of Switzerland recently ruled in a remarkable judgment of 14 May 2001 that the *lis pendens* rule in Article 9 of the Swiss Private International Law Statute is also binding on an arbitral tribunal having its seat in Switzerland. As a consequence, an arbitral tribunal having its seat in Switzerland is now obliged by Article 9 to stay the proceedings and possibly to decline jurisdiction if the same subject matter is already pending between the same parties in a foreign court. In addition, according to the rule of Article 9, the arbitrators have to determine whether it is to be expected that the foreign court will adopt a decision within reasonable time, which will be recognizable in Switzerland; *see* BGE 127 III 279 et seq. For commentary *see* Liatowitsch, 'Die Anwendung der Litispendenzregel von Artikel 9 IPRG durch schweizerische Schiedsgerichte: Ein Paradoxon', ASA Bulletin 2001, pp. 422 et seq., and Vulliemin, 'Litispendence et compétence internationale indirecte du juge étranger', ASA Bulletin 2001, pp. 439 et seq.

scope of application of the Convention.[27] This was precisely the requirement which had not been met in Marc Rich. Impianti had sought a negative declaration before the Italian courts before Marc Rich initiated arbitration proceedings in England and before the High Court had to decide on the appointment of an arbitrator on behalf of Impianti. As mentioned, the ECJ held that the proceedings in England did not come within the scope of application of the Brussels Convention (see supra, para. III/1). Consequently, the English court had not been under a duty to stay its proceedings in accordance with Article 21 of the Brussels Convention in order to wait for the Italian courts to rule on their jurisdiction, that is to say, on the validity of the arbitration clause.

Furthermore, the application of the *lis pendens* rules in Articles 21 et seq. of the Lugano Convention is limited to cases where the same parties sue on *the same cause of action*.[28] This is not the case where – as in Marc Rich – the one proceeding is for the appointment of an arbitrator and the other is for a negative declaration on the substantive claim. The only identical item in these court proceedings is the preliminary issue whether or not the parties have concluded a valid arbitration agreement. In this respect, it is irrelevant that the English court proceedings 'served' the arbitration proceedings, and hence the arbitral tribunal was called upon to determine the substantive claims to liability.[29]

V. An Arbitration Clause as a Defence Against the Recognition or Enforcement of a Foreign Judgment

1. Introduction

As demonstrated above, there is no harmonized approach in Europe regarding the effects of *lis pendens* as between courts and arbitral tribunals.

Article II(3) of the 1958 New York Convention directs courts to decline jurisdiction in favour of arbitration if the parties to the dispute have concluded an arbitration clause that is not 'null and void, inoperative or incapable of being performed'. However, this clause does not state according to which system of law the validity of the arbitration clause should be determined.[30] Therefore, each court will apply its own conflicts rules (*lex fori*) in order to determine the law applicable to the

---

[27] *See* Geimer/Schütze (*supra* note 25), Article 21 N. 14.

[28] *See*, for example, Kropholler, *Europäisches Zivilprozessrecht*, 7. A., Heidelberg 2001, Article 27 N. 6 et seq.

[29] *See* Schlosser *supra* note 12), p. 239, who would always apply Article 22 (= Article 28 of the Regulation).

[30] *See* only Van Houtte, 'May Court Judgments that Disregard Arbitration Clauses and Awards be Enforced under the Brussels and Lugano Conventions?', Arb. Int. 13 (1997), pp. 86 et seq.

arbitration clause. And since the contracting states to the 1958 New York Convention have different rules on the substantive validity of an arbitration clause,[31] the question of whether or not such a clause will be upheld may depend on the court called upon to determine that question.

In addition, an arbitral tribunal will have to examine its jurisdiction according to the *lex arbitri*.

Consequently, the decision as regards the validity of an arbitration clause may be different not only from court to court but also from an arbitral tribunal sitting in one country to one sitting in another country. Again, there is a danger that the same subject matter between the same parties could become the object of parallel litigation in a court and an arbitral tribunal and could be decided in different and inconsistent ways.

The discussion now turns to the question whether – and if so, how – the Lugano Convention deals with these kinds of conflicts at the stage of the recognition and enforcement of arbitral awards and court judgments, respectively.

2. *Enforcement of Arbitral Awards*

The recognition and enforcement of arbitral awards is subject to the 1958 New York Convention, which has been ratified by all contracting parties to the Lugano Convention, with the exception of Iceland. The courts of the states which are parties to the 1958 New York Convention will therefore determine the recognition and enforcement of an arbitral award on the basis of 1958 New York Convention – and possibly other (bilateral) agreements. The Lugano Convention is irrelevant when considering the recognition and enforcement of arbitral awards.[32]

3. *Recognition and Enforcement of Judgments in Spite of the Existence of an Arbitration Clause?*

In practice, the most important cases are those where a court in a Lugano Convention country has made a judgment on the merits, thereby, either overlooking a valid arbitration agreement or wrongly holding that the arbitration agreement is invalid. The question under the Lugano Convention is whether a judgment must be recognized and enforced in cases in which the parties were bound by a clause providing for arbitration.

In court practice and academic writings, different opinions have been voiced as to the proper resolution of this problem.[33] Essentially, three different views have evolved:

---

[31] This concerns in particular the issue of arbitrability.

[32] This is not disputed and accepted even by those who support a narrow interpretation of the term 'arbitration' in Article 1(2) (4) of the Brussels and Lugano Conventions, *see* Schlosser, EuGVÜ, München 1996, Art. 1 N. 24.

[33] For an overview see Besson, 'Le sort et les effets au sein de l'Espace juridique européen d'un jugement écartant une exception d'arbitrage et statuant sur le fond', *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Lausanne 1999, pp. 332 et seq.

(i) First, it has been claimed that a state court judgment which has overlooked or misinterpreted an arbitration clause does not come within the scope of application of the Lugano Convention. According to this view, the obligation to recognize and enforce foreign judgments contained in the Convention is not relevant. The question of recognition would, therefore, have to be answered according to the national law of the state where enforcement is sought.[34]

This position, which is supported in particular by French academics,[35] would seem to contradict the very concept of the Lugano Convention. It should be recalled that judgments which provide a final decision on a subject matter falling into the scope of application of the Convention must be recognized according to the rules in the Convention. The possibility that the state court issuing the judgment may have wrongly decided on the preliminary issue whether or not the parties have concluded a valid arbitration agreement, cannot have any relevance.[36] The latter conclusion is supported by the judgment in the Marc Rich Case, in which the ECJ expressly held that a preliminary issue, 'whatever that issue may be', cannot determine whether or not the application of the Brussels Convention is justified.[37]

(ii) According to the most widely accepted view, all judgments made within the

---

[34] *See* Audit, 'Arbitration and the Brussels Convention', Arb. Int. 9 (1993), p. 22 who requires, however, that the defendant invoked the existence of the arbitration agreement and 'that the allegation of an arbitration agreement before the foreign court which denied its existence or validity was a *bona fide* argument (...)'; Gaudement-Tallon, *Les Conventions de Bruxelles et de Lugano*, 2nd ed., Paris 1996, pp. 30 and Hascher (*supra* note 23), pp. 60 et seq., who comes to the same result by claiming that according to Article 57(1) of the Brussels and Lugano Conventions, the 1958 New York Convention has priority over them; *see also infra* note 38. However, according to the opposite – and correct – view, agreements concerning the area of arbitration do not fall under Article 57; *see*, for example, Schmidt (*supra* note 12), at 207.

[35] *See* ibid. These views are determined by Article 1458 of the French *Nouvelle Code de Procédure Civile*. According to this provision, a State court must decline jurisdiction, unless an arbitration clause is '*manifestement nulle*'. Furthermore, a State court must decline jurisdiction if an arbitration tribunal is already dealing with the case.

[36] *See also* Oberlandesgericht Celle, judgment of 8 December 1977, RIW 1979, p. 131; and OLG Hamburg, judgment of 5 August 1993, IPRax 1995, p. 391. *See also* the French Cour de cassation, judgment of 14 November 2000, Rev. arb. 2001, p. 507 (with commentary by Idot), in which case the Cour de cassation upheld the enforcement of a German court decision on the basis of the Brussels Convention despite the fact that the parties agreed upon an arbitration clause. However, it appears that that the Cour de Cassation was of the opinion that the French defendant should have challenged the jurisdiction before the German Court. The defendant's failure to challenge the jurisdiction of the German court was interpreted as an appearance in the sense of Article 18 Brussels Convention (= Article 24 of the Regulation).

[37] 1991 ECR I–3855, (*supra* note 10), para. 26; *see also* Poudret (*supra* note 3), p. 768; and Van Houtte (*supra* note 30), pp. 87 et seq.

scope of application of the Convention must be recognized and enforced according to the rules in the Convention. Nevertheless, different views have been held as to the proper treatment of a defence that there was an arbitration agreement binding on the parties to the proceedings, when this defence is raised in the recognition proceedings.

According to some scholars, the disregard of a valid arbitration clause by the court which decided on the merits amounts to a breach of public policy within the meaning of Article 27(1) of the Lugano Convention (Art. 34(1) of the Regulation). The breach of public policy lies in the breach of the international obligation contained in Article II(3) of the 1958 New York Convention to enforce the arbitration agreement and stay the proceedings and ultimately to decline jurisdiction in favour of arbitration.[38]

This argument is not persuasive, however. First, it must be remembered that Article II(3) of the 1958 New York Convention does not contain provisions on jurisdiction with harmonized criteria for the validity of an arbitration clause. As a consequence, it would seem that a breach of public policy can only be found to have taken place in extreme cases. Secondly, and it is argued decisively, Article 28(4) of the Lugano Convention (see Art. 35(3) of the Regulation) provides that the jurisdiction of the court called upon to decide on the merits can be reviewed only in the exceptional cases listed in Article 28(1) and (2) of the same Convention. A court's (willful) oversight of an arbitration clause is not mentioned in that list. The provision of Article 28 must not be circumvented by reliance on the public policy exception, particularly bearing in mind the fact that Article 28(4) expressly provides that – with the exception of the cases mentioned in paragraphs (1) and (2) of the same article, 'the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction.'

(iii) As a result, a judgment made by a court of a contracting party has to be recognized and enforced even if that court has overlooked or disregarded a valid arbitration agreement.[39] Reliance on the public policy exception will

---

[38] Schlosser (*supra* note 12), p. 234. *See also* Van Houtte (*supra* note 30), p. 88; and Schmidt, (*supra* note 12), pp. 218 et seq. Compare these views with those of Beraudo, 'The Arbitration Exception of the Brussels and Lugano-Conventions: Jurisdiction, Recognition and Enforcement of Judgments', Journal of Int. Arb., 2001, p. 26, who suggests to refuse recognition of such a judgment on the basis of Article 57 of the Lugano Convention in combination with Art. II(3) of the New York Convention of 1958. This view is also supported by Hascher (*supra* note 23), at pp. 60 et seq., who points out that the list of international agreements in Art. 57(1) of the Brussels and Lugano Conventions – while it does not mention the 1958 Arbitration Convention – is not limitative.

[39] For the same result, *see also* High Court in the *The Heidberg* (1994) 2 Lloyd's Rep., p. 287 (Q.B.). The court held that the violation of an arbitration agreement is not a valid defence to recognition and enforcement under the Brussels Convention.

> in principle be of no avail to the party resisting recognition or enforcement.[40]

While arbitral awards are recognized according to the provisions in the 1958 New York Convention, recognition of judgments of state courts of contracting parties is subject to the provisions of the Lugano Convention. The possibility that arbitration should have taken place instead of state court proceedings cannot change this result.

Obviously, this can lead to undesirable conflicts between judgments and arbitral awards. This sort of conflict is particularly serious if both decisions are presented for recognition and enforcement in the same country.

Occasionally, it has been suggested that this sort of collision can be resolved by application of Article 27(3)[41] and/or Article 27(5)[42] of the Convention (see Art. 34(3) and (4) of the Regulation). These provisions deal specifically with cases where two recognizable but incompatible judgments are submitted for recognition in the same state. Article 27(3) provides for a general priority of judgments made by the courts of the forum over foreign judgments. Article 27(5) deals with conflicts between two foreign judgments and establishes a priority of the judgment first submitted.

It is evident that certain conflicts between inconsistent decisions by an arbitral tribunal and a court could be resolved through the application of Article 27(3) and (5). Nevertheless, the general application of these provisions in this kind of cases must be rejected.[43] It is generally accepted that the term 'judgment' in Article 25 of the Lugano Convention covers only decisions by state courts.[44] After all, it is the very purpose of that Convention to deal with the recognition and enforcement of state court decisions and only those. By contrast, the recognition of arbitral awards is specifically excluded from the scope of application of the Convention by way of its Article 1(2) (4).

4. Interim Conclusions

On the one hand, the Lugano Convention does not deal with the recognition of arbitral awards; on the other hand, it provides for the recognition of judgments even if these were adopted without regard to valid arbitration clauses. In combination

---

[40] Federal Supreme Court of Switzerland, judgment of 9 February 2001, BGE 127 III 188; OLG Celle, judgment of 8 December 1977, RIW 1979, p. 131; OLG Hamburg, judgment of 5 August 1993, IPRax 1995, p. 391 (and commentary by Mansel on p. 362); *see also* Kropholler (*supra* note 28), Art. 1, para. 46; Geimer/Schütze (*supra* note 25), Art. 1 N. 103, Art. 28 N. 33 et seq.; Gottwald (*supra* note 25), Art. 1, para. 26.

[41] Jenard, 'L'arbitrage et les Conventions C.E.E. en matière de Droit International Privé', *Festschrift Arthur Bülow* 1981, pp. 81 et seq.; Haas (*supra* note 23), p. 294 et seq.; Schmidt, (*supra* note 12), p. 222, who uses a teleological reduction to get to this result; Berti (*supra* note 25) pp. 348 et seq., who suggests applying Art. 27 (3) by analogy.

[42] Van Houtte (*supra* note 30), pp. 90 et seq.; Kropholler (*supra* note 28), Art. 34 N. 59.

[43] Gottwald (*supra* note 25), Art. 27 N. 31.

[44] *See*, for example, Jametti Greiner, *Der Begriff der Entscheidung im schweizerischen internationalen Zivilverfahrensrecht*, Basel 1998, pp. 290 et seq.; Kropholler (*supra* note 28), Art. 32 N. 8.

with the obligation to recognize arbitral awards as contained in the 1958 New York Convention, this creates the danger that the contracting parties must recognize and enforce parallel and conflicting decisions.

These undesirable conflicts cannot be resolved by a broad application of the rules on recognition and enforcement contained in Title III of the Lugano Convention. The examination of the question whether the court which adjudicated on the merits of the dispute was entitled to assume its jurisdiction in spite of an arbitration clause between the parties can only be sensible once common rules for the validity of arbitration agreements have been adopted. The same criteria would then also have to be applied under the 1958 New York Convention.

VI. Summary and Perspective

It is a precondition for a functioning internal market in Europe that claims arising under the multitudes of legal and commercial relationships can be confirmed and enforced through the courts. If this is not generally ensured, economic life is impaired.

The European States recognize that arbitration is a sensible and valid alternative method of dispute settlement.

Therefore, the same European States would seem obliged to ensure that in the European area of justice, conflicts between private and State courts are avoided as far as possible.

As was shown in this paper, the Lugano Convention cannot make a significant contribution to this goal of conflict avoidance. As long as arbitration is generally excluded from the scope of application of the Convention (and the Regulation, respectively), there will be no satisfactory resolution of conflicts between private and State courts, contrary to the intentions of the original drafters. This problem cannot be overcome by a broader interpretation of the Convention either.

Ultimately, the most effective solution to the problem of conflicts between arbitral tribunals and State courts would be a new and comprehensive convention, which would not only deal with jurisdiction, recognition and enforcement in the context of judgments of State courts but which would explicitly include arbitration. Such a convention should not limit the autonomy of arbitral tribunals. Rather, it should develop common criteria for questions such as:

- The validity of arbitration agreements (in particular the issue of arbitrability);
- How situations can be resolved if parallel proceedings are brought before arbitral tribunals and state courts; and
- How conflicts can be resolved if incompatible decisions are adopted by private tribunals and by State courts in spite of the first-mentioned rules.

To be realistic, however, at present it would seem to be a formidable challenge to achieve such a harmonization at the European level. A global attempt would seem completely illusory.