

IMPACT OF THE COMMISSION'S PROPOSAL
TO REVISE THE BRUSSELS I REGULATION
ON ARBITRATION PROCEEDINGS ADMINISTERED BY
THE CHAMBER OF ARBITRATION OF MILAN

STEFANO AZZALI*
MICHELA DE SANTIS**

TABLE OF CONTENTS: 1. Problems of the Current System. – 2. Possible Solutions. – 3. The Commission's Proposal. – 4. The Effects of the Proposal. – 5. Closing Remarks.

1. The recent Commission's Proposal (herein simply the Proposal)¹ to revise the Brussels I Regulation, (herein simply the Regulation) on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, the Proposal that follows the Report on the application of the Regulation² and the Green

* Secretary General, Chamber of Arbitration of Milan. The opinions here expressed are those of the Authors, and they do not reflect the official position of the Milan Chamber of Arbitration, nor are binding upon it.

** JD, University of Milan.

¹ COM(2010) 748 final of 14 December 2010. For a first assessment of the Proposal, see ILLMER M., "Brussels I and Arbitration Revisited. The European Commission's Proposal COM(2010) 748 final", *RabelsZ* 2011, 645 ff; RADICATI DI BROZOLO L.G., "Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonization?", *JPIL* 2011, 423 ff. The Commission, in formulating the Proposal, took into account results of various studies and of consultations among interested parties, and in particular of a 2007 study on the practical application of the Regulation known as the *Heidelberg Report*. On the HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* from the Italian perspective, see CONSOLO C., "Arbitration and EC Law. An Italian Reaction in the Heidelberg Colloquium", *Int. Arb. L.R.* 2009, 49 ff.

² Report on the application of Council Regulation (EC) No 44/2001. The Report has shown that the interface between the Regulation and arbitration raises difficulties. In particular, the following critical issues were raised: the phenomenon of parallel court and arbitration proceedings, the incompatibility with the Regulation of procedural devices under the national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit

Paper on the review of the Regulation,³ presents some innovative aspects regarding the interface between the Regulation and arbitration.

The Chamber of Arbitration of Milan, an arbitral institution actively operating at domestic and international level, has analysed the practical impact of the Proposal on arbitration and on its arbitration proceedings.

At first, it should be said that the Proposal has not had a great impact on institutional arbitration. The impact on arbitration proceedings administered by the Milan Chamber relates to the rules determining the seat of arbitration and the moment when the arbitral tribunal is considered seized (see § 3). The Proposal does not have any particular effects on the mechanisms of administration of the procedure. As far as other issues are concerned, the Milan Chamber can express its own comments as an interested party only.

In 2009, the Milan Chamber of Arbitration submitted to the European Commission a Position Paper,⁴ taking a position on the proposed amendments of the Green Paper. The Position Paper

injunctions), the lack of a uniform allocation of jurisdiction in proceedings supportive of arbitration proceedings, the doubts about the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award and, finally, the issues related to the recognition and enforcement of arbitral awards, governed by the New York Convention, considered less swift and efficient than the recognition and enforcement of judgments.

³ Green Paper on the review of Council Regulation (EC) No 44/2001. The Green Paper, which accompanies the Report on the application of Council Regulation (EC) No 44/2001, with respect to the points raised in the Report, raises a series of questions to the interested parties launching a broad consultation on possible ways to improve the operation of the Regulation. In the matter of the interface between the Regulation and arbitration, the Green Paper has proposed a series of amendments, including the well-known partial deletion of the exclusion of arbitration from the scope of the Regulation. The Green Paper also asked the interested parties in Question 7 which action they consider to be appropriate at Community level to strengthen the effectiveness of arbitration agreements, to ensure a good coordination between judicial and arbitration proceedings, and to enhance the effectiveness of arbitration awards.

⁴ The Position Paper of the Milan Chamber of Arbitration has been adopted, after a consultation, by its Arbitral Council on 23 June 2009, and is available on the institution's website www.camera-arbitrale.it. Other institutions and experts submitted their comments to the European Commission. Those that deserve to be mentioned are the reports of the Association for International Arbitration, the French Committee on Arbitration of the ICC, and the Arbitration Committee of the International Bar Association, all available at http://ec.europa.eu/justice_home/news/consulting_public/news/consulting_public/news_consulting_002_en.htm.

also remarks on the abolition of the current exclusion of arbitration from the scope of the Regulation, the so-called “arbitration exclusion”, of Article 1(2)(d) of the Regulation, which states that the Regulation shall not apply to arbitration.

The current position of the Milan center, in comparison with the 2009 position, could be more flexible. In 2009, an EU intervention on arbitration did not seem necessary. Today, in light of the international debate on arbitration and the case law regarding intra-EU conflicts on issues related to arbitration, the possibility of the European Union opening to arbitration seems more acceptable. As a further positive aspect, the current Proposal, in comparison with the proposal of the Green Paper on which the Chamber made its comments, is not affected by the initial dogmatism and does not try to introduce a discipline governing any possible conflict between States’ courts and arbitration, proposing to the contrary a less pervasive solution.⁵

It is true that there are other conventions regulating arbitration, starting from the 1958 New York Convention, which was signed by all Member States. Also, it is true that a further regulation, in the wake of the regulatory trend of the recent years, could create more conflicts.⁶ But it is also true that recently some

⁵ The initial proposal, contained in the Green Paper, would entail substantial changes in the national law of arbitration of the different Member States and, for this reason, has been criticized. Among the various contributions, see PINSOLLE P., “The Proposed Reform of Regulation 44/2001: A Poison Pill for Arbitration in the European Union”, *Int. Arb. L.R.* 2009, 62 ff; RADICATI DI BROZOLO L.G., “Choice of Court and Arbitration Agreements and the Review of the Brussels I Regulation”, *IPRax* 2010, 124 ff; DRAETTA U./SANTINI A., “Arbitration Exception and Brussels I Regulation: no need for change”, *DCI* 2009, 547 ff. Among the most problematic provisions, the denial of *Kompetenz-Kompetenz* rule, in providing that on the validity of the arbitration agreement should be decided by the judges (and not the arbitrators) of the Member State of the seat of arbitration (see fn 23).

⁶ Such as the result of the *Heidelberg Report* and noted by the international doctrine. In this regard, see MOURRE A., “Should arbitration stay excluded from the scope of application of Regulation 44/2001?”, *ASA Bull.* 2006, 800 ff; VAN HAERSOLTE-VAN HOF J.J., “The Arbitration Exception in the Brussels Convention: Further Comment”, *J. Int. Arb.* 2001, 27 ff; VAN HOUTTE H., “Why Not Include in the Brussels Jurisdiction Regulation?”, *Arb. Int.* 2005, 509 ff; BERAUDO J.-P., “The Arbitration Exception of the Brussels and Lugano Convention: Jurisdiction, Recognition and Enforcement of Judgments”, *J. Int. Arb.* 2001, 13 ff, for which the drafters of the Convention did not want to add new instruments to the already-expanding *corpus* of international treaties regulating arbitration and the recognition of arbitral awards.

doubts have arisen regarding the proper functioning of the New York Convention in the European Union.⁷

At the European level, there is no uniform application of the New York Convention, because each Member State interprets its rules differently. On one hand, this has created a strong competition among the different legal systems, which has fostered the progress of arbitration.⁸ On the other hand, such a situation gives rise to some anomalies in the functioning of the system, such as parallel proceedings, with conflicting decisions, which undermine the certainty and the stability of commercial relations in the EU internal market.⁹

Moreover, there are no jurisdictional criteria covering the courts' proceedings, ancillary proceedings in arbitration or uniform rules on the application of the *Kompetenz-Kompetenz* principle. For example, it may happen that, in order to delay and elude the action, a party bound by an arbitration agreement could bring the dispute before the ordinary courts. And that same party, in objection to the exception raised by the other party, opposes the validity or efficacy of the arbitration agreement. Consequently, the judge declares the invalidity of the arbitration agreement and decides the proceedings on the merits, a decision that is able to circulate in the European Union pursuant to the Regulation. At the same time, arbitral proceedings could take place in another Member State at the seat of arbitration, leading to an arbitral award that is in contrast with the judgment, but subject to *res*

⁷ However, even recently, part of the doctrine continues to argue that no relevant problems arise to justify a review. Among others, DRAETTA U./SANTINI A. (fn 5), 552 f., for which “the present system has worked well for arbitration so far ... [t]he practitioners' view is that the few cases where problems have occurred within the EU during the last 40 years with regard to the recognition and enforcement of judicial decisions relating to arbitration do not justify far-reaching amendments of the Regulation”, and they make explicit reference to the “IBA Submission to the European Regulation (EC) No 44/2001” (see fn 4) in supporting their statement. The Authors argue that the Commission, when drafting its proposal on the review of the Regulation, should not delete the arbitration exception. It should also be noted that the statement of the Authors is placed at the end of a critical analysis of the proposal contained in Green Paper (and not in the one contained in the most recent and softened Proposal).

⁸ RADICATI DI BROZOLO L.G. (fn 1), at 425.

⁹ Also, the HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report* has admitted the proper functioning of the 1958 New York Convention, on the basis of the opinions (see fn 15) which led to the drafting the report, but at the same time has highlighted a number of problems related to the arbitration exception of the Regulation. This sort of contradiction is also contained in the Green Paper, see DRAETTA U./SANTINI A. (fn 5), at 551.

judicata. This example demonstrates the seriousness of the phenomenon, not only with respect to arbitration – from a European perspective, and not only the arbitration community – but also with respect to the certainty of law and contractual relations intra-Union.

This situation, at least in the European context, seems to be imputable, together with the problems related to the application of the New York Convention and the domestic laws, to the exclusion of arbitration from the scope of the Regulation. The exclusion concerns not only the recognition and enforcement of arbitral awards, covered by the New York Convention and the national laws, but also – and especially – the proceedings in support to arbitration. Proceedings in support of arbitration include provisional proceedings to determine the arbitration agreement's effects until the constitution of the arbitral tribunal as well as proceedings on the validity of arbitration agreements. These proceedings, in absence of a uniform *lis pendens* rule, are not managed, nor are manageable, at the European level.

In particular, the problem arises when the proceedings on the validity of the arbitration agreement, pursuant to Article II(3) of the New York Convention, are not recognized in a decision by a judge of another Member State, because the arbitration proceedings do not fall within the scope of the Regulation. Thus, the arbitration exception is applicable, not Article 32, which defines the judgment that the Member States shall recognize.

However, up to now, and despite all these anomalies, there were no significant problems in practice. Or, rather, the Court of Justice has always been able to solve these problems without difficulty by providing, through well-known cases, a series of interpretative criteria that have filled the gaps of the system, without the need of legislative interventions.¹⁰ More recently, however, conflicts between Member States have become frequent and the Court's decisions are in some ways unacceptable for supporters of arbitration. Thus, the idea of a legislative intervention

¹⁰ See ECJ, 25 July 1991, Case C-190/89, *March Rich & Co. AG v Società Italiana Impianti PA* [1991] ECR 3855. See the commentaries by, respectively, MAYER P., *Rev. crit. dr. int. pr.* 1993, 316 ff; and HUET A., *Clunet* 1992, 488 ff; see also GAIA G., "Arbitrato e procedimento giudiziario in Stati diversi dopo la sentenza della Corte di giustizia nella causa March Rich c. Italimpianti", *Riv. arb.* 1995, 417 ff. See also ECJ, 17 November 1998, Case C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR 7091. For a comment, see PETTINATO C., "Provvedimenti provvisori e arbitrato nella Convenzione di Bruxelles del 1968", *Riv. arb.* 1999, 313 ff.

by the European Union to solve the difficult relationship between arbitration and the Regulation has been raised.

The difficulties have become more frequent after the decision of the Court of Justice in the famous *West Tankers* case.¹¹ Taking no notice of the anti-suit injunction remedy, typical of common law systems, the Court in this case has established that the use of such remedy is not consistent with the Brussels I regime, under which the judges of a Member State are forbidden to control how the judges of other Member States affirm or deny their own jurisdiction. This principle also applies not just to actions before a national court, but to arbitration, which is a matter excluded from the Brussels I regime. In fact, in the *West Tankers* case, although the anti-suit injunctions remedy was intended to protect an arbitration agreement and not a lawsuit pending before a national court, as in the *Gasser* and *Turner* cases that the Court mentions,¹² the Court of Justice, ignoring the arbitration exception, applied the Regulation and its principles, precluding the use of anti-suit injunctions.¹³

¹¹ The proceedings that led the Court of Justice to the decision mentioned here, commenced on 10 December, 2004 by West Tankers against Italian insurance companies Generali and Allianz, sued after the compensation of the insured Erg. The High Court was asked to declare that the parties were bound by the arbitration clause contained in the lease agreement originally signed between West Tankers and the insured and to grant an anti-suit injunction to protect the arbitration proceedings. See *West Tankers Inc. v Riunione Adriatica di Sicurtà S.p.A. and others* [2005] EWHC (Comm) 454; and *West Tankers Inc. v Riunione Adriatica di Sicurtà S.p.A. and others* [2007] UKHL 4. On a preliminary reference by the House of Lords the issue was decided by the European Court of Justice, ECJ, 10 February 2009, Case C-185/07, *Allianz S.p.A. (formerly Riunione Adriatica di Sicurtà S.p.A.), Generali Assicurazioni Generali S.p.A., v West Tankers Inc.* [2009] ECR 663. Among the first commentaries, see DAVIES K., *Where to now, the Italian Torpedo*, available on *Kluwerarbitrationblog*, 16 May 2011; WINKLER M.M., “West Tankers: la Corte di Giustizia conferma l’inammissibilità delle anti-suit injunctions anche in ambito escluso dall’applicazione del Regolamento Bruxelles I”, *DCI* 2008, 375 ff.

¹² ECJ, 9 December 2003, Case C-116/02, *Erich Gasser GmbH v MISAT S.r.l.* [2003] ECR 14693. For comments, see ROMANO G.P., “Le principe de sécurité juridique à l’épreuve des arrêts Gasser et Owusu”, *Cahiers dr. eur.* 2008, 175 ff; FENTIMAN R., “Case C-116/02, *Erich Gasser GmbH v MISAT S.r.l.*”, *CMLR* 2005, 241 ff.; and ECJ, 27 April 2004, Case C-159/02, *Turner v Grovit* [2004] ECR 3565. See the critical comments of KRUGER T., “The Anti-Suit Injunction in the European Judicial Space: *Turner v. Grovit*”, *ICLQ* 2004, 1030 ff.

¹³ WINKLER M.M. (fn 11), at 739.

In light of these decisions and others,¹⁴ it is clear that the current European system – consisting of the New York Convention, the exception of the Brussels I Regulation, and the national laws of the Member States – could, and should, be improved. Some countries, although supporting the New York Convention,¹⁵ start to raise some criticisms.

What is not desirable is a modification of the functioning of arbitration by pervasive rules imposed by a European legislator, like the ones proposed in the Green Paper, because arbitration works properly. What is desirable is the introduction of a few rules of coordination able to deal with the difficulties that arise in practice and due to national differences. The latest Proposal seems to go in this direction, presenting a few rules on arbitration that, taken together, produce less consequences compared to previous proposals.¹⁶ But another question arises: does it make sense to harmonize, in a context such as the European Union, an instrument that has – and must have – an international character? If the New York Convention is able to ensure harmony at the international level, does it make sense to jeopardize this harmony by adding a new regulation and regionalizing arbitration?¹⁷

¹⁴ For a roundup of the best known recent cases that demonstrate a failure of the arbitration system intra-Union, see RADICATI DI BROZOLO L. G. (fn 1), at 427 ff.

¹⁵ The HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report*, following a consultation with Member States and interested parties, found that most of the interviewed stakeholders did not see any need for an extension since the New York Convention was working very well. In this sense the opinions of Austria, Belgium, Cyprus, England, Finland, France, Germany, Hungary, Ireland, Malta, Netherlands, Scotland, and Spain. With regard to the positions of national reporters about the relationship between Regulation and New York Convention, we can find expressions like “proper functioning” (England), “satisfied with the New York Convention [...] deemed to work properly” (France), “the New York Convention provide an efficient system” (Italy), “the New York Convention is generally considered to be adequate” (Netherlands). However, different levels of satisfaction emerged. Some, although satisfied with the system, pointed out the presence of anomalies. In particular, the English report “expressly stresses the advantage of the English practice to enforce the integrity of an arbitration agreement by an anti-suit injunction. However, the recognition of these injunctions in other Member States is far from clear, as the Regulation does not apply”. The English fears have been confirmed in *West Tankers* case.

¹⁶ RADICATI DI BROZOLO L.G. (fn 1), at 449.

¹⁷ Among the many answers in negative, see DRAETTA U./SANTINI A. (fn 5), at 553, for which international arbitration is a product of international trade law ... is global in nature and yet subject to the various national laws, [whereas] EU law is regional and tends to achieve uniformity in national laws. Then, the

2. The above-mentioned problems are, on a theoretical level, subject to different solutions, which have been widely discussed.¹⁸ For instance, is it possible to include within the scope of the Regulation proceedings to support arbitration, such as proceedings on the validity and effects of the arbitration agreement, provisional, and protective measures? Is it possible to protect arbitration agreements, not by the English remedy of the anti-suit injunction, but by a rule that establishes the so-called “negative effect” of *Kompetenz-Kompetenz*? In other words, is it possible to create a rule that will stay the proceedings before the national court until the arbitral tribunal reaches a decision on its own jurisdiction?

It is not possible to assimilate and to submit arbitral awards and judgments of national courts to the same rules. And it is not possible to proceed to the pure and simple abolition of the arbitration exception. In principle, arbitration, for its peculiarities, must be excluded from the scope of the Regulation, which governs the recognition and enforcement of any decision rendered by a court or tribunal of a Member State (Article 32 of the Regulation).

Also the opposite solution of an expansion of the exclusion,¹⁹ thus allowing the use of anti-suit injunctions to protect arbitration, cannot meet consensus (except for the English community of arbitration) because it is contrary to the principle of “mutual trust” between the courts of the Member States, which is one of the key principles of the European Union, as confirmed by the Court of Justice in the *West Tankers* case. In addition, anti-suit injunctions are remedies only available before the English courts and assuming an extension of this remedy to other countries, through similar instruments or counter-anti-suit injunctions, it will not be a solution to the problems but rather give rise to further conflicts.²⁰

A third solution, which is a sort of compromise compared to the two above mentioned, adopted by the Commission in the

Authors associate the idea of a European *arbitration* law to the idea essentially failed of a European *contract* law.

¹⁸ In addition to HESS B./PFEIFFER T./SCHLOSSER P., *Heidelberg Report*, see the Commission’s “Impact assessment of the proposal for the review of Regulation 44/2001”, SEC(2010), at 1547.

¹⁹ It seems to be the solution proposed by the European Parliament which has made a series of amendments to the Commission Proposal. See Committee on Legal Affairs, Rapporteur T. ZWIEFKA, Draft Report.

²⁰ RADICATI DI BROZOLO L.G. (fn 1), at 432.

Proposal, is the partial abolition of the arbitration exception. This solution is accomplished without the imposition of a significant regulation on arbitration at European level, but rather through few rules only. The solution would create a discipline that simply establishes some key principles – such as *Kompetenz-Kompetenz* – essential for the proper functioning of arbitration, and recognizes a certain margin of freedom to the Member States.

Another solution is found in developing an overall regulation on arbitration, by means of rules for the harmonization of arbitration national laws. However, it seems difficult, if not impossible, to implement this solution because arbitration laws (and attitude) of the individual Member States differ from each other too significantly.²¹ The *favor arbitrati* of certain countries, and the hostility of others, continually emerge in the practice of international arbitration and make uniformity very difficult to be reached.

The last option would be to maintain the *status quo* since the problems of the current system are not so serious to justify a legislative intervention. However, even if there are no *serious* situations but *critical* issues of the system, today a European action over the Member States appears almost inevitable.

3. The Commission's Proposal on arbitration to revise the Regulation seems to be a compromise solution. As a general rule, the exclusion of arbitration from the scope of the Regulation is confirmed by the Proposal. It is also clarified that the Regulation "does not apply to the form, the existence, validity and effects of arbitration agreements, the powers of the arbitrators, the procedure before arbitral tribunals, and the validity, annulment, and recognition and enforcement of arbitral awards" (Recital 11). The Proposal envisages the introduction of some special rules aimed at avoid[ing] parallel proceedings and abusive litigation tactics, when "the agreed upon or designated seat of an arbitration is in a Member State" (Recital 20). And the same Recital clarifies that seat of arbitration means the seat selected by the parties or designated by an arbitral tribunal, arbitral institution or any other authority directly or indirectly chosen by the parties. These special rules are substantiated in Article 29(4), which lays down a specific *lis pendens* rule for arbitration: "[W]here the agreed or designated seat of an arbitration is in a Member State,

²¹ RADICATI DI BROZOLO L.G. (fn 1), at 434.

the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement”.

In the two preceding paragraphs, it is clarified that the national court whose jurisdiction is contested may decline jurisdiction immediately, if so prescribed by its national law.²² And the court may decline jurisdiction if and when the existence, validity or effects of the arbitration agreement is established by the court of the seat or by the arbitral tribunal. It is also clarified that this rule does not apply to disputes arising from consumer contracts, insurance contracts, and employment relationships.

As instrumental rules for the proper workability of this provision, the Proposal has introduced two additional rules on arbitration: one to define the moment when the arbitral tribunal is considered seised (Article 33(3)), and the other to establish the ways to determine the seat of arbitration (Recital 20). With regard to the first of these two rules, it follows the same purpose as Article 33(1) of the Proposal for court proceedings. However, Article 33(3) indicates the appointment of the arbitrator, when a party has nominated an arbitrator, as the decisive moment. This seems to refer, if placed in the Italian context, to the moment in which the party promotes the proceedings, filing the request, and appointing the arbitrator and not to the moment of the party’s acceptance. Or, more specifically, to the moment in which the defendant has notice of it. We should also specify that since the request for arbitration and the appointment could be filed in two different moments, the decisive moment is the *receipt* of such appointment. In the case that an appointing authority exists, the decisive moment is the filing of the appointment request with the Secretariat of the institution, the office of the authority, or the filing of the recourse with the President of the court.

As far as the criteria to determine the seat of the arbitration are concerned, Recital 20 states that it should be the one agreed by the parties. Or, in case of no indication by the parties, the one

²² This is the case in France. See Article 1448 of the French Code of Civil Procedure introduced by the latest reform; reform that has confirmed and translated into law the negative effect of *Kompetenz-Kompetenz* as recognized by case law.

designated by the arbitral tribunal, the arbitral institution or the authority that the parties, directly or not, have chosen.

In this regard, it may be useful to compare this solution with the previous one contained in the Green Paper. The solution contained in the Green Paper has been criticized by the Milan Chamber of Arbitration for recognizing the exclusive jurisdiction to the judges of the Member States of the seat of arbitration for court proceedings in support of arbitration. The Green Paper further proposed, in the case of no indication of the arbitration seat by the parties or by the arbitrators, to refer to “the courts of the Member State, which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement”.²³ The current Proposal takes a different and more acceptable direction, respecting the parties’ freedom and their choice for an institutional arbitration. Generally speaking, the Proposal is more consistent with the international standard of commercial arbitration.²⁴

The Milan Chamber of Arbitration welcomes the possibility for the arbitral institution to fix the seat of arbitration, as contained in Recital 20. The Chamber’s rules contain a provision,

²³ The notion of the seat of arbitration contained in the Green Paper does not include the possibility of designating the seat of arbitration by an arbitral institution or by reference to specific rules or, in case of no indication by the parties and the arbitral tribunal, by recourse to the court. Moreover, the Green Paper identifies such on the basis of the uniform criteria imposed by the Regulation for the identification of the competent court in the absence of an arbitration agreement (“the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement”). This would have favored the so-called “forum shopping” by offering different options to the claimant: the court of the place of domicile of the defendant (Article 2) and the court of the place where the obligation is to be performed (Article 5(1)). This would offer one of the parties, on its own initiative and without the consent of the other party, the possibility to place the seat of arbitration in a State rather than in another, without considering that the seat, in arbitration, should not be selected on the basis of unilateral, opportunistic evaluations. Also the proposed exclusive jurisdiction for ancillary proceedings seems inappropriate, being extended to provisional and evidentiary measures in respect of which the parties should be free to resort, as established in Article 31 of the Regulation (and, by the Court of Justice, in the *Van Uden* case), to any judge where the provisional measures are to be enforced or where the evidence is located. In this sense, see the reports of the Milan Chamber of Arbitration and of the International Bar Association. See fn 4.

²⁴ To determine the seat, the Proposal takes into account parties’ will (as expressed in the arbitration agreement), then the designation of the arbitrators, of the arbitral institution or of another authority chosen, directly or not, by the parties.

Article 4, for the determination of the seat that may support the new mechanism.²⁵ The definition of seat, provided by Recital 20, applies either to *ad hoc* arbitration or to institutional arbitration. Thus, parties' freedom in choosing the seat of arbitration by means of an arbitral institution, or referring to rules, is granted.

It is important to underline that the indication of the seat of arbitration, at least in the arbitration clauses examined by the Milan Chamber of Arbitration in its practice, is not very frequent. This is especially so because parties do not pay attention to this aspect, often taking into account the seat only as the location where the hearings will materially take place. Thus, the intervention of the institution and its rules become crucial for the identification of this frequently missing aspect.

Besides Article 29(4) and the related provisions, the Proposal does not include further arbitration provisions. Therefore, the current Proposal seems to be less pervasive than the previous ones dated 2009. Moreover, the general inapplicability of the Regulation to arbitration under Article 1(2)(d) still exists.

No provisions about the applicability of the Regulation to the judgments concerning arbitration have been included. Judgments that are still outside the scope of the Regulation give happiness to the many skeptics of any kind of EU arbitration Regulation and give disappointment to the few who expected something more.

Four kinds of judgments in matter of arbitration may be considered:²⁶ judgments of the State of the seat on the validity and effects of the arbitration agreement, judgments of the State of the seat on the validity and effects of arbitral awards, judgments recognizing arbitration awards – governed by the New York Convention and the national laws – and, finally, judgments on the merits rendered by Member State courts in relation to any dispute falling on the application of an arbitration agreement.

Under the Proposal, all these arbitration-related judgments remain outside the scope of the Regulation. However, according to the new system provided by Article 29(4) for judgments on the

²⁵ Article 4 CAM Rules (Seat of the Arbitration). “1. The parties shall fix the seat of the arbitration, in Italy or abroad, in their arbitration agreement. 2. In the absence of any agreement as to the seat, the seat of the arbitration shall be Milan. 3. Notwithstanding the provision in paragraph 2, the Arbitral Council may fix the seat of the arbitration elsewhere, taking into account the requests of the parties and any another circumstance. 4. The Arbitral Tribunal may determine that hearings or other procedural acts take place in a location other than the seat”.

²⁶ RADICATI DI BROZOLO L.G. (fn 1), at 450 ff.

validity and effects of the arbitration agreement, if the State upholds the validity of an arbitration agreement, such decision has to be considered final and binding for the non-seat court. Thus, a judge of the European Union shall not decide the case on the merits and shall deny its jurisdiction. Undoubtedly, this is positive in relation to the Commission's purposes and as an expression of *favor arbitrati*.

Arbitration is also mentioned in Article 36 concerning the provisional and protective measures. It states that an application may be made to the courts of a Member State for provisional measures, including protective measures that may be available under the law of that State. This is true even if the courts of another State or, under the new provision, *an arbitral tribunal* have jurisdiction as to the substance of the matter. As clarified by European case law,²⁷ the application applies to national courts, even if there is an arbitral tribunal that is competent on the merits.

4. At this stage, we should wonder whether the Proposal does reach the Commission's goals, as well as whether it avoids parallel proceedings and abuses. The analysis conducted by some authors²⁸ seems to be very useful.

The non-seat court's obligation to stay proceedings, pursuant to Article 29(4), seems to take this direction: the ordinary judge invested with the dispute subject to arbitration agreement (if different from the one of the seat), is forced to stay the proceedings, when a party invokes the arbitration agreement, and to invest the judge of the seat or the arbitral tribunal with the matter of the arbitration agreement's validity. This represents an application of the *Kompetenz-Kompetenz* principle. This principle was not respected by the proposal contained in the Green Paper, which, in order to verify the arbitral agreement's validity, admitted the sole recourse to the judge of the arbitration's seat.²⁹

At the same time, the option of the judge of the seat or arbitral tribunal represents a compromise for those Member States that are not so arbitration friendly to accept the negative effect of the *Kompetenz-Kompetenz* principle and to accept an arbitral statement on jurisdiction. Thus, the above article seems to reduce the risk of parallel proceedings as well as to represent a

²⁷ In *Van Uden* case (fn 10).

²⁸ RADICATI DI BROZOLO L.G. (fn 1), at 456 ff.

²⁹ See fn 23.

good alternative option to the more invasive and criticized remedy of anti-suit injunctions.

One criticism that may result under the system provided by Article 29(4) is that the party who wishes to make use of the arbitration agreement and to avoid a judgment in the State where it is sued, is almost forced to introduce another, ordinary or arbitration, proceedings to verify the validity of the arbitration agreement. This is so especially when a party believes that the non-seat court will uphold its position.³⁰

However, the mechanism provided by Article 29(4) in the Commission's Proposal does not require the adoption of the rules on the arbitration agreement's validity and effectiveness, not recognized by the Regulation (Recital 11). Merely raising an arbitration exception, together with proceedings that verify the effects of the arbitration agreement before the judge of the seat or the arbitral tribunal, is sufficient to freeze the proceedings started in violation of an arbitration agreement. Such a mechanism is open to abuses, since the Regulation does not provide for any definition of arbitration agreement and the non-seat judge is prevented by any assessment on its existence and validity.

There is always the possibility to refer a question to the Court of Justice about the real meaning of arbitration agreement. This would force the Court to lay down some rules on the requirements for the arbitration agreements' validity (although this might conflict with the exclusion of the matter from the application of the Regulation).

During the analysis of the existence of an arbitration agreement, the non-seat court could not refer to its national law because it would frustrate the effects of the new rule (and the decision on suspension by the non-seat judge may lead again to parallel proceedings). Also a verification of the arbitration agreement's existence pursuant to the law of the Member State of the seat, does not seem to be an effective solution because the non-seat judge, as happened in *Dallah* case,³¹ could apply and interpret that law differently and even be in contrast with the interpretation of the seat judge.

³⁰ RADICATI DI BROZOLO L.G. (fn 1), at 440.

³¹ Paris Court of Appeal, 17 February 2011, *Gouvernement du Pakistan v Société Dallah Real Estate & Tourism Holding Co*, *Cahiers arb.* 2011, at 433 ff, cf also the commentary by CUNIBERTI G., *ibid.*; *Dallah Real Estate & Tourism Holding Company v The Ministry of Religious, Government du Pakistan* [2010] UKSC 46 (on appeal from [2009] EWCA Civ 755).

Thus, the mechanism of Article 29(5) has to be interpreted as follows and hope that no abuse will occur.³² The mere raising of an arbitration objection, based on the sole existence of the arbitration agreement, together with the related declaratory proceedings left to the arbitrators or to the judges of the seat, is sufficient to stop the jurisdiction of the court.

Also, the innovative approach of the Proposal is clear in respect to the established *Kompetenz-Kompetenz* principle. The mechanism provided by Article 29(4) is able to limit the jurisdiction of the courts of certain Member States, imposing on them an assessment of the validity of the arbitration agreement made by other Member States' judges or by arbitrators. It is a mechanism based on the consolidated EU principle of mutual trust among Member States.³³

Furthermore, the primary role of the judge of the seat and of the *lex arbitri* is clear. The consequence is that the choice of the seat will become even more decisive for the destiny of arbitration.³⁴ Also the trend will be always towards arbitration friendly States and towards countries adopting liberal interpretation of arbitration agreements. In the light of the above, it may be said that the effectiveness of the new provision is conditioned on the choice of a seat favorable to arbitration.

5. In the light of the above and “on a not prejudicial analysis” against the European Commission,³⁵ the Commission's Proposal in the field of arbitration may be considered appropriate, as the partial abolition of the arbitration exception is formulated.

³² RADICATI DI BROZOLO L. G. (fn 1), at 442 ff. The same Author indicates the possible interpretations mentioned here and the exclusion of their applicability.

³³ However, there are those who argue that the principles of mutual trust and mutual recognition are not suitable for arbitration because there are too many differences between arbitrators and courts and between judgments and awards. In this sense, see DRAETTA U./SANTINI A. (fn 5), at 553 f.

³⁴ Too much emphasis on the seat of arbitration does not seem a problem, especially for a mechanism (such as the one of the last Proposal) that includes, besides the possibility to bring the proceedings on the validity of the arbitration agreement before the court of the seat, the possibility alternatively to bring the proceedings before the arbitral tribunal. The expression “too much emphasis” is used by DRAETTA U., SANTINI A. (fn 5), at 553, referring to the Green Paper's proposal recognizing an exclusive jurisdiction (only) to the courts.

³⁵ RADICATI DI BROZOLO L.G., “L'arbitrato e la proposta di revisione del Regolamento Bruxelles I”, *Riv. arb.* 187 ff, esp. at 230.

It seems to be consistent with the goal to avoid, as much as possible, parallel proceedings and abusive litigation tactics in such circumstances. This is done by means of a rule, the *lis pendens* rule, which does not bring particular disadvantages, interferences with other supranational laws, or steps backward. On the contrary, it seems representing a development in the arbitration law. Having placed on the same level the decisions by arbitrators and judges regarding the arbitration agreement's validity and effects, this represents a development of the *Kompetenz-Kompetenz* principle. Moreover, it does not appear to be inconsistent with the international conventions currently in force, in particular with the New York Convention. Indeed, it may be considered complementary to it. Article 29(4) of the Proposal seems in a certain way to complete Article II(3) of the New York Convention by coordinating judges of Member States and their decisions on arbitration agreements' validity and effects.

In addition, the Proposal and its new mechanism of *lis pendens* (that highlights the importance of the seat of arbitration) could be an opportunity for Italy and similar countries to change their image as a country hostile to arbitration, *i.e.* a country not frequently chosen as a seat for international arbitration. Italian courts, in assessing the validity of arbitration agreements – either *incidenter tantum* during a proceedings on the merits of the dispute, or in a declaratory proceedings, whenever invested as a “court[s] of the Member State where the seat of arbitration is located” under the new mechanism provided for by Article 29(4) – will have the opportunity to remove jurisdiction from certain countries and to assign it to an arbitral tribunal, according to a broad and favorable interpretation of the arbitration agreement.

The previous proposals, in particular the one contained in the Green Paper, did not deserve much support and their purposes have been considered too ambitious (despite the declaration of intent “not for the sake of regulating arbitration”). By imposing European regulation of arbitration, this Proposal simply aims to avoid some of the problems faced in Europe over these years of application of the Brussels I Regulation, New York Convention and national laws.

Besides its positive aspects, some of the solutions included in the Proposal can be certainly criticized. The mechanism of

Article 29(4) may be considered counterproductive,³⁶ implying a sort of obligation for the party who relies on the arbitration agreement to start ordinary or arbitral proceedings in order to verify its validity. The suspension without any time limit provided by the new mechanism also appears a critical aspect, as well as the inapplicability of the recognition rules to judgments in arbitration matters.

Finally, the new mechanism may lead the European Union “to put a foot in the door to the world of arbitration”.³⁷ It is sufficient to think about the possible interventions of the Court of Justice on the new provisions in the arbitration field, being the Regulation’s inapplicability not sufficient to prevent the Court’s intervention. In this respect, we can only place our hope in the Court of Justice to be *favor arbitrati* and without prejudices.

³⁶ This is a definition used by the Milan Chamber of Arbitration commenting on the proposal of the Green Paper. In its Position Paper (see § 1), the Chamber argues that the need for a declaratory judgment at the seat court, “instead of enforcing the parties’ will to solve their dispute out of court, ... will inevitably favor a race to the court”. In this regard, it is necessary to point out again that in the Green Paper’s proposal, the declaration of validity of the arbitration agreement must necessarily come from the court of the seat (and not, in the alternative, by the arbitral tribunal) and that the seat was, as we have seen, is ill-defined. Now the mechanism, with the possibility to bring the proceedings on the validity of the arbitration agreement before the arbitral tribunal, is partially changed, and the problem of the enforcement and its consequences are highly reduced. For this reason, perhaps the new mechanism should no longer be defined with that adjective.

³⁷ RADICATI DI BROZOLO L.G. (fn 1), at 457.