Do We Need Separate European Regulation of Arbitration?

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1. Introduction

Mr. President, Ladies and Gentlemen,

I wish to thank the European Branch of the Chartered Institute of Arbitrators for inviting me here to address the question of whether we need separate European regulation of arbitration. It is a tremendous privilege to address you in this beautiful city and to share the podium with one of its most respected practitioners, Tomasz Wardyński.

The question, "Do We Need Separate European Regulation of Arbitration?", implies, correctly, that arbitration is regulated within the European Union, if not by the European Union itself (well, at least for the most part). The title of this presentation invites us to reflect not on whether an additional or indeed complementary layer of regulation on arbitration is desirable, but whether such additional regulation is necessary. The question refers to "we", which is to be construed as including all relevant stakeholders, that is, the European Commission, the European Parliament, the EU Member States, European arbitration institutions, and the users of international arbitration within the EU, all of whom have different interests in and perspectives on the topic of this address. Moreover, I will confine my address to commercial arbitration, rather than investment treaty arbitration, which I believe the question pre-supposes.

I will proceed, as follows. First, I will briefly comment on the background to, and the context in which, this issue has arisen. Second, I will briefly discuss the historical reasons why arbitration has not been separately regulated by the EU to date. Third, I will examine the scope of existing regulation of arbitration in Europe, both internationally and at Member States level. And I then I will consider whether there are any residual issues or aspects that fall outside the scope of existing regulation within the EU. Fourth, I will turn to the questions of whether the EU is competent to regulate any such residual areas (or lacunae) and whether such regulation is warranted with reference to core principles of EU constitutional law. Finally, I will briefly consider the potential scope of such regulation and offer some concluding remarks.

2. Background and context

The background to, and context of, the topic of this address is three-fold.

1. The first of these is the exclusion of arbitration from the scope of the Brussels I Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), and its predecessors, the Brussels Regulation No. 44/2001, and the Brussels Convention.

[1] The author is grateful to Han Byul ("Star") Lee of Al Tamimi & Company for her valuable assistance with researching this paper and preparing the attached table.

The Regulation provides, among other things, for the free movement of judgments within the EU by establishing rules on the recognition and enforcement of judgments falling within the scope of Article 1 of the Regulation.

Article 1(2) (d) of the Brussels I Regulation provides that arbitration is excluded from the scope of the Regulation; likewise, the preceding Brussels Regulation and Brussels Convention each contained an identical exclusion.

If we go back thirty years ago, the early jurisprudence of the then European Court of Justice ("Court of Justice") concerning the arbitral exception held that not only was arbitration excluded from the Brussels Convention, but so too were arbitration-related proceedings.[2] And this largely remained the position until five years ago when the Court of Justice issued its controversial decision in *West Tankers*, which leads us to the second contextual aspect of this discussion.[3]

2. In *West Tankers*, Erg Petroli SpA chartered a vessel, the Front Comor, from West Tankers Inc ("West Tankers"). The charter party was governed by English law and contained an arbitration clause which specified London as the seat of the arbitration. The vessel collided with a pier in Syracuse, Italy in 2000. Erg Petroli claimed against its insurance policy but also commenced an arbitration against West Tankers in London to recover the uninsured portion of its loss. In the meantime, Erg's insurer (Allianz SpA) exercised its subrogation rights against West Tankers and brought a claim against West Tankers in a Syracuse court to recover the sum paid out by them.

   West Tankers sought and obtained an anti-suit injunction from the English courts to prevent the insurer from pursuing the proceedings in Italy, in breach of the arbitration clause, and a declaration that the disputes were subject to arbitration. The insurers appealed to the House of Lords, which sought a preliminary reference to the Court of Justice on the question of whether an anti-suit injunction could be granted to restrain proceedings in another EU Member State or whether such an order was precluded by the EU jurisdiction rules set out in the Brussels Regulation.

   In the meantime, the London arbitration continued (with the insurer joined to the proceedings as co-claimants). In May 2008 the tribunal declared West Tankers was not liable to Erg Petroli.

   The Court of Justice found that although the Brussels I Regulation (then Regulation No. 44/2001) excluded arbitration from its scope, the Regulation did apply to arbitration in the circumstances in that case, that is to say, where two Member State Courts were seized in circumstances where one party seized the first Member State court by instituting judicial proceedings in breach of the arbitration agreement and the other party seized a second Member States court to issue an anti-suit injunction against the continuation of the judicial proceedings in the first-seized court, the proceedings of the court first-seized fell within the scope of the Regulation. The Court of Justice concluded that it followed from this that the preliminary issue

[2] McInerney and Gaffney, "West Tankers: Fuelling the Debate on the position of Arbitration, International Litigation, Quarterly2009, Volume 25, Issue 3, p. 7 et seq (McInerney & Gaffney)
[3] Allianz SpE, Generaili Assicuracioni and "SpA, C-1854/07 [2009]".

concerning the validity of the underlying arbitration agreement fell within the scope of the Regulation.

The Court of Justice's approach in West Tanker was very much at odds with its earlier jurisprudence, which, as I noted earlier, took a broad view of the exclusion of arbitration from the scope of Brussels I Regulation and its predecessors.

The *West Tankers* decision caused some alarm to members of the international arbitration community, especially those based in London, since the Court of Justice found that the use of anti-suit junctions in support of international arbitration proceedings breached the Brussels Regulation and the underlying principle of mutual trust between Member States.

More generally, *West Tankers* raised the unappealing prospects of:

- Parallel judicial and arbitration proceedings, including the threat of the judicial proceedings (the so-called "Italian Torpedo") sinking arbitrations seated elsewhere in the Union;

- Resulting contradictory judgments and arbitral awards in relation to the same dispute. [4]

To which categories may be added the following new issue:

- Arbitral awards (involving an anti-suit injunction) and the conduct of judicial proceedings.[5]

I would note in passing that some would say that *West Tankers* created a false sense of alarm in the sense that the issues that arose in that case were not widespread or endemic throughout the EU. On the other hand, *West Tankers* was a not a singular case as regards conflicting arbitration-related judgments and parallel proceedings. One can mention the *Putrabali*[6] and *Cytec v. SNF*[7] cases in which awards set aside respectively by the English and Belgian courts were enforced in France. Or the

[4] McInerney & Gaffney, p. 13

[5] Case C-536/13, Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 14 October 2013 – Gazprom OAO, other party to the proceedings: Republic of Lithuania (in which the Supreme posed the following questions to the Court of Justice: (1) Where an arbitral tribunal issues an anti-suit injunction and thereby prohibits a party from bringing certain claims before a court of a Member State, which under the rules on jurisdiction in the Brussels I Regulation 1 has jurisdiction to hear the civil case as to the substance, does the court of a Member State have the right to refuse to recognise such an award of the arbitral tribunal because it restricts the court's right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in the Brussels I Regulation?; (2) Should the first question be answered in the affirmative, does the same also apply where the anti-suit injunction issued by the arbitral tribunal orders a party to the proceedings to limit his claims in a case which is being heard in another Member State and the court of that Member State has jurisdiction to hear that case under the rules on jurisdiction in the Brussels I Regulation? (3) Can a national court, seeking to safeguard the primacy of European Union law and the full effectiveness of the Brussels I Regulation, refuse to recognise an award of an arbitral tribunal if such an award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of the Brussels I Regulation?)

[6] *Societe PT Putrabali Adyamulia v. Societe Rena Holding,* French Court of Cassation, 29 June 2007, (2007) Rev. arb. 507 (annotated by E. Gaillard); (2007) JDI 1236 (annotated by Th. Clay).

[7] SNF v. Cytec, French Court of Cassation, 4 June 2008, (2008) Rev. arb. 473 (annotated by Fadlallah); SNF v. Cytec, Brussels Court of First Instance, 8 March 2007, (2007) Rev. arb. 303; Cytec v. SNF, Brussels Court of Appeal, 22 June 2009, (2010) Cahiers de l'arbitrage/Paris J. Int'l Arb. 1818 (annotated by Radicati di Brozolo).

Fincantieri case[8] in which the French courts declined recognition of an Italian judgment that had refused to uphold an arbitration agreement,[9] or the *National Navigation* case in which the English courts reached the opposite conclusion and applied the Regulation to the recognition of a member State court judgment disregarding an arbitration agreement.[10] One may also add the *Dallah* case in which the English and French courts reached conflicting decisions as to the effects of an arbitration agreement on a non-signatory, leading to the upholding of the award by the Paris Court of Appeal[11] and its refusal of enforcement in England.[12]

However, it was the problematic decision of the Court of Justice *West Tankers* that led to renewed interest in the interface between the Brussels I Regulation and arbitration, especially at a time when the Regulation was undergoing an extensive review by the Union, which led to the revised Brussels Regulation, No. 1215/2012, which leads us to the third contextual aspect to this topic.

3. Following a lengthy and detailed debate on the relationship between the Brussels I Regulation and arbitration, which included the revised Brussels Regulation widened the exclusion of arbitration from the scope of Regulation in line with the approach evinced in the early jurisprudence of the Court of Justice and indeed the underlying policy of the Brussels Convention and the Brussels Regulation, to which I will now turn in the next section of this address.

3. The rationale for the exclusion of arbitration from the Brussels Convention / Brussels Regulation

Arbitration historically was excluded from the scope of Brussels Regulation, and its predecessor, the Brussels Convention, because it was felt that arbitration was satisfactorily dealt with by the 1958 New York Convention ("New York Convention"), to which all EU Member States are a party, and 1961 Geneva Convention on International Commercial Arbitration ("Geneva Convention"), to which many, but not all, EU Member States are parties.[13]

The same rationale also informed the expansion of the arbitration exception in the revised Brussels I Regulation (No. 1215/2012). For example, in the Draft Report dated 20 June 2011 of the Committee of Legal Affairs of the European Parliament, it was noted in the Explanatory Statement that:

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[8] Legal Department du Ministere de la Justice de la Republique d'Irak v Fincantieri Cantieri Navali Italiani et alii, Paris Court of Appeal, 15 June 2006, (2007) Re. arb. 90 (annotated by S Bollee); Soc. Fincantieri v Gov. Iraq, Genoa Court of Appeal, 7 May 1994, (Rivista dell'arbitrato, 505 (annotated by La China).

[9] The same solution was upheld in ABCI c. Banque Franco-Tunisienne, [1996] 1 Lloyd's Rep, 485, 488 and in National Navigation v. Endesa Generacion SA, [2009] EWHC 196 (Comm).

[10] See National Navigation v. Endesa Generacion SA, [2009] EWCA Civ 1397.

[11] Gouvernement du Pakistan c. Societe Dallah Real Estate & Tourism Holding Co, Paris Court of Appeal, 17 February 2011.

[12] Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46, on appeal from : [2009] EWCA Civ 755.

[13] [] Report on the Convention [1979] OJ C59; this rationale was echoed again in a 1986 report by Professors Evrigenis and Kerameus, which reiterated that the arbitration was excluded as the result of the existence of numerous multi-national international agreements in the area. [1986] OJ C2984/1.

> "Your rapporteur adheres to the position taken by the Parliament in its resolution on Green Paper: arbitration is satisfactorily dealt with by the 1958 New York Convention and 1961 Geneva Convention on International Commercial Arbitration. All Member States are parties to the above mentioned conventions; therefore the exclusion of arbitration from the scope of the Regulation should be preserved…"[14]

The foregoing rationale for expanding the exclusion of arbitration – although partially flawed in so far as it incorrectly presupposes that all Member States are parties to the Geneva Convention - is consistent with the approach taken in other international similar instruments. For example, arbitration is excluded from the Hague Convention of Choice Court Agreements ("Hague Convention"), which was signed a number of years ago by the European Communities.[15] The so-called Hartley/Dogauchi Report on the Convention observed that the arbitration exclusion:

> "…should be interpreted widely and covers any proceedings in which the court gives assistance to the arbitral process – for example, deciding whether an arbitration agreement is valid or not; ordering the parties to proceed to arbitration or to discontinue arbitration proceedings, revoking, amending, recognizing or amending; appointing or dismissing arbitrators; fixing the place of arbitration; or staying the time for making awards. The purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on arbitration".[16]

Historically, it is also worth noting that the arbitration exclusion may also have been prompted to some extent by the existence of the still-born 1966 European Convention providing a new Uniform Law on Arbitration ("European Convention on a Uniform Arbitration Law"), which was intended to unify the laws of Member States of Council of Europe to provide for more effective settlement of private law disputes by arbitration in international commercial relations between the member countries of the Council of Europe.[17] The latter differs from the New York and Geneva Conventions, since only a few EU Member States signed the draft instrument and hence never came into effect.[18]

It is notable that not only does the revised Regulation expand the exclusion of arbitration from the scope of the Regulations because of the existence of the New York Convention, but actually gives the New York Convention primacy over the Regulation. Article 73 (2) of the revised Regulation specifically provides that the nothing in the Regulation shall affect the application of New York Convention. And an explanatory recital to the Regulation goes even further, stating that the obligations of EU Member State courts under the revised Brussels Regulation is "without prejudice"

[14] 2010/0383 [COD] p.48; see also European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)).
[15] Convention on Choice Court Agreements [Concluded 30 June 2005].
[16] Convention on the 30 June 2005 on the Choice Court Agreements, Explanatory Report by Trevor Hartley and Masato Dogouchi, paragraph GE 4.
[17] Report on the Council of Convention and Jurisdiction of the Enforcement of Judgements in Civil and Commercial Matters, O.J. C59, 5 March 1979.
[18] Austria, Belgium.

to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards under the New York Convention, which takes precedence over the Regulation.[19]

This all begs the question, of course, as to the respective scopes of application of the New York Convention, the Geneva Convention and, even if of academic interest, the still-born European Convention on a Uniform Arbitration Law. In this regard, I would refer you to a table which you should find on your desks this afternoon.

The table is intended to list - in Section I - the arbitration-related areas that one would expect to see regulated. (The table also references other issues in Section II, to which I will return later in this address.) By reference to that list, the table identifies the scope of coverage of the New York Convention, the Geneva Convention and the still-born European Convention on a Uniform Arbitration Law. Significantly, you will see that the table also includes the UNCITRAL Model Law Model Law on International Commercial Arbitration ("Model Law"), to which I will return shortly.

As may be seen, the New York Convention covers very few of the subjects set forth in the table. It provides for only two, albeit critically important, areas, as follow:

- The recognition and enforcement of arbitration agreements and the corresponding obligation of the courts of the Contracting States, when seized of an action in respect of which the parties have entered into an arbitration agreement, to refer the parties to arbitration, when one of the parties so requests, unless it finds the arbitration agreement is null and void, inoperative or incapable of being formed (Article II)(this provision does not address, however, the question of which court should determine validity of the arbitration agreement);

- The recognition and enforcement of arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in Articles IV and V (Article III).

Hence, given the relatively limited, albeit highly significant, scope of coverage of the New York Convention, it is perhaps surprising that its existence should in and of itself have informed, and continue to inform, the rationale for the exclusion of arbitration from the Brussels I Regulation. As one commentator notes:

> "…the New York Convention to which all member States are parties, does not provide for a complete regulation of arbitration and of arbitration-related court litigation and thereby leaves most issues to be determined by national law."[20]

This leads me back to the important role played by the Model Law within the EU concerning the harmonization of Member State arbitration and arbitration-related laws.

[19] Regulation No.1215/2012, op. cit. (The Geneva Convention is not expressly mentioned in the same way as the New York Convention is mentioned and so it remains unclear whether the Geneva Convention has precedence over the Regulation or not).

[20] Radicati di Brozolo, "Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?" Journal of Private International Law, Volume 7, Number 3, December 2011, pp. 423-460.

I would respectfully submit that - although not stated in any of the EU policy documents that I have seen on the arbitral exclusion issue - the New York Convention should not and cannot be considered in isolation from the Model Law, which, as may be seen, provides a far broader scope of regulation.

In one of the Resolutions issued at the time the Model Law was adopted in 1985, the General Assembly noted that together with the New York Convention (and the UNCITRAL Arbitration Rules) the Model Law:

> "…significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations"[21]

And in 2006, at a time that the Model Law was revised and modernized, the General Assembly professed its belief that the:

> "…promotion of a uniform interpretation and application of [New York Convention] is particularly timely" [22]

As may be seen, the subject matter coverage of the Model Law is broad, covering the majority of issues set forth in section I of the table. And its territorial coverage is also broad - the Model Law has been adopted in full by 13 of the 28 EU Member States, while it has been partially adopted by further 13 EU Member States, leaving only France and Latvia as the only two Member States, who have not formulated their laws on the basis of the Model Law.

It is respectfully submitted that the importance of the role of the Model Law in the regulation of arbitration within the EU largely has been overlooked to date.

The Geneva Convention was (not unlike the Model Law) also intended to complement the New York Convention in Europe by:

> "…promoting the development of European Trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries."

As I noted earlier, not all EU Member States are parties to the Convention: of the 28 EU Member States, only 11 are parties thereto (Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Hungary, Italy, and Spain). And if we look at the table, the Geneva Convention does not appear to cover any areas in Section I not already regulated by the New York Convention and the Model Law, as adopted into domestic law.

Article VI (3), however, covers at least one of the additional areas enumerated in Section II by providing for the regulation of certain conflicts, as follows:

> "Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the

[21] A/RES/40/72, 11 December 1985.
[22] A/RES/61/33, 4 December 2006

> same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitration's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary."

As may be seen, Article VI(3) seeks to regulate the issue of parallel proceedings, which neither the New York Convention nor Model Law purports to do.

The European Convention on a Uniform Arbitration Law has been rendered largely moot. While in the early days of the Brussels Convention, the exclusion of arbitration from the scope of the Convention may have been informed by, among other things, the existence of the European Convention on a Uniform Arbitration Law, it is clear from the legislative record concerning the revised Brussels Regulation that the existence of the European Convention in no way informed the decision to expand the exclusive arbitration under the revised Regulation.

This is hardly surprising given that only two Member States (Austria, Belgium) ever signed the Convention, as a result of which it never came into effect. Moreover, as may be seen from the table, the European Convention on a Uniform Arbitration Law does not regulate any areas in Section I that are not already covered by the New York Convention, the Geneva Convention and the Model Law.

However, Article 24 (of Annex 1) covers one additional area by providing that:

> Unless the award is contrary to ordre public or the dispute was not capable of settlement by arbitration, an arbitral award has the authority of res judicata when it has been notified in accordance with paragraph 1 of Article 23 and may no longer be contested before arbitrators.

As may be seen, Article 24 thus sought to address the conclusive and preclusive or res judicata effects of a valid arbitration award, although it has no legal impact today given that the draft Convention never entered into force.

4. Conflicts Issues Not Covered By Existing Regulation

So, if we take as our starting point that the EU should not intervene in the regulation of arbitration to the extent it might interfere with existing regulation of arbitration, which I have suggested above, is principally constituted of the mutually-complementary New York Convention and Model Law, as well as the Geneva Convention, may the EU regulate at all and, if so, to what extent?

In its 2010 Opinion on the proposal to revise the Brussels Regulation No. 44/2001, the European Economic and Social Committee called on:

> "…the Commission to consider creating, as soon as possible, a supranational legal instrument for the recognition and enforcement of arbitration decisions."[23]

[23] INT/566 - CESE 795/2011 - 2010/0383 (COD), para. 4.5.1.

There is nothing in the New York or Geneva Conventions to prevent an additional layer of arbitral regulation: neither of the New York or Geneva Conventions is at odds *per se* with the enactment of uniform rules by the EU. As already pointed out, they both cover only specific aspects of arbitration law and leave the contracting States more or less free to regulate, as they wish, important aspects of arbitration.[24]

And after all, the EU has seen fit to regulate important aspects of mediation. Thus, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters ("EU Mediation Directive") is intended to facilitate the use of mediation as a method of settling disputes in civil and commercial matters. However, it is notable that the EU has regulated mediation in circumstances where there is no mediation equivalent of the New York and Geneva Conventions, and the UNCITRAL Model Law on International Commercial Conciliation has been adopted by only six of the 28 EU Member States.

So, when we consider the extensive and complementary regulation afforded by the New York Convention and the Model Law, to the extent that it has been adopted wholly or partially by most EU Member States, we must ask ourselves, is such a measure really necessary?

Well, as may be seen from the table, to which I referred earlier, there exists three principal areas that fall outside the current scope of regulation in Europe afforded by the New York Convention and Model Law (leaving aside the Geneva and European Conventions), are:

- Parallel arbitration and court proceedings.
- Conflicts between judgments and arbitral awards.

For its part, the European Commission, in its 2009 Green Paper on review of the Brussels Regulation (No. 44/2001),[25] also noted the same potential areas where regulation was desirable:

> "[the satisfactory operation of the New York Convention] 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.***"[26] (emphasis added)

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[24] Benedettelli 'Communitarization' of International Arbitration: A New Spectre Haunting Europe?" Arbitration International, Volume 27, No. 4, p.603. Prof. Benedetelli suggests that this may include: (a) subject-matter arbitrability; (b) the validity of the arbitration agreement for matters other than form; (c) the jurisdiction on setting aside actions and the grounds for the setting aside of arbitral awards; (d) the recognition and enforcement of court judgments on setting aside actions and other arbitration-related matters; and (e) the coordination of parallel arbitral or judicial proceedings.

[25] COM [2009] 175 Final, Brussels, 21 April 2009.

[26] Ibid.; see also: the so-called Heidelberg Report, Study JLS/C4/2005/03; Report of the Commission to the European Economic Committee Council and European Parliament COM [2009] 174, Brussels 21 April 2009. The "specific points" identified by the European Commission to be addressed are as follows:(a) Improving the interface of arbitration with court proceedings;
(b) Ensuring that all the Regulation's jurisdiction rules applied for the issuance of provisional measures in support of arbitration (not only Article 31); (c) Allowing the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award; (d) Ensuring the recognition of a judgment setting aside an arbitral award; (e) Coordinating between proceedings concerned with the validity of arbitration agreements before a court and arbitral tribunal; (f) Providing for the refusal of enforcement of the

This leads us back to the earlier question as to whether the EU is permitted to regulate any such residual areas, which, as those noted above, not governed or not governed adequately under existing international and national regulations.

5. The Permissibility of Regulating Arbitration At An EU Level

The permissibility of EU regulation of arbitration is governed, as with other areas of regulation, by the following principles:

- Conferral, i.e., the Union may only within the limits of powers conferred by the Member States, which may involve exclusive or non-exclusive competence;
- Subsidiarity, i.e., in areas in which it does not have an exclusive competence, the EU acts only if and in so far as the objectives of its action cannot be better achieved by the Member States);
- Proportionality, i.e., the contents and form of the action by the EU shall not exceed what is necessary to achieve its intended objectives.[27]

Hence, any proposal to regulate any of the residual issues identified earlier, which are not already adequately regulated by the New York (and Geneva) Convention and the Model Law, must be examined in the light of each of these principles:

a. Conferral

Arbitration is not mentioned in the Treaty on the Functioning of the European Union (TFEU), save for Article 272 TFEU ("The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.")

However, Articles 67 (1) and (4) of the TFEU do provide:

> "1.The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
>
> […]
>
> 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."

judgment which is irreconcilable with an enforceable arbitral award with the same subject matter; (g) Preventing parallel proceedings.

[27] See e.g., Benedetelli,. p. 598 (there are also concomitant obligations on Member States, including the principles of: supremacy (whereby EU law prevails over any conflicting provision of State law); loyal cooperation (whereby the Member States shall take appropriate measures to ensure the fulfillment of their obligations under EU law); and *effet utile* (whereby Member States must exercise their powers so that the objectives of the EU are not, even indirectly, jeopardized).

While Article 81 TFEU provides:

> "1. 1.The Union shall 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 includes the adoption of measures in the approximation of the laws and regulations of the Member States.
>
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
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> (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
> (b) the cross-border service of judicial and extrajudicial documents;
> (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
> […]
> (e) effective access to justice;
> (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
> (g) the development of alternative methods of dispute settlement"[28]

It is not clear whether arbitration is intended to be included in the scope of "extra-judicial' cases and decisions, to which Article 81 refers.

For the purpose of this address, however, we shall assume, not unreasonably, that this reference includes arbitration.[29] As Prof. Benedetelli has observed;

> "There 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.".[30]

As he notes, arbitral proceedings are (a) functionally equivalent to judicial proceedings (being also a means to resolve disputes in civil and commercial matters through a decision which may acquire res judicata effect and be the ground for enforcement actions); and (b) do not take place in a vacuum, but necessarily interact with judicial proceedings so that the need for harmonization of Member States' procedural laws may also exist, in principle, in this area.[31]

Notably, the EU Mediation Directive, which I mentioned earlier, is based on Article 61(c) and the second indent of Article 67(5) of the Treaty establishing the European Community, which are the equivalents of Articles 67 TFEU and 81 TFEU, respectively. It is stated in the recitals that:

[28] C 326/78 EN Official Journal of the European Union 26.10.2012.
[29] Benedettelli, p. 599.
[30] Ibid.
[31] Ibid.

> "…the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice."[32]

The Mediation Directive thus indicates that arbitration likewise may constitute a component of the administration of justice within Member States and thus may be regulated by EU law to the extent permitted by the principles of subsidiarity and proportionality.

As may be seen, the scope of additional regulation is circumscribed by legal basis afforded by Articles 67 and 81 TFEU, thus militating against a comprehensive regulation of arbitration by the EU. This contrasts with the position concerning foreign direct investment, including investment treaty arbitration, in which the EU enjoys exclusive competence.

In any case, this would seem unnecessary if EU Member States were encouraged to adopt more fully the Model Law in their domestic laws on arbitration.

b. Principles of Subsidiarity and Proportionality

In addition to the limitations imposed by the conferral principle, the regulation of arbitration at an EU level could only be justified if it were more effective than action taken at a national level by its Member States, and would not go beyond what is necessary in attaining the objectives of the Treaties.[33]

It is arguable that any modification to the scope of the Brussels I Regulation, by removing or limiting the arbitration exclusion requires the intervention of the EU and, by definition cannot be achieved by the Member States.[34] But this justification – which the Commission has been apt to rely on – seems somewhat trite. Perhaps a better explanation is as follows:

> "…member States cannot by themselves ensure arbitrations in their Member States are properly coordinated with court proceedings going on in other Member States because the fact of national legislation is limited by the territoriality principle."[35]

This a more convincing basis of action as regards addressing conflicts arising in the case of parallel arbitral and judicial proceedings, and conflicts between resulting arbitral awards and judicial decisions. It also finds support in the principles of efficient and effective access to justice (Article 47 of the Charter of Fundamental Rights of the EU) and the freedom to conduct business (Article 16 of the Charter).[36]

It is thus submitted that a separate layer of European regulation arbitration would be justified to the extent necessary to create a European "area of justice" which aimed:

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[32] Directive 2008/52/EC Of The European Parliament And Of The Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal of the European Union, L 136/3.
[33] Article 5, TFEU.
[34] See e.g., Commission Staff working paper, S (2010) 1547, Brussels, 14 December 2010.
[35] Proposal for proper Regulation of the Parliament and of the Council on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters, (2010) 748 Final Brussels, 14 December 2010.
[36] Ibid.

> "to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two member states" and ensuring "mutual recognition of judicial and extra-judicial decisions."[37]

Since such an objective cannot sufficiently be achieved by the Member States and can be better achieved at EU level, EU action is justified in accordance with the principles of subsidiarity and proportionality. But this is not to favor wholesale harmonization efforts at an EU level.[38]

6. Potential scope of application of regulation

It is suggested, with respect to the principles of conferral, subsidiarity and proportionality, discussed above, and having regard to the scope of the regulation provided by the New York Convention and Model Law, only selective regulation at EU level would be justified. It is also suggested that such regulation can only be justified in relation to conflicts issues that could not be addressed satisfactorily at a Member State level through domestic adoption of the New York Convention and the Model Law.

Thus, it is suggested that regulation should be confined at most to achieving uniformity and consistency within the EU in relation to:

- The existence of parallel arbitration and judicial proceedings (*lis pendens* issues); and
- The circulation of arbitral awards and arbitration-related judgments, including the issue of the conclusive and preclusive effects of prior arbitral awards in relation to conflicting judgments (*res judicata* issues).

And even these discrete areas may still be too broad – for example, it is arguable that the primacy afforded by the Brussels I Regulation to the New York Convention arguably entitles an EU Member State court, when faced with a conflicting judgment and arbitral award, to give priority to the award rather than the competing court judgment.[39] As against that, the preambular basis provide only indirect guidance and thus leaves some uncertainty.

The reach of EU harmonization measures in the field of arbitration should also be determined by giving due weight to the different interests of the various relevant 'stakeholders', which in addition to the EU and its Member States, should include the interests of private parties involved in international commerce, by finding a proper balance between them. In other words, the EU has to strike a careful balance in maintaining the sovereignty of its Member States to regulate arbitration, while at the same time protecting party autonomy and *Competence-Competence*, which form the cornerstone of international arbitration, in endeavoring to regulate this area.

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[37] Articles 67 and 81 TFEU; recitals (3) and (21) of the Brussels I Regulation (No 1215/2012).

[38] Radicati di Brozolo, op. cit., observes, "At the present time any attempt at harmonization would either be doomed to failure or, worse, could result in a harmonization which would be unlikely to be at the more progressive levels. The result would be a setback for arbitration, with effects comparable to those of the Commission's proposal mentioned above, with no noticeable upside given the relative scarcity of major practical problems."

[39] Freshfields Bruckhaus Deringer Briefing, "Arbitration in the EU", January 2013, p.4.

This leads to the question of the appropriate instrument by which essential, residual, extra-territorial issues may be regulated, the nexus required in order for such additional regulation to apply in specific cases and, most importantly and challenging, how such conflicts issues can be adequately addressed. Having listened to me for forty minutes, you will be pleased to hear that I do not propose to address these in detail, save for a number of brief remarks.

As regards the form of any additional regulation of arbitration, which is intended to introduce uniform rules across the EU, it would appear appropriate to adopt a supra-national measure with direct effect in all EU Member States, that is to say, a Regulation akin to the Brussels I Regulation.[40] EU Regulations are of general application, binding in their entirety and directly applicable. They must be complied with fully by those to whom they apply (private persons, Member States, Union institutions). Regulations are directly applicable in all the Member States as soon as they enter into force and do not need to be transposed into national law. Regulations are designed to ensure the uniform application of Union law in all the Member States. Regulations supersede national laws incompatible with their substantive provisions.[41]

Indeed, given the limited scope of regulation, which I have proposed above, and the interface between arbitral (*qua* extra-judicial) proceedings and decisions and judicial proceedings and decisions, it seems appropriate to consider whether the Brussels I Regulation would be amended to include such additional regulation of extra-judicial and judicial conflicts.[42]

Secondly, regarding the nexus required in order for such additional regulation to apply in specific cases, it is submitted that there should be a link between arbitration proceedings to which the Regulation applies and the territory of the Member States bound by the Regulation. It seems appropriate that such a nexus would be established at a minimum where the arbitral proceedings were seated in an EU Member State, to which the Regulation applied. Whether any additional nexus would be desirable is a matter for further reflection.

Which leads me to the third remark concerning how such conflicts could be adequately addressed? This is an issue that requires careful reflection. In its draft Report on the revised Brussels I Regulation, the European Parliament cautioned against any changes to the Regulation which involved regulating arbitration,[43] pending careful consideration of the relationship between arbitral and judicial proceedings:

> "Taking the view that the questions posed by the relationship between arbitral and judicial

[40] See Sources And Scope Of European Union Law, Fact Sheets on the European Union – 2014: the legal acts of the Union are listed in Article 288 TFEU. They are regulations, directives, decisions, recommendations and opinions. EU institutions may adopt legal acts of these kinds only if they are empowered to do so by the Treaties.

[41] In contrast, Directives are binding, as to the result to be achieved, upon any or all of the Member States to whom they are addressed, but leave to the national authorities the choice of form and methods. National legislators must adopt a transposing act or 'national implementing measure' to transpose directives and bring national law into line with their objectives.

[42] For a contrary view, see Radicati di Brozolo, op. cit.

[43] Such as introducing a special rule allocating jurisdiction in relation to proceedings in support of arbitration to the courts of the member State of the seat of the arbitration (For further discussion, see Radicati di Brozolo, op. cit.)

proceedings must be thoroughly reflected upon in a separate review and that, until such time as review has been conducted…"[44]

Given the complexity of the regulation of arbitration at an EU level, this seems to be a prudent course of action. Indeed, the European Parliament has recently commissioned a study whose focus is "to provide an in-depth, objective description and analysis of the law and practice of arbitration in the EU,"[45] as well as the general framework of arbitration within the EU.[46] It seems intended that the results of the study would inform "the improvement of national and EU frameworks for arbitration."[47]

In the interests of full disclosure, I am a Rapporteur for the project on the issue of Commercial Arbitration within the EU and do not wish to prejudge the outcome of the study. However, I would submit that

(a) Articles VI of the Geneva Convention and 24 of the European Convention (which I quoted earlier and in the interests of time, I will not return to);

(b) Regulation 29(4) of the draft revised Brussels I Regulation proposed by the Commission; and

(c) Resolution No. 1/2006 on International Commercial Arbitration of the International Law Association

should each receive careful attention in any future proposals to regulate arbitration in the EU.[48]

a. Regulation 29(4) of the draft revised Brussels I Regulation proposed by the Commission

Article 29(4) required a court whose jurisdiction is contested on the basis of an arbitration agreement to stay its proceedings once the arbitral tribunal, or the courts of the member state of the seat of the arbitration, have been seized of proceedings to determine the existence, validity or effects of the arbitration agreement, even if that is merely an incidental question in those proceedings. While it was excluded from the Brussels I Regulation, the proposed *lis pendens* rule is worthy of further consideration.

As one commentator has observed, the rule "has profound implications and a very innovative potential" and "goes a long way towards achieving a workable mechanism … to prevent parallel court and arbitration proceedings and conflicts between awards and judgments." Moreover, "By

[44] Draft Report on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), pp. 6-7.
[45] Terms Of Reference Of The Services To Be Provided Under The Service Contract, IP/C/JURI/IC/2013-047 For A Study On Legal Instruments And Practice Of Arbitration In The EU.
[46] Ibid, p. 4
[47] Ibid., p. 6 (The Parliament has stated that the starting point of the study should be the New York Convention and the Geneva Convention (to which it incorrectly claims that all Member States are parties). Curiously, the Parliament does not mention the Model Law.)
[48] Resolution No 1/2006 Annex 2; ILA "Final Report on Lis Pendens and Arbitration, Reports of the Seventy-Second Conference, Toronto, 2006"

better shielding arbitrations seated in the EU from competing court proceedings, at least within the EU, the proposed amendment should actually strengthen the local arbitration market making it more attractive to seat arbitrations within the EU. "[49]

That said, the proposed solution is premised on the negative effect of *Competence-Competence*, which not all jurisdictions recognize, and so could meet opposition on that basis.

b. Resolution No. 1/2006 on International Commercial Arbitration

The Resolution addresses the respective issues of lis pendens and res judicata in arbitration. It contains Recommendations to arbitral tribunals, with a view to facilitating:

> "uniformity and consistency in the interpretation and application of provisions and principles concerning parallel proceedings and the conclusive and preclusive effects of prior arbitral awards".

The Resolution also requests the ILA Committee and others "to encourage the application of the Recommendations within the arbitral community."

In relation to the issue of parallel proceedings, while taking as its starting point the principle that an arbitral tribunal:

> "that considers itself to be prima facie competent pursuant to the relevant arbitration agreement should, consistent with the principle of competence-competence, proceed with the arbitration and determine its own jurisdiction, regardless of any other proceedings pending before a national court or another arbitral Tribunal"

Should nevertheless:

> "…in the interest of avoiding conflicting decisions, preventing costly duplication of proceedings or protecting parties from oppressive tactics, an arbitral tribunal requested by a party to decline jurisdiction or to stay the arbitration on the basis that there are parallel proceedings should decide in accordance with the principles set out in paragraphs 3., 4. and 5.below."

These principles address different scenarios, which for reasons of time, I will not elaborate on.
As regards the issue of res judicata and arbitration, the Resolution recommends:

> "To promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings.

And notes:

> "The conclusive and preclusive effects of arbitral awards in further arbitral proceedings set forth below need not necessarily be governed by national law and may be governed by transnational rules applicable to international commercial arbitration.

[49] Radicati di Brozolo, op. cit.

While the Recommendations in the Resolution do not extend to the conclusive and preclusive effects of arbitral awards in related judicial proceedings, they provide a useful point of reference for any future initiatives in the area.

7. Conclusion

To conclude, I would summarize my response to the question posed by the title to this address, "Do We Need Separate European Regulation of Arbitration?", as follows:

- Yes, but only to the extent that conflicts issues can only be meaningfully addressed by EU action in furthering the creation of an area of freedom, security and justice: namely:
    - the existence of parallel arbitration and judicial proceedings (*lis pendens* issues); and
    - the conclusive and preclusive effects of prior arbitral awards in relation to conflicting judgments (and indeed awards) (*res judicata* issues).

- And also only to the extent that is necessary having regard to the extensive regulation already provided at Member State level by the combination of the New York Convention and Model Law (as well as the Geneva Convention, where applicable).

- The scope of any additional regulation should be the subject of careful study and widespread consultation with all affected stakeholders.

- Such regulation should thus seek to be minimalist, rather than maximalist, in accordance with the principles of subsidiarity and proportionality, and so as to avoid interfering with existing instruments on arbitration and also to avoid harmonizing unnecessarily the law of arbitration in the EU (for the present), in light of the comprehensive coverage already in provided by the New York Convention and Model Law.

- And in the meantime, the EU should encourage its member States to adopt the Model Law to the fullest extent possible, which together with the New York Convention should serve to further the harmonization of arbitral regulation within the EU and thus reduce the scope for potentially duplicative action at EU level

This conference is dedicated to "Ethics, Empathy and Exasperation": in the interests of avoiding any further exasperation and ensuring the empathetic and ethical treatment of audience members, I shall conclude this lengthy address!

Thank you very much for your kind attention.