

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

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## 1 Abstract

The European Union (“EU”) is a form of co-operation between its Member States and the principle of mutual trust defines, legitimizes and orders this co-operation.<sup>2</sup> The Brussels regime provides the legal framework for the recognition and enforcement of EU Member State judgments within the EU. The result is free circulation of judgments, predictability, legal certainty and efficiency. A similar co-operation is missing for arbitral awards, however. The article reflects on the arbitration exclusion of the Brussels regime and the possibility to enforce annulled awards under the New York Convention, which allows for multiple and conflicting interpretations. The article identifies an incompatibility of such court practice to the principle of mutual trust in the EU. In investigating this conflict, the article argues that the exclusion of arbitration from the Brussels regime undermines the EU’s aim in achieving a harmonized area of justice and that the principle of mutual trust ought to apply to post-award judgments, specifically annulment decisions. The article concludes by proposing the establishment of a new EU Court for the future development of EU co-operation in cross-border arbitration.

## 2 Introduction

Generally, when parties enter into an arbitration agreement they contract out of the national court system. Court involvement before, during and after the arbitral process, however, may still occur. After arbitration proceedings have been concluded, the losing party may want to challenge the award at the seat of arbitration.<sup>3</sup> And the winning party may want to start an enforcement action in a country where the losing party has assets, whereby the courts of that state will enforce the arbitral award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>4</sup>

If the court at the seat of arbitration sets aside the award, is the winning party thereby secured against enforcement in all of the 156 countries that are signatories to the New York Convention? Not necessarily so. The court at the

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2 See Weller, Matthias, *Mutual Trust: In Search of the Future of European Union Private International Law*, (2015) 11 *Journal of Private International Law*, p. 73.

3 That is, if national arbitration law offers this possibility and neither party has waived their right to challenge the award, as is possible in jurisdictions such as Switzerland, Sweden, France and Belgium.

4 If it is a state other than the one where the arbitration took place and the state is a signatory to the New York Convention (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958). The New York Convention gives arbitrators powers beyond those of national court judges since arbitral awards can be enforced in 156 countries that are signatories to the New York Convention. The latest addition is Andorra on 17 August 2015, see *Signatories to the New York Convention* available at: “[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)” last accessed February 18, 2017.

place of enforcement has discretion to disregard the annulment decision and enforce the award, whereby the party succeeding in the setting aside procedure, ends up winning the battle but losing the war and is possibly left with a more costly, more time-consuming and less satisfactory dispute resolution than if it had opted for litigation.

There is increasing jurisprudence from courts around the world recognizing and enforcing awards that have been set aside in a signatory state to the New York Convention. This development is contrary to the actions gradually taken by the EU to build the trust necessary for businesses and consumers to enjoy a single market that works like a domestic market.<sup>5</sup> Mutual trust is the foundation upon which EU justice policy is built and enhancing mutual trust is a core objective of the EU.<sup>6</sup> Under the Brussels regime, a judgment in one Member State is recognized and enforced in another Member State without intermediary procedures. Judgments relating to arbitration, however, are excluded from this regime.<sup>7</sup>

The result is legal uncertainty and unpredictability as regards the fate of annulled awards in countries of enforcement, which diminishes the role of arbitration as a preferred method of dispute resolution and undermines the EU's harmonization efforts.

This article first outlines in Section 3 the legal framework and the relationship between EU law and international commercial arbitration. The main focus lies on the Brussels regime and the New York Convention. The delocalization and localization theories of arbitration are explored in order to systemize court decisions when it comes to the issue of enforcing annulled awards. Section 4 examines the mutual trust principle and gives examples of cases in which the Court of Justice of the European Union ("CJEU")<sup>8</sup> used this principle in its reasoning and Section 5 deals with the issue of enforcing annulled awards. In Section 6 this article critically analyzes the identified conflict between enforcing nullified awards and the EU's principle of mutual trust. Section 7 explores the way forward and proposes the establishment of a European Court for international commercial arbitration, and finally Section 8 covers all issues touched upon in closing remarks.

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5 See Commission, *EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union*, (Communication), COM (2014) 144 final (EU Justice Agenda for 2020).

6 *Ibid.*

7 Art. 1 (2) lit. d of Brussels I - Regulation 44/2001 of the Council of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. L 12/1 ("Brussels I"); and Recital 12 of the Recast Brussels I Regulation - Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters O.J. L 351/1 2012 ("Recast").

8 Informally known as the European Court of Justice ("ECJ").

### 3 European Union Law and International Commercial Arbitration

EU law and arbitration are two legal regimes that have advanced mostly untouched by each other, occupying their own separate worlds with their own distinctive logics.<sup>9</sup> The relationship between these two regimes has been described rather negatively as being one of “mutual indifference” and “co-existence”,<sup>10</sup> even as “schizophrenic”.<sup>11</sup> Coincidentally, 1958 is a milestone year for both the EU and international commercial arbitration. Both the Treaty Establishing the European Economic Community (“EEC Treaty”) and the New York Convention entered into force that year.<sup>12</sup>

While efforts in regulating and harmonizing EU law were limited in the beginning, encompassing few domains such as, e.g., constitutional and administrative law,<sup>13</sup> the objective of achieving an internal market and harmonizing law across the EU also brought core fields of private law, into the EU’s radar.<sup>14</sup> The field of private international law, however, was traditionally kept at a distance.<sup>15</sup> And arbitration, widely regarded as a branch of private international law, was not historically part of the EU’s core concerns.<sup>16</sup> The development of the European harmonization in the area of private international law has thus been described as relatively slow with a *de facto* legislative

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9 See Bermann, George A., *Navigating EU Law and the Law of International Arbitration*, (2012) 28 *Arbitration International*, pp. 397–398; see also Cole, Tony *et al.*, *Legal Instruments and Practice of Arbitration in the EU - Study for the Committee on Legal Affairs*, p. 186 available at: “[www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL\\_STU\(2015\)509988\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf)” last accessed February 18, 2017.

10 *Ibid.*

11 See Benedettelli, Massimo V., *Communitarization’ of International Arbitration: A New Spectre Haunting Europe?*, (2011) 27 *Arbitration International*, p. 593.

12 See Bermann, *supra* at footnote 9, p. 400; The EU was established by the Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1; 31 I.L.M. 247 (1992) (“TEU”). The TEU changed the name of the EEC Treaty in Treaty establishing the European Community (“EC Treaty”). The treaties were amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Oct. 2, 1997, O.J. (C 340). Note that the term “European Union (law)” or its abbreviation “EU (law)” is used throughout this article, also when addressing the historical context, notwithstanding its origins from the European Coal and Steel Community (“ECSC”) and the European Economic Community (“EEC”).

13 See Bermann, *supra* at footnote 9, p. 401.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*; see also Born, Gary B., *International Commercial Arbitration*, 2d edn, Kluwer Law International 2014, p. 216.

inactivity.<sup>17</sup> This changed when the Member States eventually signed the Brussels Convention.<sup>18</sup>

### 3.1 *European Union Law: The Brussels Regime and its Arbitration Exclusion*

The Brussels Convention of 1968 was the basis for creating a harmonized regime of jurisdiction, recognition and enforcement of judgments in civil and commercial matters for EU Member States. It was signed on the basis of Art. 220 of the EEC Treaty,<sup>19</sup> in which the Contracting States of the Treaty<sup>20</sup> declared that they would ensure “the simplification of formalities governing the *reciprocal recognition and enforcement of judgments* of courts or tribunals and of *arbitration awards*.”<sup>21</sup> This article therefore required the Member States to enter into negotiations for a treaty aimed at harmonizing their domestic laws in the area of mutual recognition and enforcement not only of court judgments but also of arbitral awards.

Art. 1 (2) no. 4 of the Brussels Convention, however, excluded arbitration from its scope.<sup>22</sup> As apparent from the *Jenard Report*,<sup>23</sup> arbitration was excluded for two reasons. First, it was established that the main aim of Art. 220 of the EEC Treaty had been satisfied through the Member State’s accession to the New York Convention.<sup>24</sup> Second, it was expected that the European Convention providing for a Uniform Law on Arbitration would be ratified.<sup>25</sup>

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17 See Schmon, Christoph, *Convergence between the European Regulations Brussels I & Rome I on the Example of Consumer Contracts*, Stanford-Vienna European Union Law Working Paper No. 4, p. 17.

18 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, 1972 O.J. (L 299) 32; see Bermann, *supra* at footnote 9, p. 401.

19 Treaty of Rome establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; see also Schmon, *supra* at footnote 17, p. 19.

20 *Ibid.*; Belgium, France, Germany, Italy, Luxembourg, and the Netherlands.

21 Emphasis added.

22 It reads: “This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. The Convention shall not apply to: [...] (4) arbitration.”

23 Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1979, see Jenard Report, 1979 O.J. No. C 59/13. Its rapporteur, Mr P. Jenard, Directeur d’Administration in the Belgian Ministry for Foreign Affairs and External Trade, wrote the explanatory report (Jenard Report).

24 See *ibid.* See also See Dickinson, Andrew and Lein, Eva, *The Brussels I Regulation Recast*, Oxford University Press 2015, p. 74. Except for Luxembourg and Ireland, who were not Member States of the New York Convention but had expressed their intent to ratify at a later stage.

25 See *ibid.* This convention never entered into force as it was only ratified by one state, Belgium in 1973. A minimum of three ratifications were needed. See *Chart of Signatures and Ratifications of the European Convention Providing a Uniform Law on Arbitration*, available at: “[www.coe.int/en/web/conventions/full-list/-/conventions/treaty/056/signatures?\\_p\\_auth](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/056/signatures?_p_auth)”

The *Schlosser Report*<sup>26</sup> notes, however, that the interpretation of this “arbitration exclusion” was not clear and created divergent positions, impossible to reconcile.<sup>27</sup> This seemingly simple “arbitration exclusion” therefore gave rise to a series of uncertainties, *inter alia*, (i) the uncertainty as to which arbitration related court proceedings were excluded; (ii) whether it was possible to start court proceedings to neutralize the arbitration process (so-called “Torpedo actions”); and (iii) whether it was possible to award anti-suit injunctions in favor of arbitration.<sup>28</sup>

The Brussels I Regulation (“Brussels I”),<sup>29</sup> which in 2002 replaced the Brussels Convention, did not resolve any of the uncertainties created by the arbitration exclusion either.<sup>30</sup> It was still unclear which types of arbitration-related court proceedings were to be excluded from the Brussels regime, including whether the exception encompassed actions relating to the enforcement or annulment of arbitral awards.<sup>31</sup> As a result the CJEU has tried to reduce the inherent unpredictability over the years, without great success.<sup>32</sup>

In 2012, a decade after the adoption of Brussels I, a new version, the Recast Brussels Regulation<sup>33</sup> (“Recast”) should shed some light on the arbitration exclusion. Recital 12 to the Preamble of the Recast clarifies that “[t]his Regulation should not apply to [...] *any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.*”<sup>34</sup> Recital 12 further asserts that the obligations of the EU States under the Recast should not prejudice their competence to decide on the enforcement of arbitral

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=gK0JbgXz” last accessed February 18, 2017. See also, Gaffney, John, *Should the European Union regulate commercial arbitration?*, (2016) *Arbitration International* 2016, p. 5.

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

27 See Schlosser Report, *ibid.*, p. 92.

28 See Huard-Bourgeois, Juliette and Tripathi, Swati, *Recast Brussels Regulation: A Brighter Future for Arbitration in the EU*, available at: “[www.lexology.com/library/detail.aspx?g=88696789-8e6f-4695-883d-747376eae2cf](http://www.lexology.com/library/detail.aspx?g=88696789-8e6f-4695-883d-747376eae2cf)” last accessed February 18, 2017; Anti-suit injunctions aim to protect and give effect to the arbitration agreement, whereas judicial review and enforcement proceedings of arbitral awards are ancillary to arbitration.

29 Brussels I, *supra* at footnote 7.

30 The arbitration exclusion of the Brussels Convention was restated *verbatim* at Art. 1 (2) lit. d of Brussels I; see *supra* at footnote 22.

31 Huard-Bourgeois and Tripathi, *supra* at footnote 28, refer to (i) actions relating to the validity of the arbitration agreement or its scope; (ii) actions ancillary to arbitration including actions for the appointment of the arbitral tribunal or the challenge of an arbitrator; (iii) actions relating to the enforcement – or annulment – of an arbitral award; and (iv) actions relating to the enforcement of a court judgment recognizing the validity of an arbitration agreement.

32 *Ibid.*

33 Recast, *supra* at footnote 7.

34 Emphasis added.

awards under the New York Convention.<sup>35</sup> In addition, Recital 12 affirms the supremacy of the New York Convention by stating that it “takes precedence over this Regulation”, meaning that any shortcomings of the New York Convention would automatically be transferred to the European scene of justice.

### 3.2 *International Arbitration: The New York Convention*

The New York Convention is an international convention whose signatories are under the obligation to recognize arbitral agreements and foreign arbitral awards. It has a wide scope of application and facilitates the recognition and enforcement of foreign arbitral awards in the territories of any of its 156 signatory states.<sup>36</sup>

Originally, the New York Convention replaced the 1927 Geneva Convention, for the states that are parties to both conventions,<sup>37</sup> and the 1923 Geneva Protocol.<sup>38</sup> It is considered to be an improvement and was appraised for being “the single most important pillar on which the edifice of international arbitration rests”.<sup>39</sup> Leaving certain deficiencies of the New York Convention aside, it has proven to be a success story. This is why, for now, there is hesitancy to modernize the Convention’s existing text.<sup>40</sup>

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

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

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”<sup>41</sup>

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35 Moreover, the new article 73.2 states that “[t]his Regulation shall not affect the application of the 1958 New York Convention”.

36 See Blackaby, Nigel et al., *Redfern and Hunter on International Arbitration*, 6th edn, Oxford University Press 2015, para 11.37.

37 See Art. VII(2) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

38 See Blackaby et al., *supra* at footnote 36, para. 11.40.

39 See *ibid.* with reference to Wetter, Gillis, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1990 Am. Rev. Int’l Arb., p. 93.

40 See *ibid.*

41 Emphasis added.

The term “may” instead of a more mandatory language such as “shall” or “must”, has been taken by some to mean that Art. V(1) of the New York Convention gives the state courts discretion whether to refuse enforcement or still recognize and enforce a foreign award even if it has been set aside at the seat of arbitration.<sup>42</sup> Some courts have reportedly taken this view and have regarded the annulment at the country of origin as being insufficient to impede the enforceability of an “international arbitral award”.<sup>43</sup> The practice of courts to enforce annulled awards can be seen as a certain inclination towards “delocalized” arbitration. Against this backdrop, the following question arises.

### 3.3 *Is arbitration Localized or De-localized?*

The debate on whether arbitral proceedings and the resulting arbitral awards are “localized” or “delocalized” to-date still remains unsettled, and centers around the principle of territoriality and the concept of party autonomy.<sup>44</sup> According to the principle of territoriality, a state is sovereign within its own borders and its law and courts have the exclusive right to determine the legal effect of acts done.<sup>45</sup> Party autonomy establishes that the binding authority of an award stems from the agreement of the parties.<sup>46</sup> Depending on how much force is given to either of these two concepts, different models of localization and delocalization are possible.<sup>47</sup>

The “localization theory” or “territorial approach” was widely accepted until the end of the 1970s and the beginning of the 1980s, and is based on the notion that every international arbitration procedure is necessarily linked to a given national system of law which will maintain control over the procedure and the arbitral award, i.e. the *lex fori* of the seat.<sup>48</sup>

Critics argue that this theory is contrary to party autonomy since it automatically subjects parties to the laws of the state in which their arbitration is

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42 See, e.g., Girsberger, Daniel and Voser, Nathalie, *International Arbitration: Comparative and Swiss Perspectives*, 3rd edn, Schulthess Verlag 2016, pp. 437–438 with further references; Blackaby et al., *supra* at footnote 36, para. 11.89.

43 Courts, e.g., in France, Belgium, Austria and the United States; see Blackaby et al., *supra* at footnote 36, para. 11.90.

44 See Goode, Roy, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, (2001) 17 *Arbitration International*, p. 24.

45 *Ibid.*, p. 21.

46 *Ibid.*

47 See *ibid.*, where Goode identifies at least six possible models, arranged in ascending order of delocalization. Some take a more moderate view and recognize the importance of court involvement in assisting and supporting the arbitral process but are against courts intervening in the process. Others take a more radical view and completely disregard the importance of the seat of arbitration and proclaim that judicial review by the courts at the seat is irrelevant to enforcement procedures.

48 See Sandrock, Otto, *To Continue Nationalizing or to De-Nationalize? That is Now the Question in International Arbitration*, 12 *Am. Rev. Int'l Arb.*, p. 305.



conducted.<sup>49</sup> However, proponents of the localization theory argue that party autonomy has to be integrated in a legal framework, which gives it legal meaning and effect and cannot by its virtue elevate arbitration to be detached from any national legal order.<sup>50</sup> The argument is that localized arbitration is not against party autonomy since the parties implicitly chose the *lex arbitri* to govern the proceedings by choosing the seat of arbitration.<sup>51</sup>

Under the localization theory, it is not possible to enforce annulled awards since the seat country is seen to have the role of reviewing the arbitral process, which took place under the supervision of its national legal system.<sup>52</sup> Judicial review of the arbitral proceedings has existed as long as arbitration has been an alternative to litigation.<sup>53</sup> However, court review mostly occurred during enforcement proceedings.<sup>54</sup> Nowadays, it is widely recognized that the courts at the seat of arbitration have jurisdiction to review the arbitral process and enjoy exclusive competence as regards setting aside actions.<sup>55</sup> Park noted that “[a]nnulment standards are matters for the place of arbitration, to be addressed in statutes interpreted by local judges.”<sup>56</sup> Under the territorial approach, therefore, once an award was set aside, there is no longer an award which can be enforced.

In the context of understanding the significance of judicial review of arbitral awards, it can be noted that although users to arbitration expect a final award, they do not want to be wholly outside the legal framework of national courts.<sup>57</sup> National court involvement and national legislation has the purpose to secure a

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49 See, e.g., Blackaby et al., *supra* at footnote 36, para. 2.01, 3.78.

50 In this regard Professor Weil’s statement seems appropriate that “[t]he principle of *pacta sunt servanda* and that of party autonomy do not float in space; a system of law is necessary to give them legal force and effect.” Translation in Blackaby et al., *supra* at footnote 36, para. 3.80 FN93 making reference to Weil, *Problèmes relatifs aux contrats passés entre un état et un particulier*, 1969, 128 Hague Recueil 95, p. 181.

51 *Ibid.*

52 See, e.g., Tweeddale, Andrew, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press 2007, para 13.85; van den Berg, Albert Jan, *Enforcement of Annulled Awards*, (1998) 9 The ICC International Court of Arbitration Bulletin, p. 15; Gaillard, Emmanuel, *The Enforcement of Awards Set Aside in the Country of Origin*, ICSID Review 1999, Vol. 14, p. 17.

53 See van den Berg, Albert Jan, *Should the Setting Aside of the Arbitral Award Be Abolished?*, (2014) ICSID Review, p. 3.

54 See *ibid.*

55 See *ibid.*, p. 4.

56 Park, William W, *Quis Custodiet Ipsos Custodes?*, *Arbitration of International Business Disputes*, 2d edn, Oxford University Press 2012, p. 144.

57 See Leurent, Bruno, *Reflections on the International Effectiveness of Arbitration Awards*, (1996) 12 *Arbitration International*, p. 272; Tweeddale, *supra* at footnote 52, para. 7.84; Goode, *supra* at footnote 44, p. 30. While it can be reckoned that parties generally do not want the arbitral process to be entirely removed from judicial review, they neither want judicial review to give rise to a multitude of proceedings, resulting in higher costs, and risks of conflicting decisions. See Leurent, *ibid.*, p. 273.

minimum standard of objectivity and fairness in the proceedings,<sup>58</sup> which is of utmost importance to parties in international arbitration.<sup>59</sup> In securing that standard, courts can be seen to play a dual controlling role at the end of the procedure, in the setting aside as well as in the enforcement procedure.<sup>60</sup>

The possibility of “double review”, however, may lead to conflicting decisions by different courts. This potential of double control is due to the award being reviewed on similar grounds in annulment and enforcement proceedings.<sup>61</sup> Gaillard noted that although double review does not amount to double exequatur, which the New York Convention wanted to abolish, it “is undoubtedly a step backwards.”<sup>62</sup> In this respect, the question arises as to why there should be any annulment proceedings at all.<sup>63</sup>

And this question ultimately brings about so-called “floating” or delocalized arbitration.<sup>64</sup> Proponents of the delocalization theory argue that arbitration agreements as well as arbitral awards should be recognized and enforced by national courts with little to no review and the arbitral award may “float” free from the constraints of the national laws of the seat of arbitration.<sup>65</sup> The rationale

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58 See, e.g., Moses, Margaret L., *The Principles and Practice of International Commercial Arbitration* (2d edn, Cambridge University Press 2012), p. 87; Carbone, Giulia, *Interference of the Court of the Seat with International Arbitration, the Symposium*, (2012) 2012 Journal of Dispute Resolution, p. 1, available at: “[scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1128&context=jdr](http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1128&context=jdr)” last accessed February 18, 2017.

59 See Strong, SI, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, (2012) Journal of Dispute Resolution, p. 10. This is evidenced by a decline of arbitrations conducted in a particular state after it abolished judicial review of arbitral awards and adopted *de facto* “delocalized” arbitration. Under an amendment to the Belgian Judicial Code in 1985, parties with no connection to Belgium in an international arbitration were not permitted to have their arbitral awards reviewed by Belgian courts, which resulted in a decrease of international arbitrations in Belgium. As a consequence, in 1998, Belgium amended the law again, giving parties the choice to opt out of setting aside proceedings instead. See Blackaby et al., *supra* at footnote 36, para 3.81. In Sweden the Titan v. Alcatel case (Svea hovrätt T 1038-05) drew much attention. In this case the Svea Court of Appeal refused to review an arbitral award based on the fact that the parties had no connection to Sweden, although the parties had chosen Stockholm as the seat of arbitration. This decision was heavily criticized, see e.g. Shaughnessy, SIAR 2005:2, p. 264 et seqq. The Swedish Supreme Court ultimately overturned the Svea Court of Appeal’s decision in NJA 2010 p. 508. See also Heuman, *Svensk domsrätt på skiljedomsrättens område*, Juridisk Tidskrift (JT) No. 4 2010/11, p. 955.

60 See Van Haersolte-van Hof, Jacomijn J. and Koppe, Erik V., *International Arbitration and the Lex Arbitri*, (2015) Arbitration International, p. 33.

61 See van den Berg, *Should the Setting Aside of the Arbitral Award Be Abolished?*, *supra* at footnote 53, p. 3.

62 Gaillard, Emmanuel, *Legal Theory of International Arbitration*, Martinus Nijhoff Publishers 2010, p. 33.

63 Park identifies at least one scholar who suggests complete elimination of pre-enforcement judicial review: Philippe Fouchard; see Park, William W., *Why Courts Review Arbitral Awards*, in *Festschrift für Karl-Heinz Böckstiegel*, (ed. Jens Bredow et al.), p. 595.

64 It can also be referred to as stateless or a-national arbitration. See Moses, *supra* at footnote 58, p. 60.

65 See Lew, Julian D.M., *Achieving the Dream: Autonomous Arbitration*, (2006) 22 Arbitration

is that international arbitration has “no forum”,<sup>66</sup> and derives its force solely from the agreement of the parties (party autonomy), unconnected to any national legal order.<sup>67</sup>

First seeds of the notion of delocalization appeared in the 1950s when Frédéric Eisemann, who participated in the drafting of the New York Convention, promoted this idea.<sup>68</sup> In the course of the 1980s practitioners and scholars, such as Jan Paulsson,<sup>69</sup> argued in favor of delocalization of international arbitration.<sup>70</sup> The movement towards delocalization was grounded on the parties’ and practitioners’ frustration with the interference by state courts with party autonomy.<sup>71</sup> Supporters of this theory argued that there was no reason why an international commercial arbitration had to be attached to a state’s national law.<sup>72</sup>

International arbitration, however, always had to coexist with national laws resulting from private consent and public power.<sup>73</sup> And historically, tensions have always existed between state control of arbitration and national law, on the one hand, and party autonomy and independence of arbitration, on the other hand.<sup>74</sup>

One of the main arguments in support of the delocalization theory is that parties to international arbitration often choose a seat of arbitration in one jurisdiction rather than another for its practicality, neutrality and convenience, which supposedly has nothing to do with the parties’ preference for the laws of that particular country,<sup>75</sup> and that parties might not even be aware that by

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International, p. 179; Park, William W., *The Lex Loci Arbitri and International Commercial Arbitration*, (1983) 32 *International and Comparative Law Quarterly*, p. 24; Moses, *supra* at footnote 58, p. 60.

66 See Tweeddale, *supra* at footnote 52, para. 7.72; Fouchard, Philippe, Gaillard, Emmanuel and Goldman, Berthold, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International 1999, para. 1181; see also Heiskanen, Veijo, *And/Or: The Problem of Qualification in International Arbitration*, (2010) 26 *Arbitration International*, p. 449 with further references.

67 See Goode, *supra* at footnote 44, p. 21: “In other words, at the very moment of its birth, produced by the consensual coupling of the parties in the arbitration process, the award took off and disappeared into the firmament, landing only in those places where enforcement was sought.”

68 See Lew, *supra* at footnote 65, p. 179.

69 See, e.g., Paulsson, Jan, *Arbitration Unbound: Award Detached From the Law of Its Country of Origin*, (1981) 30 *International and Comparative Law Quarterly*, p. 358; see also Paulsson, Jan, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, (1983) 32 *International and Comparative Law Quarterly*, p. 53.

70 See Goode, *supra* at footnote 44, p. 21, who makes reference to further supporters such as Pierre Lalive, Arthur von Mehren, Rene David, Berthold Goldman and Philippe Fouchard.

71 See Tweeddale, *supra* at footnote 52, para. 7.75; see also Goode, *supra* at footnote 44, p. 21.

72 See *ibid.*

73 See Lew, *supra* at footnote 65, p. 181.

74 See *ibid.*

75 See Brazil-David, Renata, *Harmonization and Delocalization of International Commercial*

choosing a specific seat of arbitration they bind themselves to its mandatory laws.<sup>76</sup> “Delocalists” are therefore usually in favor of enforcing awards annulled at the seat if the enforcement country sees fit.

### 3.4 Conclusion

The relationship between EU law and arbitration is complex. The Brussels regime has brought harmonization in the area of jurisdiction, recognition and enforcement of judgments relating to civil and commercial matters. Arbitration has been excluded from that regime because it was assumed that judgments relating to arbitral awards were sufficiently dealt with under the New York Convention.

While there is a harmonious development and approach in EU law guaranteed by the CJEU, a single body, which has the ultimate competence for interpreting EU law, the same is not achieved in arbitration. In the area of judgments relating to arbitration Art. V(1)(e) of the New York Convention leaves room for interpretation. Courts all around the world have discretion in interpreting the language as they see fit and are mandated to do so if faced with an annulled decision and an objection to enforcement under this particular provision. The rationale of the arbitration exclusion therefore stands on loose footing and undermines the objectives of a European area of justice.

Judicial review of the arbitral process is an important factor in arbitration, which involves courts at the seat of arbitration. Party autonomy and the seat of arbitration are important and well recognized concepts of international arbitration. In the specific area of the recognition or enforcement of annulled awards by national courts, the balance between party autonomy and the seat of arbitration may tip one way or the other.

Some scholars are of the opinion that recognition or enforcement of an annulled award should always be refused.<sup>77</sup> The argument is based on “localized” arbitration: an award that has been set aside ceases to exist and as a result nothing is left to enforce (the balance tips towards the seat of arbitration). Others argue that the setting aside of an award should not prevent enforcement. This opinion is based on the notion that international arbitration is “delocalized”, i.e., arbitration is not linked to any national legal order. Arbitral awards are seen as part of a transnational legal order (the balance tips towards party autonomy).

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*Arbitration*, (2011) 28 *Journal of International Arbitration*, p. 455; Heiskanen, *supra* at footnote 66, pp. 449-450; Lew, Julian D.M., Mistelis, Loukas A., Kröll, Stefan, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), p. 361.

<sup>76</sup> See Brazil-David, *supra* at footnote 75, p. 455.

<sup>77</sup> See Scherer, Maxi, *Effects of International Judgments Relating to Awards*, (2016) 43 *Pepp. L. Rev.*, p. 639 with further references. Scherer identifies, e.g., Hamid Gharavi, Georgios Petrochilos, Richard Hulbert and Albert Jan van den Berg.

## 4 The Principle of Mutual Trust

In this section the EU's principle of mutual trust is analyzed and brought into context. Jurisdictions which enforce annulled awards have a predisposition towards delocalized arbitration which as such contradicts mutual trust: a Member State court does not trust the other Member State court's judgment rendered but comes to a conflicting decision. While one Member State court may annul the award, another Member State court enforces it. Such situations are prevented under the Brussels regime for judgments relating to civil and commercial matters, however, not for such matters, which are the result of an arbitral proceeding.

The EU legal system is made up of certain fundamental principles, such as conferral, subsidiarity, proportionality and respect of international law obligations.<sup>78</sup> A specific principle has taken a prominent role in the European area of justice in civil and commercial law matters having cross-border influence: the principle of mutual trust.

This principle, although not clearly defined, has been adopted as the pillar for judicial cooperation in civil matters, and is specifically referred to in Arts. 67 (1), (4) and Art. 81 of the TFEU and Recitals 3 and 26 of the Recast Brussels I Regulation.<sup>79</sup> Similarly, Art. 4(3) of the TEU embeds the notion of mutual respect in the cooperation and application of EU law.<sup>80</sup>

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

### 4.1 *EU Member States Ought to Trust Each Other*

One may attempt to define mutual trust as the confidence Member States ought to have in each other's legal systems and courts, which results in the prohibition to review other state courts' decisions.<sup>81</sup> All EU Member States have signed treaties, according to which they share the same common values, to be found in Art. 2 of the TEU.<sup>82</sup> Affording trust to the legal orders of other states is justified

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78 See Benedettelli, *supra* at footnote 11, p. 583.

79 See Kramer, Xandra E., *Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights*, (2013) 60 *Netherlands International Law Review (NILR)* Vol. 60, Issue 3, p. 364.

80 See *ibid.*

81 See *ibid.*

82 Art. 2 TEU states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." See also Weller, *supra* at footnote 2, p. 74.

based on the common values underlying the legal orders of all states participating.<sup>83</sup>

Based on the values of “justice” and “rule of law”, the EU aims to fulfill its promise in Art. 3 (2) of the TEU to “offer its citizens an area of freedom, security and justice without internal frontiers”.<sup>84</sup> In addition, Art. 81 of the TFEU provides that “the European Union shall develop judicial co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases”.<sup>85</sup>

As a legal principle of the EU’s private international law, “mutual trust” became more relevant for the recognition of foreign judgments than for the choice of law.<sup>86</sup> Recital 26 of the Recast Brussels I Regulation explains that “[m]utual trust [...] justifies the principle that [...] a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.”<sup>87</sup> Thus, Recital 26 goes further in intensifying mutual recognition by removing any *exequatur* proceedings and fully equating judgments rendered by the courts of EU Member States with domestic judgments.<sup>88</sup>

The European Commission identifies mutual trust as a key factor in establishing the area of freedom, security and justice of the EU and affirms that mutual recognition appears as the predominant practice of granting such trust.<sup>89</sup> In the EU Justice Agenda for 2020, the European Commission further outlines the importance of enhancing mutual trust.<sup>90</sup>

In critical terms mutual trust could be described as a “myth” or as an “opaque and omnipresent buzzword”.<sup>91</sup> However, it is quite clear that the EU has built much of what is now considered the European area of justice on the principle of mutual trust, which it has used to justify and support further and deeper integration and judicial cooperation.<sup>92</sup> Mutual trust can therefore be considered an important underlying notion of EU law.

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83 See Weller, *supra* at footnote 2, p. 72, referencing to Friedrich Carl v. Savigny, *System des heutigen römischen Rechts* – Vol. III (Berlin, 1849), p. 27.

84 See also Weller, *supra* at footnote 2, p. 74.

85 *Ibid.*, p. 75.

86 *Ibid.*, p. 73.

87 Emphasis added. As has the previous Brussels I Regulation, Recital 16 explains that mutual trust in the administration of justice within the EU “justifies judgments given in a Member State being recognized automatically without the need for any procedure except in cases of dispute”. Recital 17 also makes reference to mutual trust.

88 See Weller, *supra* at footnote 2, p. 82; see also Kramer, *supra* at footnote 79, p. 364.

89 See Weller, *supra* at footnote 2, p. 75 with further references.

90 See EU Justice Agenda for 2020, *supra* at footnote 5. In this communication, the European Commission sets out the political priorities that should be pursued in order to make further progress towards a fully functioning common European area of justice oriented towards trust, mobility and growth by 2020; see also Weller, *supra* at footnote 2, p. 65.

91 See Weller, *supra* at footnote 2, pp. 67, 100.

92 See Storskrubb, Eva, *Civil Procedure and EU Law: A Policy Area Uncovered*, Oxford University Press 2008, p. 168.

## 4.2 Cases

A number of cases in the context of the Brussels regime within the EU have turned on an extensive interpretation of the underlying principle of mutual trust.<sup>93</sup> The CJEU has applied the notion of mutual trust for the first time in *Gasser*<sup>94</sup> and then later in *Turner*.<sup>95</sup> These cases are relevant and representative for what mutual trust in the EU stands for, and how the CJEU has used it as an interpretative tool. They fit into the broader context of the Brussels regime and show how Member State courts are asked to trust each other and each other's judicial systems, regardless of comparatively excessive duration of proceedings and bad faith actions of a party.

The cases discussed in more detail below are at the intersection of mutual trust and arbitration and are therefore of particular importance for this article. The CJEU has again relied on mutual trust in justifying the outcome of its decision. The scope of the arbitration exclusion has played a prominent role.

In the controversial decision of *West Tankers*,<sup>96</sup> the CJEU invoked the principle of mutual trust and held that the English court's practice of granting anti-suit injunctions to prevent parallel proceedings in other Member State courts and to give effect to an arbitration agreement is not compatible with Brussels I.<sup>97</sup>

A vessel owned by West Tankers and chartered by Erg Petrol SpA (Erg) collided with a jetty in Syracuse, Italy.<sup>98</sup> The charterparty was governed by English law and contained a clause for arbitration in London.<sup>99</sup> Allianz and Generali paid compensation to Erg for the losses it had suffered under the insurance policies and started court proceedings in Italy against West Tankers in order to recover the sums paid to Erg.<sup>100</sup> In parallel, West Tankers obtained an anti-suit injunction requiring Allianz and Generali to discontinue the proceedings commenced before the Italian court. Upon appeal, the House of Lords made a referral to the CJEU.<sup>101</sup>

Since Art. 1(2)(d) of Brussels I generally excludes matters involving arbitration, it seemed that West Tankers was outside of Brussels I and the CJEU admitted as much stating that "the main proceedings, which lead to the making

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93 Weller, *supra* at footnote 2, p. 101.

94 Case C-116/02 – Erich Gasser GmbH v Misat Srl (2003) I-14693. In light of Art. 27 of Brussels I, according to which "any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established" and "[w]here the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

95 Case C-159/02 – Turner v Grovit (2004) ECR I-3565.

96 Case C-185/07 – Allianz SpA et al v West Tankers Inc (2009) ECR I-663 (West Tankers).

97 See Dickinson and Lein, *supra* at footnote 24, pp. 42, 57.

98 West Tankers, *supra* at footnote 96, para. 9.

99 *Ibid.*

100 *Ibid.*, para. 11.

101 *Ibid.*, paras. 12-13.

of an anti-suit injunction, cannot [...] come within the scope of Regulation No 44/2001.”<sup>102</sup>

The House of Lords argued that the Brussels regime provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States, which must trust each other to apply those rules correctly, and referred to the judgments in *Gasser* and *Turner*.<sup>103</sup> Its view was that in the field of arbitration, which is excluded from the scope of Brussels I, there is no set of uniform rules, which is a necessary condition in order to establish mutual trust between the courts of the Member States.<sup>104</sup>

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

“[...] even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and *the free movement of decisions in those matters*.”<sup>105</sup>

The CJEU held that anti-suit injunctions by one Member State court issued in view of proceedings before the court of another Member State touch upon the relationship between Member State courts and therefore upon mutual trust.<sup>106</sup> Despite that the main proceedings before state courts related to arbitration and regardless of the arbitration exception, the CJEU brought anti-suit injunctions under the scope of the Brussels regime based upon the mutual trust principle.

Ultimately not the court at the seat of arbitration but another court was seized with determining the validity of an arbitration agreement, upon which the English “seat” court issued an anti-suit injunction. The CJEU, however, held that this was against the principle of mutual trust. Notwithstanding that the seat of arbitration was in London, therefore the *lex arbitri* was the English Arbitration Act 1996, which allows for anti-suit injunctions.

In another prominent case, *Gazprom*,<sup>107</sup> the CJEU considered whether a Member State could refuse to recognize and enforce an arbitral award containing an anti-suit injunction by which an arbitral tribunal restricted a party from

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102 *Ibid.*, paras. 22-23.

103 *Ibid.*, para. 14.

104 *Ibid.*, para. 15.

105 *Ibid.*, para. 24; Emphasis added; in this regard criticizing, see Requejo, Marta, *Rafael Arenas on West Tankers*, available at “<http://conflictoflaws.net/2009/rafael-arenas-on-west-tankers/>” last accessed February 18, 2017; see also George, Martin, *Harris on West Tankers*, available at “<http://conflictoflaws.net/2009/harris-on-west-tankers/>” last accessed February 18, 2017: “[I]t is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion.”

106 See *West Tankers*, *supra* at footnote 96, para. 30; see also Weller, *supra* at footnote 2, p. 86.

107 Case C-536/13 - “Gazprom” OAO v Lietuvos Respublika (2015) (Gazprom).



bringing proceedings before a Member State court in breach of an arbitration agreement.<sup>108</sup>

Gazprom commenced arbitration against the Lithuanian state in Stockholm under the shareholders' agreement. It sought an order requiring the Lithuanian Ministry of Energy to withdraw the proceedings it had brought before Lithuanian courts, because of the existence of an arbitration agreement and the necessity therefore to arbitrate the dispute. The arbitral tribunal rendered an award, which contained a decision on the merits and an anti-suit injunction.<sup>109</sup> Gazprom sought recognition of the tribunal's award before the Lithuanian Court of Appeal, which refused recognition and enforcement of the arbitral award based on a violation of Lithuanian public policy.<sup>110</sup> This decision was appealed to the Lithuanian Supreme Court, which made a referral to the CJEU.

Although Recast Brussels I was not in force at that time, Advocate General Wathelet<sup>111</sup> still heavily relied on its recitals to interpret Brussels I.<sup>112</sup> In the Advocate General's opinion, recognition and enforcement of the decisions of arbitral tribunals fell exclusively within the scope of the New York Convention.<sup>113</sup>

The CJEU did not reason based on the Recitals of the Recast but instead focused its decision on Art. 1(2)(d) of Brussels I, which simply states that arbitration does not fall within the scope of Brussels I.<sup>114</sup> The CJEU reaffirmed its decision in *West Tankers* that anti-suit injunctions are not compatible with Brussels I.<sup>115</sup> It distinguished this case, however, from *West Tankers* insofar as it was not a Member State court that issued the restraining order but an arbitral tribunal.<sup>116</sup> It clarified that arbitration is excluded from the scope of the Brussels regime<sup>117</sup> and in particular held that

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108 See Dickinson and Lein, *supra* at footnote 24, p. 81.

109 *Ibid.*, p. 80.

110 *Ibid.*

111 During the Court's general meeting it is decided whether an official opinion from the Advocate General is necessary. Opinions by Advocate Generals have no binding force but may serve the CJEU in its decision-making. For more information see "europa.eu/european-union/about-eu/institutions-bodies/court-justice\_en" last accessed February, 18, 2017.

112 He relied, e.g., on Recital 12 (4) of Recast Brussels I, which states that the Regulation does not apply to an action or "ancillary proceedings relating to [...] the conduct of an arbitration procedure or any other aspects of such a procedure, nor to [...] the [...] recognition or enforcement of an arbitral award."

113 See, Opinion of Advocate General Wathelet in Case C-536/13 (4 December 2014), paras. 153, 157.

114 Gazprom, *supra* at footnote 107, para. 28.

115 *Ibid.*, para. 32 et seq.

116 *Ibid.*, para. 35.

117 See *ibid.*, para. 36.

“so far as concerns the principle of mutual trust [...], in the circumstances of the main proceedings, as the order has been made by an arbitral tribunal there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.”<sup>118</sup>

Therefore it was within the discretion of the Lithuanian Supreme Court whether to recognize or not the arbitral award since the CJEU held that the proceedings for the recognition and enforcement of an arbitral award were covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Brussels I.<sup>119</sup>

### 4.3 *Conclusion*

The CJEU has repeatedly reinforced the importance of mutual trust between Member State courts. In *West Tankers*, the anti-suit injunction issued by a Member State court prohibiting a party from commencing proceedings before the court of another Member State fell within the Brussels regime, and violated mutual trust, regardless of the fact that the injunction was issued in regards to arbitration. The CJEU observed that orders which touch upon the relation between Member State courts touch upon mutual trust.<sup>120</sup>

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

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

## 5 **The Enforcement of Annulled Arbitral Awards**

As has been shown in Section 3.3. above, the controversy when it comes to the enforcement of annulled awards is interlinked with the debate regarding delocalized/localized arbitration. Applying the principle of *ex nihil nihil fit* (nothing can come of nothing), one view is that the award as a result of the annulment does not exist and cannot be enforced.<sup>121</sup> The contrary view is that international arbitration awards are delocalized from the seat and therefore an

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118 *Ibid.* para. 37.

119 *See ibid.*, para 41.

120 *West Tankers*, *supra* at footnote 96, para 30; *see also* Weller, *supra* at footnote 2, p. 86.

121 *See, e.g.*, Tweeddale, *supra* at footnote 52, para. 13.85; van den Berg, *Should the Setting Aside of the Arbitral Award Be Abolished?*, *supra* at footnote 53, p.17; *see also* Scherer, *supra* at footnote 77, p. 639.

annulment has no effects on the award.<sup>122</sup> Most countries assert their entitlement for setting aside an award for arbitrations taking place within their jurisdictions and may refuse to enforce awards that have been set aside at the seat under Art. V(1)(e) of the New York Convention.<sup>123</sup>

Professor Pieter Sanders, an extremely influential “founding father” of the New York Convention in 1959 offered his view that despite the New York Convention’s permissive text,<sup>124</sup> nullified awards must be refused enforcement as “enforcing a non-existing arbitral award would be an impossibility.”<sup>125</sup> However, some courts around the world have achieved the “impossible”, as can be seen in the cases shown below.

## 5.1 Cases

The purpose of this section is to give a demonstration of the differing approaches to annulled awards or the relevance of the seat court’s judgments as perceived by state courts in the EU. The lack of a harmonious approach for post-award judgments undermines the advancement of the European area of justice and overshadows the Member State court’s expectations towards mutual trust. A complete analysis of all cases where such practice has occurred is outside the scope of this article. The French and German approaches are discussed in this article for two main reasons. First, both France and Germany are Member States of the EU. Second, their approaches are in complete contrast to each other and therefore serve as a good example of how disparate the positions by just two jurisdictions in the EU can be.<sup>126</sup>

### 5.1.1 The French Approach

In the leading decision of *Hilmarton*,<sup>127</sup> an award was recognized and enforced although it had been set aside in Switzerland. The French *Cour de Cassation* stated:

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122 See Tweeddale, *supra* at footnote 52, para. 13.85.

123 See Tweeddale, *supra* at footnote 52, para. 7.77; see also ICCA’s Guide to the Interpretation of the 1958 New York Convention, p. 83.

124 Art. V(1)(e) of the New York Convention can be interpreted as either permissive or mandatory.

125 Sanders, Pieter, *New York Convention and the Recognition and Enforcement of Foreign Arbitral Awards*, (1959) Netherlands International Law Review, p. 55. Text (reference at p. 110) available at “[www.arbitration-icca.org/media/1/13467703664740/new\\_york\\_convention\\_on\\_the\\_recognition\\_and\\_enforcement\\_of\\_foreign\\_arbitral\\_awards.pdf](http://www.arbitration-icca.org/media/1/13467703664740/new_york_convention_on_the_recognition_and_enforcement_of_foreign_arbitral_awards.pdf)” last accessed February 18, 2017.

126 See Member Countries of the EU available at “[europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm)” last accessed February 18, 2017.

127 *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* (1994) Rev. Arb., p. 327 et seqq; English excerpts, see XX Y.B. Com. Arb., p. 663; see also Blackaby et al., *supra*

“ [...] the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside.”<sup>128</sup>

The arbitration agreement specifically stated that the “arbitration shall take place in Geneva under the law of the Canton of Geneva”.<sup>129</sup> The terms and the intentions of the parties could thus not have been any clearer.<sup>130</sup> The law the parties had chosen permitted judicial review of the arbitral award.<sup>131</sup> It has been suggested that in enforcing the annulled award the French court, relying on the concept of delocalization whose fundament is party autonomy, undermines the theory rather than supports it.<sup>132</sup>

In another prominent case, *Putrabali*,<sup>133</sup> an award set aside in England was enforced in France.<sup>134</sup> Rena Holding and PT Putrabali Adyamulia (Putrabali) had entered into a contract for the sale of white pepper. A dispute arose and Putrabali initiated arbitration in London and asked for payment. The arbitral tribunal found that there was no breach by Rena Holding and that no payment was due. An award in favor of the Rena Holding was therefore rendered.

The award was partially annulled by the High Court of London on the basis of an error of law.<sup>135</sup> As a result, a second award was rendered, this time in favor of Putrabali, finding that there was a breach of contract and that Rena Holding had to pay. Therefore, two arbitral awards with completely opposite outcomes were rendered. In the meantime, Rena Holding sought enforcement of the first award in its favor in France (which had been set aside), and Putrabali also sought enforcement of the second award in its favor in France. The French *Cour de Cassation* enforced the first nullified award and later refused the enforcement of the second award on the basis of *res judicata*, that the second award was precluded by the first. Notable is the French *Cour de Cassation*'s reasoning:

“[...] an international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought.”<sup>136</sup>

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at footnote 36, para. 11.94.

128 See reprinted in Blackaby et al., *supra* at footnote 36, para. 11.94.

129 See Tweeddale, *supra* at footnote 52, para. 7.79.

130 *Ibid.*

131 *Ibid.*

132 *Ibid.*

133 *Soci t  PT Putrabali Adyamulia v Soci t  Rena Holding et Soci t  Mnogutia Est Epices* (2007) Rev. Arb., p. 507 et seq.

134 See also Blackaby et al., *supra* at footnote 36, para. 11.96.

135 Review of such questions are allowed under the English Arbitration Act 1996.

136 Emphasis added.

The *Putrabali* decision outlines the French approach: arbitral awards are not fixed in any national legal order, but are “international decisions of justice”, judgments relating to such awards (outside of France that is) are irrelevant in France. The ground of refusal according to Art. V (1)(e) of the New York Convention, i.e., refusing to enforce an award based on its annulment in the country of origin, is not foreseen by French law. The French court relied on Art. VII of the New York Convention according to which a more favorable domestic law may be applied, thus applying French national arbitration law to the enforcement of the award rendered in England.<sup>137</sup>

In sum, it can be said that annulment at the place of arbitration has very little to no relevance in France. The focal point is the award, set free from annulments.

### 5.2.2 The German Approach

German courts take the completely contrary position to the French approach. Under the German view, the award is inseparably linked to the judicial regime of the seat of the arbitration.<sup>138</sup> Therefore, German courts tend to follow the determination of the seat court and refuse to enforce annulled arbitral awards. German law even specifically provides that courts may reverse its earlier decision to enforce an award if it is subsequently set aside at the seat of arbitration.<sup>139</sup> Although the cases shown below involve annulment judgments rendered by Non-EU Member States, they are insightful as to how Germany approaches this issue. It is argued that Germany would act in the same manner regarding annulment judgments rendered by EU Member State courts since the German approach is not primarily based on the jurisdiction from which the judgment annulling an award emerges.

In BGH III ZB 59/12<sup>140</sup> the German Supreme Court had to rule on the Higher Regional Court of Munich’s refusal to enforce an annulled award.<sup>141</sup> A German and Ukrainian party had entered into an exclusive distribution agreement, giving the Ukrainian party exclusive right to sell beet-harvesting machines produced by the German party in the territory of Ukraine. The agreement also included a penalty clause in case there was a violation of this exclusive distribution agreement. A dispute arose between the parties after the German producer had directly sold ten harvesting machines to a third party in Ukraine. The Ukrainian party started arbitration and the award was rendered in its favor, obliging the

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137 Besides France, jurisdictions such as the Netherlands and Belgium have laws that differ from Art. V (1)(e) New York Convention and allow for a more favourable rule for the recognition and enforcement of arbitral awards. See Poudret, Jean-François and Besson, Sébastien, *Comparative Law of International Arbitration* (2nd edn, 2007), para. 926.

138 See Silberman, Linda and Scherer, Maxi, *Forum Shopping and Post-Award Judgments*, PKU Transnational Law Review 2014 Vol. 2:1, p. 119 with further references.

139 *Ibid.*

140 German Supreme Court (BGH) decision of 23 April 2013.

141 See *Zur Vollstreckbarerklärung Eines Im Ursprungsstaat Aufgehobenen Schiedsspruchs*, SchiedsVZ 2013, 229.

German party to pay a certain amount in penalty and other expenses. The German party started setting aside proceedings arguing that this specific penalty clause violated Ukrainian public policy, which resulted in the annulment of the award.<sup>142</sup> The Higher Regional Court of Munich dismissed the application for enforcement;<sup>143</sup> the applicant filed an appeal, which the German Supreme Court ruled to be non-admissible.<sup>144</sup> The Supreme Court reasoned among others based on Art. V(1)(e) of the New York Convention, which it found to be applicable.

Germany's approach is to consistently rely on a set aside judgment from foreign courts and refuse to enforce an annulled award. Germany's reliance on the seat country's judgment goes even so far as to reverse its earlier decision not to enforce an annulled award after the award's annulment is overturned in the country of origin, as can be seen in BGH III ZB 71/99.<sup>145</sup> In this case, the parties had entered into a contract for repair work of a motor vessel. A dispute arose between the parties after which the claimant started arbitration proceedings at the Chamber of Industry and Commerce of the Russian Federation and sought payment, delay compensation and reimbursement. After the award was rendered, the respondent succeeded to set aside the award based on the argument that the dispute had not been foreseen by the arbitration agreement. When the claimant sought enforcement of the annulled award in Germany, the German Higher Regional Court of Rostock refused to grant it.<sup>146</sup> The Russian Supreme Court, however, afterwards overturned the annulment decision and confirmed the award, which led the German Supreme Court to reverse the German Higher Regional court's decision, and deem the award enforceable.<sup>147</sup>

Therefore, under the German approach, the enforcement court mirrors the actions of the courts at the seat of arbitration. The award is inextricably attached to its national origins, it ceases to exist if it is annulled and may just as well be revived and subject to enforcement if the annulment decision is later overturned by a higher court at the seat.

## 5.2 *Conclusion*

While it is recognized that the award does become a legal nullity within the jurisdiction where the annulment took place, the specific effects of such an annulment to enforcement procedures elsewhere are not coherent and consistent. It seems to depend largely on a case-by-case basis and the inclination of a jurisdiction towards delocalized arbitration, such as France, which has

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142 *Ibid.*

143 OLG München, Beschluss v. 30.07.2012 – 34 Sch 18/10.

144 *See Zur Vollstreckbarerklärung Eines Im Ursprungsstaat Aufgehobenen Schiedsspruchs*, SchiedsVZ 2013, 229.

145 German Supreme Court (BGH) decision of 22 February 2001.

146 *See Silberman and Scherer, supra* at footnote 138, p. 119; Oberlandesgericht Rostock (OLG Rostock) 28 October 1999.

147 *See Silberman and Scherer, supra* at footnote 138, pp. 119-120.

repeatedly shown its readiness to enforce annulled awards. The current framework gives the possibility for an annulled award to be enforced, lacking any predictability and legal certainty.

Notwithstanding decisions such as the ones discussed above, the enforcement of awards that have been set aside by the courts of the place of arbitration therefore remains controversial.<sup>148</sup> The mechanism of judicial review that is called “annulment” therefore does not give its name full justice, as the procedure does not automatically result in a legally null award in all jurisdictions and in every case.

## 6 A Critical Analysis

### 6.1 *Reflections on mutual trust and the enforcement of annulled awards*

In the previous sections, it has been shown that an important principle in the EU is mutual trust. This principle aims at the free circulation of judgments rendered by Member State courts, which should be treated as if they were domestic judgments.<sup>149</sup> How does this relate to arbitration? The arbitration exclusion was not enough to exclude anti-suit injunctions from the scope of the Brussels regime, although they had been issued in view of arbitral proceedings (see *West Tankers*). When it comes to an arbitral tribunal’s restraining orders, these, however, do fall within the arbitration exclusion of the Brussels regime (*Gazprom*). Mutual trust does not need to apply between arbitral tribunals and Member State courts.

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

This article therefore suggests that the principle of mutual trust offers no place for enforcing annulled awards, which is a manifestation of delocalized arbitration. A Member State court that enforces an award, which has been set aside by a court of another Member State acts contrary to mutual trust.

There are three main issues that need to be considered:

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

(2) there is a lack of efficiency: anti-suit injunctions in favor of arbitration are not allowed, hindering thereby arbitration and making it necessary for parties to

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148 See Blackaby et al., *supra* at footnote 36, para. 11.97.

149 See Recital 26 of the Recast Brussels I Regulation.

spend more time and costs in litigation proceedings (which in arbitration the parties intend to avoid); and

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

Focusing on point (3), there is a contradiction in the way the EU aims to deepen the integration, obscuring that this goal is not being fulfilled in the area of enforcement of arbitral awards that have been annulled, resulting in the possibility of having two contradicting judgments from two different EU Member States dealing with exactly the same matter.

According to the CJEU in *West Tankers*, whatever benefit parties obtained from the availability of anti suit relief from English courts, it is outweighed by the need for uniformity among EU Member States.<sup>150</sup> For more consistency, this article suggests that the same ought to apply to annulment vs. enforcement procedures in EU Member State courts regarding arbitral awards.<sup>151</sup>

The ultimate question is whether mutual trust should be exercised as regards the judicial review of arbitral awards in EU Member States. The answer to this question, in the interest of the EU, is yes. The aim of the EU is to have each EU Member State court be essentially equal. If the enforcement court, however, enforces an award that has been annulled through a judgment in another EU Member State court, the objective of equality is not attained since the enforcing court would be exercising a kind of appeal function. And in any event, conflicting decisions cannot be in the interest of a harmonized internal market and an efficient European area of justice.

The current Brussels regime excludes arbitration and clearly sets out that the New York Convention stands above it. That some court judgments fall under the regime, while others simply because they relate to arbitration do not, can be seen as a conceptual flaw in the European area of justice, opening up an incoherent approach in the fundamental principle of mutual trust. The reason behind the Brussels regime's arbitration exception was that the New York Convention already provided a framework for the recognition and enforcement of arbitral agreements and arbitral awards. However, the New York Convention leaves a gap that must be seen as contrary to the EU's main objective of creating a single functioning market for two main reasons. First, the arbitration exclusion of the Brussels regime was justified by the accession of Member States to the New York Convention, which was assumed to meet the original aim of Art. 220 of the

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150 See Rainer, Daniel, *The Impact of West Tankers on Parties' Choice of a Seat of Arbitration*, (2010) 95 Cornell Law Review, p. 460; see also *West Tankers*, *supra* at footnote 96.

151 See, e.g., Benedettelli, *supra* at footnote 11, pp. 589-590 who states: "Should one take the rationale of *West Tankers* to its extreme conclusion, other judicial measures in support of arbitration [...] could be considered to breach the principle of mutual trust, and to be therefore forbidden, whenever a judicial action relating to the same subject matter is already pending before the courts of another Member State."



EEC Treaty. The aim was “the simplification of formalities governing the *reciprocal recognition and enforcement of judgments* of courts or tribunals and of *arbitration awards*.”<sup>152</sup> This aim is presently not met as regards arbitration awards. There is no “reciprocal recognition and enforcement of arbitration awards”. Second, there is no uniform interpretation of the provisions of the New York Convention, unlike for the provisions of the Brussels I Regulation, which becomes problematic in regards to harmonizing this area within the EU.

## 6.2 Conclusion

On the one hand, the EU declares mutual trust in each other’s judicial systems a fundamental principle in its area of justice, but on the other hand allows for conflicting decisions based on a notion of distrust. This is exactly what occurs if the seat court annuls the award and the court in the state where enforcement of the arbitral award is sought, disregards any judgment of annulment but instead enforces the annulled award (French approach). This practice is controversial and should be even more so in the EU. First, this solution increases the risk of contradicting decisions by enabling each state to decide differently than the annulment judgment rendered at the seat of arbitration.<sup>153</sup> Second, it creates legal uncertainty because it refuses to give the last word to the judge setting aside the award so that an award, even if it has been successfully set aside before the judge of the seat, continues to pose a threat to the party who lost the arbitration.<sup>154</sup>

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

## 7 The Way Forward: European Court for International Commercial Arbitration

In order to achieve the kind of integration necessary to have a uniform European area of justice, this article advances the idea of the formation of a whole new court: the “European Court for international commercial arbitration”. This new European court would replace national court involvement in arbitration and would have exclusive and final jurisdiction over all matters concerning jurisdiction, setting aside and enforcement proceedings. With the formation of such a court, the need for a seat of arbitration would be removed and independence from national courts would be achieved. There are many uncertainties surrounding the standards applied by national courts in determining whether an arbitral award should be annulled or enforced and approaches adopted by EU Member State courts are not uniform when it comes to enforcing

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152 Emphasis added.

153 See Poudret and Besson, *supra* at footnote 137, para. 929.

154 *Ibid.*

annulled awards. A European Court for international commercial arbitration would solve these inherent flaws and ambiguities.

The idea for a unified international arbitration court has been put forward as early as 1958 in deliberations leading up to the New York Convention and prominent jurists such as Albert Jan van den Berg, H.E. Judge Howard M. Holtzmann and Judge Stephen M. Schwebel are among the proponents of such a court.<sup>155</sup> Albert Jan Van den Berg identified a lack of efficiency in the current framework and suggested that “[i]f we really want to improve the current situation, States should transfer control over an international arbitral award to an independent international body. The body would have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all countries.”<sup>156</sup>

This idea is based on the ICSID model, where an *ad hoc* committee is responsible for annulment proceedings with universal effect and enforcement takes place “as if it were a final judgment of a court of that State”.<sup>157</sup> Also it has been suggested that “[i]nternational harmonization of solutions is indispensable to improve the effectiveness of arbitral awards, and it would seem at present that the way to such harmonization lies through concerted centralization of the reviews conditioning the effectiveness of awards.”<sup>158</sup>

The argument in favor is that an international court would render reliance on national courts unnecessary and improve efficiency and certainty. A critique, however, is that the seat of arbitration is what gives jurisdictions the competitive advantage and the stimulus to always adapt and create better suited national arbitration legislations so that parties are incentivized to choose a particular seat.

Although the disparate approaches taken by courts regarding the enforcement of annulled awards and the problem of “double review” have been highly debated, the solution of creating an international court has not been seriously considered, as it would entail changing the success story that is the New York Convention. The question is whether such an international court could be established on the basis of a modified New York Convention or rather an entirely new convention, inspired by the challenge procedure of the ICSID convention. Changing the New York Convention, although entirely plausible, given that it

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155 See Holtzmann, HE Judge Howard M., *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in Hunter, Martin, Marriott, Arthur and Veeder, V.V. (eds), *The Internationalisation of International Arbitration (The LCIA Centenary Conference 1995)*, p. 109; Schwebel, HE Judge Stephen M., *The Creation and Operation of an International Court of Arbitral Awards*, in Hunter *et. al.*, *ibid.*, p. 115; van den Berg, *Should the Setting Aside of the Arbitral Award Be Abolished?*, *supra* at footnote 53, p. 25.

156 van den Berg, *Should the Setting Aside of the Arbitral Award Be Abolished?*, *supra* at footnote 53, p. 25.

157 *Ibid.*; Art. 54(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force 14 October 1966).

158 Leurent, *supra* at footnote 57, p. 271.

came into force in 1958 and much has happened since then, is rather unlikely due to the necessary consent of the signatory states to accept such a change.

The idea of creating such an international court has been portrayed as an “impossible dream.”<sup>159</sup> Within the EU, however, this dream can become very real for EU Member States. Similar to the ICSID Convention, where the decision by the *ad hoc* committee leads to automatic enforcement in all contracting states, the European Court for international commercial arbitration’s decision would lead to an automatic effect in all EU Member States, eliminating the possibility of a national court to review the grounds for refusing enforcement again, thus eliminating the problems associated with double review and parallel proceedings.<sup>160</sup>

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

Also, the EU has the competence to regulate in the area of international arbitration and also has a real interest in doing so.<sup>161</sup> The Commission’s Green Paper regarding the Brussels I Recast proposal in particular pointed out that “[a]rbitration is a matter of great importance to international commerce”, the “1958 New York Convention is generally perceived to operate satisfactorily” and as such can be left “untouched or at least as a basic starting point for further action.”<sup>162</sup> The Green Paper further made clear that this “should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.”<sup>163</sup> In particular, the Commissions’ Explanatory Memorandum of the 2010 Proposal to the recast of the Brussels I Regulation stated that:

“Member States cannot by themselves ensure that arbitration proceedings in their Member State are properly coordinated with court proceedings going on in

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159 Read, Pippa, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 *Am. Rev. Int’l Arb.* (1999), p. 187.

160 See Art. 54(1) of the ICSID Convention. For more information on special features of ICSID arbitrations, see, generally, Moses, *supra* at footnote 58, p. 235.

161 See Benedettelli, *supra* at footnote 11, p. 600.

162 Green Paper on the Review of Council Regulation (EC) No. 44/2001 - COM(2009) 175 final, p. 8. Green Papers are published to launch a European level consultation process, they invite relevant parties to participate in discussions on the basis of the proposals put forward and may give rise to legislative developments that are then outlined in White Papers. See *Glossary of summaries - Green Paper* available at “[eur-lex.europa.eu/summary/glossary/green\\_paper.html](http://eur-lex.europa.eu/summary/glossary/green_paper.html)” last accessed February 18, 2017.

163 *Ibid.*

another Member State because the effect of national legislation is limited by the territoriality principle. Action at EU level is therefore necessary.”<sup>164</sup>

Such action could be the establishment of a European Court for international commercial arbitration.

## 7 Concluding Remarks

The Brussels regime created an efficient judicial system, which is essential for the functioning of the internal market.<sup>165</sup> However, arbitration exists as a parallel system of adjudication, excluded from the Brussels regime and falling within the exclusive competence of Member States in its entirety.<sup>166</sup> This article identified a particular inherent conflict in the system of the European area of justice, and its underlying principle of mutual trust with delocalized arbitration and the enforcement of nullified awards. This cannot be considered an optimal solution from the EU’s point of view, as cooperation between EU Member State courts is important for a harmonized area of justice.<sup>167</sup>

A uniform European regime on arbitration would be beneficial to further integration in the EU.<sup>168</sup> A harmonious approach would facilitate the free circulation of judgments regarding arbitral awards, which can be considered an objective of the EU.

For now, jurisdictions within the EU can still entertain the notion of international arbitration as a legal order detached from any national legal system. Member State courts - in their discretion - can disregard the seat court’s annulment judgment based on the non-mandatory language of Art. V(1)(e) of the New York Convention, and enforce nullified arbitral awards. The seat of arbitration, being it in Vienna, Paris or Stockholm, can retain its national peculiarities and give arbitration a “national flavour”, even if within the EU.

The New York Convention has contributed to the dramatic rise in popularity of arbitration. Resistance from including arbitration in the Brussels regime, however, stems from caution to interfere with the functioning of the New York Convention, which may have the effect of reducing the appeal of Member States as seats of arbitration.<sup>169</sup>

This article has advanced the idea of establishing a new European Court for international commercial arbitration that would replace national court involvement in arbitration within the EU and have the exclusive jurisdiction to

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164 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) - COM(2010) 748 final, p. 11.

165 See Cole, *supra* at footnote 9, p. 197.

166 *Ibid.*

167 *Ibid.*

168 *Ibid.*

169 *Ibid.*

set aside an arbitral award. Enforcement of the award would be automatic in all Member States. This way the conflict identified in this article between the principle of mutual trust and the enforcement of annulled arbitral awards could be resolved.

