

**EU COMMISSION REPORT & GREEN PAPER  
ON COUNCIL REGULATION (EC) No 44/2001**

**ASA Below 40  
Zurich - 27 November 2009**

**CASTALDI MOURRE & PARTNERS**

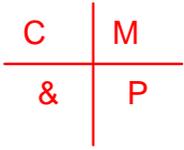
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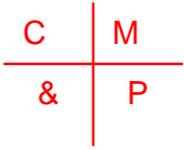
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## Structure of the Talk

- I. Issues arising on Art. 1(2)(d)  
“the Arbitration exclusion” prior & after West Tankers**
- II. Options and Prospective Solutions  
(EU Green Paper, IBA Submission to the EU)**
- III. Is Switzerland Concerned?**
- IV. Summary Conclusions**



# I. Issues arising on Art. 1(2)(d) “the Arbitration exclusion” prior & after West Tankers

*Pre-West Tankers: ECJ practice*

## **Marc Rich:**

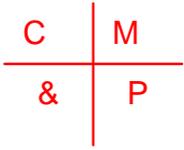
- ☞ The Arbitration Exclusion must be interpreted as meaning that the exclusion extends to litigation pending before national court relating to the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation

## **Van Uden:**

- ☞ Member States’ courts can grant provisional and conservatory measures on the ground pursuant to article 31 of the Regulation

## **Turner:**

- ☞ The principle of Mutual Trust prevent Member States’ Courts to issues Anti-Suit Injunction when the subject-matter of the dispute falls within the ambit of the Regulation



# I. Issues arising on Art. 1(2)(d) “the Arbitration exclusion” prior & after West Tankers

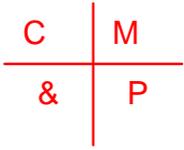
*Pre-West Tankers: National Practice*

## □ Through Transport:

- ☞ Article 1 (2) (d) Regulation must be interpreted in the sense that an English judge second seized requested to grant an injunction to restrain a party to continue an action brought in Finland in breach of an arbitration agreement providing for arbitration in London is not compelled to stay the proceedings in favour of the Finnish judge first seized by virtue of the lis pendens rule contained in article 27 of the Regulation
- ☞ Granting an Anti-Suit injunction was not breaching the principle of mutual trust

## □ Fincantieri:

- ☞ Denial of recognition to an Italian judgment, based on the fact that it was limited to the validity of the arbitration agreement, and did not deal with the substance of the case.
- ☞ The Regulation was not applicable to that decision, and the French court applied its domestic rules on recognition of foreign judgments



# I. Issues arising on Art. 1(2)(d) “the Arbitration exclusion” prior & after West Tankers

*Pre-West Tankers: National Practice*

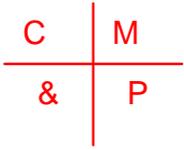
## Putrabali:

-  Enforcement of an English Award notwithstanding its prior annulment pursuant to Article 69 of the English Arbitration Act
-  The Arbitration exclusion is interpreted in the sense that the Regulation is not applicable to an action to enforce an award

## I. Issues arising on Art. 1(2)(d) “the Arbitration exclusion” prior & after West Tankers

### □ *West Tankers*

☞ “it follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation”. (§ 27)



# I. Issues arising on Art. 1(2)(d) “the Arbitration exclusion” prior & after West Tankers



## *West Tankers*

☞ « if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application» (§ 26).

# I. Issues arising on Art. 1(2)(d) “the Arbitration exclusion” prior & after West Tankers

## *Post-West Tankers National Practice:*

### *DHL v Fallimento*

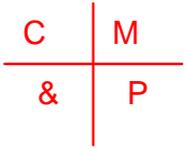
- 👉 Tomlinson J doubted that an Italian judgement on the merits disregarding an arbitration which, under English law, was applicable, could be refused recognition on public policy grounds

### *National Navigation v Endesa:*

- 👉 Gloster J held that she could refuse recognition of a Spanish judgement on the applicability of an arbitration agreement on the ground of public policy

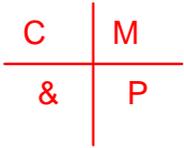
### *InZone Brands v In Beverage*

- 👉 Anti-suit injunctions are not contrary to international public policy, for matters not concerned with European law, because said relief aim solely to protect a contractual commitment



## **II. Options and Prospective Solutions (EU Green Paper, IBA Submission)**

- 1) The Inclusion of Arbitration within the scope of Regulation: The Green Paper
- 2) The Rejection of the Green Paper: the IBA Submission
- 3) The Inclusion of Arbitration with amendments to the Regulation
- 4) The Expansion of the Arbitration Exclusion



## II. Options and Prospective Solutions (EU Green Paper, IBA Submission)

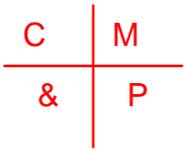
### 1) The Inclusion of Arbitration within the scope of Regulation:



#### *The Green Paper*

#### *Reasons*

- ⇒ uncertainty as to the recognition of declaratory judgements on the validity of arbitration
- ⇒ Recognition of the arbitral awards annulled in their country of origin
- ⇒ Absence of uniform rules of jurisdiction with respect to ancillary measures
- ⇒ Recognition of judgement merging arbitral awards

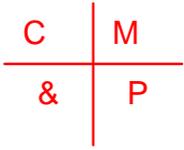


## II. Options and Prospective Solutions (EU Green Paper, IBA Submission)

### 1) The Inclusion of Arbitration within the scope of Regulation: The Green Paper

#### ❖ *Proposals*

- ⇒ Deletion of the arbitration exclusion and consequent recognition of judgments dealing with arbitration under the Regulation
- ⇒ New article 22 (6) in the Regulation: exclusive jurisdiction of the Member State where the arbitration takes place
- ⇒ New article 27 A: Courts of a Member State requested to decide on the issue of the validity or applicability of an arbitration agreement should stay the proceedings when the courts of the Member State where the seat is located are seized of a declaratory action
- ⇒ Default rule providing for the selection of the seat: absent a choice of the parties, the seat will be determined by reference to the jurisdictional rules applicable on the merit in the absence of an arbitration agreement
- ⇒ Uniform Conflict of Laws rule for the validity of arbitration agreement



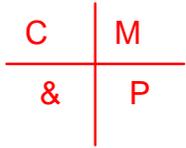
## II. Options and Prospective Solutions (EU Green Paper, IBA Submission to the EU)

### (2) To Reject the Green and Maintain the Status Quo:



#### The IBA Submission

- Recognition and Enforcement of judgment related to arbitration pursuant to the Regulation (simplified or automatic recognition as per the proposal)
- Pre-emptive declaratory action



## II. Options and Prospective Solutions (EU Green Paper, IBA Submission to the EU)

### (2) To Reject the Green and Maintain the Status Quo: the IBA Submission

- The priority in favour of the courts of the seat would not solve the lis pendens situation arising between courts' proceedings brought in breach of the arbitration agreement (where the court would be requested to declare the arbitration agreement void) and proceeding on the recognition and enforcement of an award in a Member State other than that of the seat

## II. Options and Prospective Solutions (EU Green Paper, IBA Submission to the EU)

### **(3) To Include Arbitration with amendments to the Regulation: the IBA Submission**

#### **□ Article 34**

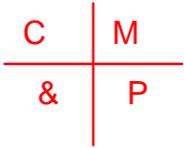
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- (5) In relations between Member States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

## II. Options and Prospective Solutions (EU Green Paper, IBA Submission to the EU)

### (4) To Expand the Arbitration Exclusion

- Art. 1(2)d of the Regulation needs to be expanded, in order to make clear that the exclusion applied to all aspects of the arbitral process in particular:
  - ⇒ If a court of a member state is seized of an action that is the subject of an arbitration agreement, the matter should be resolved by the application of Art. II of the New York Convention. The Regulation should not apply to the action
  - ⇒ The specific issue as to whether or not an arbitration agreement has in fact been concluded is valid operative, capable of being performed and of sufficient scope, should be excluded from the ambit of the Regulation
  - ⇒ All other court procedures ancillary to the arbitral process should be removed from the Regulation's coverage
  - ⇒ Judgment on the existence, validity, effect and scope of an arbitration agreement should also be excluded
  - ⇒ A provision needs to be added to further make clear that an judgement rendered in breach of an arbitration agreement need not be recognised and enforced under the Regulation. The simplest way to achieve this would be to add a further ground to article 34 of the Regulation

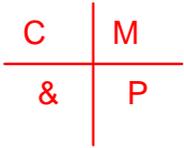


### III. Is Switzerland Concerned?

- 👉 Lugano Convention of 16 September 1998
- 👉 Revised Lugano Convention of 30 October 2007 which shall enter into force in 2011
- 👉 Pursuant to Protocol 2 (Article 1) of the Lugano Convention, when applying and interpreting the provisions of the Convention, Switzerland must take into account the principles laid down by any relevant decision delivered by Courts of the other Contracting States. This includes the decisions of the ECJ
- 👉 The Swiss Federal Office of Justice on the Green Paper
- 👉 The University of Berne on the Green Paper

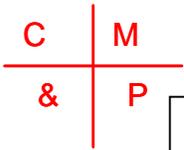
## IV. Summary Conclusions

- ⇒ Disregards fundamental principles of arbitration law
- ⇒ Regionalization of arbitration laws contrary to its universal and transnational nature
- ⇒ Disadvantage European seats of arbitration in favour of its competitors in a world where the main jurisdictions engage in a fierce competition



## IV. Summary Conclusions

- ❖ What is the best course going forward? Option 1, 2, 3, 4 ? Let's discuss...



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**Thanks for your attention !**

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