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Thomas Panighetti

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HAS LONDON OUTMANEUVERED THE ITALIAN TORPEDO?

Thomas Panighetti*

I. INTRODUCTION

The Brussels Regulation of 2012¹ (“Brussels II”) and the England and Wales Court of Appeal’s *West Tankers, Inc. v. Allianz SpA*² (“*West Tankers 2012*”) ruling completely disarmed the “Italian Torpedo.”³ The Italian Torpedo is a delay tactic used in disputes between parties from European Union member states, where the court “first seized” receives exclusive jurisdiction regardless of contrary contractual provisions.⁴ Once a state seizes a dispute, the state may then determine whether the contract and arbitration clauses are valid. If the court finds the arbitration clause invalid, it may proceed with the case, even if the contract specified that jurisdiction was to be held elsewhere. Italy deployed this tactic in the *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers, Inc* (“*West Tankers 2009*”) ⁵ case when Italy first seized the case, held that the arbitration agreement, which provided for arbitration in London, was invalid.

London, touted as the world’s center of maritime arbitration, need not worry about any more Italian Torpedoes threatening its maritime arbitrations.⁶ The newly adopted Brussels Regulation, Brussels II, will effectively reverse the effects of *West Tankers 2009*. Additionally, the England and Wales Court of Appeals decision in *West Tankers 2012* prevents any new Italian Torpedoes from being successful before Brussels II comes into effect in 2015. The *West Tankers 2012* decision allows even declaratory arbitral awards to be recognized as judgments by other EU member states.⁷ The effect of both Brussels II and *West Tankers 2012* is that parties choosing to arbitrate in London will no longer be subject to duplicative and dilatory litigation.

This article seeks to discuss the tension between the United Kingdom’s (the “UK”) common law and mainland Europe’s civil law regimes, and how this tension

* Thomas Panighetti is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2014 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

¹ 2012 O.J. (L 44/2001) (hereinafter “Brussels II 44/2001”), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF>.

² *West Tankers Inc v. Allianz SPA & Generali Assicurazione Generali SpA* [2012] W.L.R.(D) 9, [2012] EWCA Civ 27, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/27.html>.

³ Michael McParland, *Damn the Torpedoes: Protecting English Arbitration after the Front Comor*, QUADRANT FORUM (May 2012), available at <http://clients.squareeye.net/uploads/quadrant/3%20Damn%20the%20Torpedoes.pdf> (defining the Italian Torpedo as a tactic of a first seizing court to determine jurisdiction; also stated that the tactic is used primarily as a dilatory defensive strategy).

⁴ Paul Friedman, *Anti-Suit Injunctions from the English Courts*, CLYDE & Co. (Oct. 5, 2010), http://www.clydeco.com/uploads/Files/Publications/2010/Anti-Suit%20Injunctions_oct.pdf.

⁵ *Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers, Inc.*, 2009 E.C.R. C-185/07.

⁶ Acquisition International, *Maritime Disputes*, ACQUISITION INTERNATIONAL, (Feb. 3, 2012), <http://www.acquisition-intl.com/index.php/contact/205-maritime-disputes-selecting-an-arbitrator-and-a-location> (stating that seventy percent of the world’s maritime arbitration disputes occur in London).

⁷ *West Tankers Inc v. Allianz SPA & Generali Assicurazione Generali SpA* [2012] W.L.R.(D) 9, [2012] EWCA Civ 27, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/27.html>.

manifests itself in court cases and regulations that impact London's maritime arbitration. Prior to *West Tankers* 2009, England and Wales would issue anti-suit injunctions to prevent other countries from litigating disputes where the parties had agreed to arbitrate. *West Tankers* 2009 held that the anti-suit injunction was inappropriate under Brussels I and that courts should be permitted to seize tort cases in spite of arbitration clauses to the contrary. *West Tankers* 2009 started a three year revision of the Brussels regulation that culminated in the adoption of Brussels II, which explicitly stated arbitrability should be determined by contract, rather than by the subject matter of the dispute.

II. ARBITRATION IN THE EUROPEAN UNION

The European Union ("EU") is in a transitional period, moving towards greater economic unification of its member states and forming its own version of federalism. Change, however, produces resistance.⁸ The UK's political movement to separate itself from the EU has strengthened with the growing financial troubles in Europe.⁹ This movement underlies another division in the EU, the divide between the United Kingdom's common law pro-arbitration view and mainland Europe's civil law view of arbitration.¹⁰ Civil law views arbitrability as determined by subject matter, which contrasts with common law's view that arbitrability is determined by contract.¹¹ International commercial parties made London the world's center of maritime arbitration, and as such, 70 percent of the world's maritime arbitration takes place there.¹² Understandably, England and Wales have a pro-arbitration stance and desire to remove any chance of duplicative litigation from arbitrating parties' disputes.

The 2000 Brussels Regulation ("Brussels I") preserved parties' rights to contractually determine the court of jurisdiction over disputes when it made arbitration an exception to its regulatory scope. The European Court of Justice's ("ECJ") 2009 decision in *West Tankers* 2009, however, put the exclusivity of arbitration in doubt. In *West Tankers* 2009, the ECJ rejected England and Wales' issuance of an anti-suit injunction¹³ and allowed Italy, the country first seized of jurisdiction, to proceed with litigation in Italian courts when the parties had contractually agreed to arbitrate in London.¹⁴ The

⁸ See Anthony Faiola & Michael Birnbaum, *Germany Offers Vision of Federalism for the European Union*, THE WASHINGTON POST, (June 27, 2012) available at <http://www.marketwatch.com/story/eu-must-move-toward-economic-federalism-2011-06-03> (discussing proposals in the EU that intend to establish a closer union such as forming a single army and directly electing an EU president); see also Michael Crittenden, *E.U. Must Move Toward 'Economic Federalism'*, THE WALL STREET JOURNAL (June 3, 2011), (arguing that the EU is becoming more economically federalist with centralized economic institutions and central economic government operations as a result of the recession).

⁹ See David Stringer, *Britain Mulls Split With EU as Europe Plots Even Closer Ties*, MSN NEWS (Nov. 20, 2012), <http://news.msn.com/world/britain-mulls-split-with-eu-as-europe-plots-even-closer-ties>; see also Stephanie Jones-Berry & Janelle Dumalaon, *Britain's Cameron Pledges EU Membership Vote*, USA TODAY (Jan. 23, 2013), available at <http://www.usatoday.com/story/news/world/2013/01/23/david-cameron/1857655/>.

¹⁰ Daniel Rainer, *The Impact of West Tankers on Parties' Choice of A Seat of Arbitration*, 95 CORNELL L. REV. 431, 432 (2010).

¹¹ See *id.*

¹² Acquisition International, *supra* note 6.

¹³ See discussion *infra* Section II(B).

¹⁴ Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers, Inc., 2009 E.C.R. C-185/07.

ECJ's decision unnerved many commercial parties that utilize arbitration because arbitration provides confidentiality where courts do not, limits costs, and prevents protracted litigation. The *West Tankers* 2009 decision started a three year revision of Brussels I, and the EU Parliament adopted the revised Brussels Regulation, Brussels II, in December 2012.¹⁵ Brussels II explicitly reaffirms that arbitration is an exception to the "first seised" rule, and it effectively reverses *West Tankers* 2009; however, the regulation does not go into effect until January 2015.¹⁶ Understandably, England and Wales are not taking any chances of losing their arbitration industry, so they created a tactic that diverts the Italian Torpedo by entering arbitral awards into judgments that all EU member states must respect.¹⁷

A. *Brussels I and the New York Convention*

Brussels I established jurisdictional rules for commercial and civil disputes where both parties were from different EU member states.¹⁸ The rules established that jurisdiction can be exercised by the EU member state's court where the defendant was domiciled.¹⁹ Brussels I provides that, if proceedings between the same parties on the same dispute were to arise in two different EU member states, the court that "first seised"

¹⁵ Sarah Garvey, *Reform of the Brussels Regulation: Are we nearly there yet?*, ALLEN & OVERY (Dec. 21, 2012), <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>.

¹⁶ *See id.*

¹⁷ *See West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA*, [2012] W.L.R.(D) 9, ¶ 14 [2012] EWCA (Civ) 27 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/27.html> ("The purpose of s66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se.").

¹⁸ Garvey, *supra* note 15.

¹⁹ Europa, *Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I")*, EUROPA (March 5, 2011), http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm (stating that legal persons and companies are domiciled where their statutory seat, principal place of business, or central administration is located).

has the exclusive power to determine jurisdiction.²⁰ Brussels I had a few exceptions,²¹ most notably the arbitration exception.²²

The arbitration exception in Brussels I made the regulation enforceable under the New York Convention²³ prior to *West Tankers* 2009.²⁴ All EU member states are signatories of the New York Convention,²⁵ which is an international treaty that facilitates arbitration.²⁶ Signatories to New York Convention are required to recognize arbitration agreements²⁷ and to enforce valid arbitration awards.²⁸ The purpose of the New York Convention is to facilitate international trade by providing a stable, fair, and predictable legal mechanism for dispute resolution.²⁹ Kofi Annan described the impact of the New York Convention on international trade by saying, “international trade thrives on the rule of law: without it parties are often reluctant to enter into cross-border commercial transactions or make international investments.”³⁰ Effectively, parties seek arbitration because they want to keep future disputes out of court and have predictable substantive law govern.³¹

Until the *West Tankers* 2009 decision, Brussels I would only apply when the dispute did not contain an arbitration clause, and the New York Convention applied when it did. *West Tankers* 2009 allowed a court of the first seizing country to assert

²⁰ Friedman, *supra* note 4.

²¹ Brussels I, [2000] O.J. (L 44/2001) (Chapter I- Scope - Article 1:

1. This Regulation 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.

2. The Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration.)

²² *Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters* (“*Brussels I*”), EUROPA (March 5, 2011), http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm.

²³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2, Jun. 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517, codified at 9 U.S.C. §§ 201-208 [hereinafter “New York Convention”], available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.

²⁴ See Friedman, *supra* note 4.

²⁵ See U.N. Commission on International Trade Law, *Status - 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 31, 2013).

²⁶ Andrew Pullen, *The Reform of the Brussels Regulation: A Crossroads for Arbitration in Europe*, ALLEN & OVERY (Sept. 2, 2009), <http://dispute.practicallaw.com/6-422-4885>.

²⁷ See New York Convention, *supra* note 23.

²⁸ *Id.* at arts. III- V.

²⁹ See *id.*

³⁰ Kofi Annan, *Opening Address Commemorating The Successful Conclusion Of The 1958 United Nations Conference On International Commercial Arbitration*, June 10, 1998, available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>.

³¹ Daniel Rainer, *The Impact of West Tankers on Parties' Choice of A Seat of Arbitration*, 95 CORNELL L. REV. 431, 432-33 (2010).

jurisdiction, even when the seat of arbitration was elsewhere.³² When EU courts apply the law from *West Tankers* 2009, the Italian Torpedo takes precedence over the New York Convention, and consequently, creates the potential for duplicative litigation by taking disputes to court that would have otherwise gone to arbitration.

B. *Anti-Suit Injunctions*

An anti-suit injunction is an English discretionary remedy that enjoins a party from pursuing court action in a certain dispute.³³ English courts have discretion to issue anti-suit injunctions to prevent foreign proceedings when those proceedings are “vexatious or oppressive” and when England and Wales is the natural forum.³⁴ Typically, English courts grant anti-suit injunctions when the foreign proceedings would breach a valid contract between the parties, such as an agreement to arbitrate. The anti-suit injunctions are effective because England and Wales will not enforce any award procured from litigation in another country when an anti-suit injunction was granted.³⁵

The anti-suit injunction is a critical component of London’s effective maritime arbitration.³⁶ Without the injunction, parties have an incentive to forum-shop for a court that provides them with an advantage, which undermines the confidence and certainty that parties desire in their contracts.³⁷ Anti-suit injunctions also prevent protracted legal disputes in multiple forums, which is one of many reasons that commercial parties choose London to arbitrate their international disputes.

C. *The Clash of Mainland Europe's Civil Law and United Kingdom's Common Law*

The EU has two competing systems of law that are at constant odds with each other, and arbitration has been the battlefield.³⁸ The civil law system of Western Europe is at odds with the common law regime of the UK. The dispute is no different from disputes in any country that has a prevalent arbitration regime. The question becomes whether a person’s rights or freedom to contract should have more weight in determining whether a dispute can be arbitrated. The UK is both the world’s center for maritime arbitration and the most influential member state of the EU that has a common law regime. The dispute between a common and civil law is a dispute over what should determine arbitrability.³⁹ The common law view holds that when the parties have contractually agreed to arbitrate a dispute, that they must do so regardless of the substantive subject matter.⁴⁰ On the other hand, civil law holds that the dispute's subject

³² *Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers, Inc.*, 2009 E.C.R. C-185/07.

³³ *The European Court of Justice decision in West Tankers – European Arbitration Holed Beneath the Waterline?*, ASHURST (Feb. 2009), available at www.ashurst.com/doc.aspx?id_Content=4257.

³⁴ See Freidman, *supra* note 4.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See Rainer, *supra* note 10, at 432; Freidman, *supra* note 4.

³⁸ See *id.*

³⁹ See Rainer, *supra* note 10, at 442.

⁴⁰ See *id.* at 441-42.

matter is the primary consideration for determining whether a dispute can be arbitrated.⁴¹ For example, Brussels I specified in Article 5(3) that torts should be tried in courts, which *West Tankers* 2009 considered as primary over Brussels I's arbitration exception.

III. WEST TANKERS AND THE BIRTH OF THE ITALIAN TORPEDO

In 2009, the ECJ shook the foundation of the England and Wales' anti-suit injunction when it issued *Allianz SpA v. West Tankers, Inc.*⁴² *West Tankers* 2009 prevented England and Wales from issuing an anti-suit injunction when Italy first seized the dispute.⁴³ This case started a three year revision process of Brussels I, which culminated in the European Parliament adopting an almost identical provision to Brussels I. The revised regulation, Brussels II, added new recitals of how courts should interpret it moving forward, including that the arbitration exception supersedes the desire for torts to be litigated in courts.⁴⁴

In *West Tankers*, ERG Petroli S.p.A., an Italian petroleum products retailer, chartered the "Front Comor," a vessel owned by West Tankers, Inc.⁴⁵ The two parties had a contract that provided for arbitration under English law in London. The Front Comor struck a jetty near Syracuse, Italy, and sustained damages.⁴⁶ ERG began arbitration proceedings against West Tankers, in London, for the damages in excess of ERG's insurance coverage.⁴⁷ ERG's insurer then brought suit in Italy to recover the money it had paid to ERG.⁴⁸ The English High Court issued an anti-suit injunction against the insurer from continuing the suit in Italy.⁴⁹ The House of Lords agreed with the English High Court's determination that the arbitration clause was valid, but the House of Lords referred the case to the ECJ for that court to determine whether anti-suit injunctions were valid.⁵⁰

⁴¹ *See id.*

⁴² *Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers, Inc.*, 2009 E.C.R. C-185/07.

⁴³ *See id.*

⁴⁴ Brussels II, 2012 O.J. (L 44/2001).

⁴⁵ *The Practical Implications of the West Tankers Decision*, SLAUGHTER & MAY (April 2009), http://www.slaughterandmay.com/media/822289/the_practical_implications_of_the_west_tankers_decision.pdf; *ERG Petroli SpA*, NEW STATESMAN (Feb. 12, 2013, 1:30pm),

<http://www.newstatesman.com/company-profiles/energy/fuel-retailing/erg-petroli-spa>.

⁴⁶ *The Practical Implications of the West Tankers Decision*, SLAUGHTER & MAY (April 2009), http://www.slaughterandmay.com/media/822289/the_practical_implications_of_the_west_tankers_decision.pdf.

⁴⁷ *See id.*; Mark G. Materna, *An Unnecessary Consternation: An Analysis of the Future of EU Arbitration in the Wake of the West Tankers Decision*, 11 PEPP. DISP. RESOL. L.J. 571 (2011), available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1027&context=dlj>.

⁴⁸ *See* Mark G. Materna, *An Unnecessary Consternation: An Analysis of the Future of Eu Arbitration in the Wake of the West Tankers Decision*, 11 PEPP. DISP. RESOL. L.J. 571 (2011); *see also* *The Practical Implications of the West Tankers Decision*, SLAUGHTER & MAY (Apr. 2009), http://www.slaughterandmay.com/media/822289/the_practical_implications_of_the_west_tankers_decision.pdf.

⁴⁹ *The Practical Implications of the West Tankers Decision*, SLAUGHTER & MAY (Apr. 2009), http://www.slaughterandmay.com/media/822289/the_practical_implications_of_the_west_tankers_decision.pdf.

⁵⁰ *See id.*

When the ECJ received the case, it determined that the *West Tankers* case fell under the Brussels I, because while arbitration clauses normally put the case outside of Brussels I, the advocate-general⁵¹ asserted that the tort claim in the action fell within the Brussels Regulation.⁵² The ECJ upheld this subject matter distinction, and opined that while the anti-suit injunction serves an economic purpose for England and Wales, that such a purpose does not “justify infringements of Community law.”⁵³ Furthermore, the advocate-general argued that national courts would not invalidate “clearly formulated” arbitration clauses.⁵⁴ The ECJ followed the advocate-general’s opinion and stated that the validity of the arbitration clause in this case was a preliminary matter for the tort claim that fell under Brussels I.⁵⁵ The ECJ dismissed any practical concerns of the impact of their holding on Europe’s future as a seat of arbitration, when it decided that subject matter of a dispute was more important than the agreement to arbitrate.⁵⁶

IV. BRUSSELS REGULATION REFORM OF DECEMBER 2012

The *West Tankers* 2009 case spurred a push to reform Brussels I that culminated in the European Parliament voting in favor of adopting a revised regulation on November 20, 2012.⁵⁷ Brussels II came into force on January 9, 2013, but some of its provisions do not go into effect until 2015.⁵⁸ Brussels II did not change the language of the arbitration exclusion in Article 1(2)(b), but it included recitals that explicitly define what disputes come under the Brussels regime and those that do not.⁵⁹ The new regulation limits the utility of the Italian Torpedo by revising the *lis pendens* rules (rules governing disputes pending elsewhere) and protects arbitration clauses from dilatory litigation.⁶⁰

⁵¹ *Court of Justice of the European Union*, EUROPEAN UNION (Feb. 2, 2013, 1:30pm), http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (stating that the ECJ has one judge from each country and a total of eight “Advocates-general” who present the court’s opinion publicly and impartially; additionally the advocate-general’s opinion is not necessarily the same as the opinion of the court in the matter.).

⁵² Rainer, *supra* note 10, at 442.

⁵³ *See id.* at 443.

⁵⁴ *See id.*

⁵⁵ Rainer, *supra* note 10, at 444; Allianz SpA & Generali Assicurazioni Generali SpA v. West Tankers, Inc., 2009 E.C.R. C-185/07 (“Article 5 of that regulation provides: ‘A person domiciled in a Member State may, in another Member State, be sued: ... (3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur’”).

⁵⁶ Rainer, *supra* note 10, at 444.

⁵⁷ *Reform of the Brussels Regulation: Are we nearly there yet?*, ALLEN & OVERY (Dec. 21, 2012), <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>.

⁵⁸ *Arbitration in the EU following the revised Brussels I Regulation*, FRESHFIELDS BRUCKHAUS DERINGER (Jan. 2013), <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Arbitration%20in%20the%20EU%20following%20the%20revised%20Brussels%20I%20Regulation.pdf>.

⁵⁹ *See id.*

⁶⁰ *See Reform of the Brussels Regulation: Are we nearly there yet?*, ALLEN & OVERY (Dec. 21, 2012), <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>; *see also*, *Arbitration in the EU following the revised Brussels I Regulation*, FRESHFIELDS BRUCKHAUS DERINGER (Jan. 2013),

Brussels II revised its *lis pendens* rules, mandating that the court that first seized proceedings between the same parties on the same dispute does not necessarily retain jurisdiction, as was the case with the Italian Torpedo.⁶¹ Article 31(2) of Brussels II was amended to provide that where an agreement between the parties gives a different member state exclusive jurisdiction, the first seized court must stay its proceedings until the court of exclusive jurisdiction determines the jurisdiction of the agreement.⁶² If the court designated by the parties in the agreement determines that it lacks jurisdiction, the first seized court may resume its proceedings.

The *lis pendens* provision protects the seat of arbitration from an Italian Torpedo, which will prevent duplicative and abusive litigation.⁶³ The Italian Torpedo could be deployed by a party seeking merely to delay litigation by choosing a court renowned for being slow to begin proceeding. Parties can use this tactic to increase the costs for the other party, which can pressure the other party to settle the dispute. Brussels II also includes recital #12 that declares if a member state were to first seize an arbitration dispute, any judgment rendered on the validity of the arbitration clause or any other enforcement decision is not binding on the seat of arbitration.⁶⁴ The recital expounds at

<http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Arbitration%20in%20the%20EU%20following%20the%20revised%20Brussels%20I%20Regulation.pdf>.

⁶¹ *Reform of the Brussels Regulation: Are we nearly there yet?*, ALLEN & OVERY (Dec. 21, 2012), <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>.

⁶² Brussels II 44/2001, Article 31(2).

⁶³ *Reform of the Brussels Regulation: Are we nearly there yet?*, ALLEN & OVERY (Dec. 21, 2012), <http://www.allenoverly.com/publications/en-gb/Pages/Reform-of-the-Brussels-Regulation-are-we-nearly-there-yet.aspx>.

⁶⁴ Brussels II 44/2001, recital #12:

(12) This Regulation should not apply to arbitration.

Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any

great length that the New York Convention is primary when an arbitral clause exists, rather than Brussels II, and that Brussels II does not apply to any arbitral proceeding of any kind, unless a court invalidates the arbitral clause.⁶⁵

If the ECJ follows the recitals in Brussels II, then the EU will follow both the common law view of arbitration and the New York Convention. This will allow for London to maintain its competitive edge in maritime arbitration without a fear of commercial parties fleeing from the European arbitration scene due to duplicative litigation and the delay tactic, the Italian Torpedo. Brussels II can be viewed as a compromise to the United Kingdom and to common law in light of the threat of a breakup of the EU.

V. THE ENGLAND AND WALES COURT OF APPEAL USES EVASIVE MANEUVERS TO AVOID THE TORPEDO

While Brussels II seems to reverse the anti-arbitration position of *West Tankers* 2009, the new regulation does not explicitly state that a country may issue anti-suit injunctions to prevent a party from seeking court proceedings in a foreign state.⁶⁶ The England and Wales Court of Appeals confirmed the arbitral award from the *West Tankers* arbitration proceeding in January 2012.⁶⁷ The Court of Appeals issued a declaratory arbitral award that must be recognized by other EU member states as a judgment of the England and Wales courts under section 66 of the Arbitration Act of 1996.⁶⁸ This case was legally problematic for the Court of England and Wales because the prior case law did not allow declaratory awards.⁶⁹ The *West Tankers* 2012 arbitration decision was a

action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

⁶⁵ *See id.*

⁶⁶ *The Revised Brussels Regulation: Are we back to where we started?*, HERBERT SMITH FREEHILLS (Dec. 12, 2012), <http://hsf-arbitrationnews.com/2012/12/12/the-revised-brussels-regulation-are-we-back-to-where-we-started/>.

⁶⁷ *See West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA*, [2012] W.L.R.(D) 9, [2012] EWCA (Civ) 27 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/27.html>.

⁶⁸ *See id.* at ¶ 2, (“Section 66 provides: (1.) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. (2.) Where leave is so given, judgment may be entered in terms of the award. ... (4.) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under the Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.”).

⁶⁹ Gary Born, *Route 66: Diverting the Italian Torpedo*, WOLTERS KLUWER (Mar. 5, 2012), <http://kluwerarbitrationblog.com/blog/2012/03/05/route-66-diverting-the-italian-torpedo/> (“Resisting this approach, the appellant Allianz repeated its reliance on earlier decisions of the English Court of Appeal (*Margulies Brothers Ltd v Dafnis Thomiades and Co (UK) Ltd* [1958] Lloyd’s Rep 205) and High Court (*Tongyuan (USA) International Trading Group v Uni-Clan Limited* unreported 19 January 2001) arguing that it was “a well recognised characteristic of a declaratory judgment that it is not one that can be enforced.”); *West Tankers Inc v. Allianz SPA & Generali Assicurazione Generali SpA* [2012] W.L.R.(D) 9, ¶ 19 [2012] EWCA Civ 27, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/27.html>.

declaration of non-liability. The Court of Appeals disagreed with the prior precedent and held the declaration of non-liability was an enforceable judgment.⁷⁰

VI. CONCLUSION

The England and Wales Court of Appeals created its own legal tactic that directly combats the Italian Torpedo, a delay tactic employed by parties to arbitration. While the new Brussels Regulations make the Italian Torpedo delay tactics untenable, the courts of England and Wales are not relying on that regulation to protect their maritime arbitration, especially because the new recitals do not go into effect until 2015.

⁷⁰ *See id.*