

**INTERNATIONAL BAR ASSOCIATION
ARBITRATION COMMITTEE**

**WORKING GROUP ON THE REPORT FROM THE COMMISSION TO THE
EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC
AND SOCIAL COMMITTEE (COM(2009) 174 FINAL) AND THE GREEN PAPER
ON THE REVIEW OF COUNCIL REGULATION (EC) N°44/2001 ON
JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF
JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

SUBMISSION TO THE EUROPEAN COMMISSION

1. This submission is made to the European Commission (“the Commission”) on behalf of the Arbitration Committee (“the Arbitration Committee”) of the International Bar Association (“the IBA”). The Arbitration Committee has set up a working group (“the Working Group”) in order to review and produce the present contribution to the public consultation (“the Consultation”) launched on possible ways to improve the operation of Council Regulation (EC) N°44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“the Regulation”) with respect to the points raised in the Commission’s Report and accompanying Green Paper.
2. This submission does not address all the points raised in the Commission’s Report and Green Paper. Rather, it is limited to the issues related to the interface between the Regulation and Arbitration (Report, Section 3.7, and Green Paper, question n°7).
3. The Arbitration Committee brings together over 2,300 arbitration practitioners and experts among the IBA’s 30,000 individual members across the world, with a unique blend of jurisdictional background and professional experience. The Arbitration Committee comprises academics and practitioners acting as counsel as well as arbitrators. The Arbitration Committee’s comments draw on the experience and expertise of the members of the Working Group on the interface between arbitration and court proceedings.
4. The Arbitration Committee appreciates this opportunity to make a submission to the Commission in this regard and hopes to contribute constructively to the Commission’s internal evaluation process.
5. The Arbitration Committee welcomes the acknowledgment by the Commission that arbitration is “a matter of great importance to international commerce”, and fully shares the Commission’s view that “arbitration agreements should be given the fullest possible effect and the recognition of and enforcement of arbitral awards should be encouraged” (Green Paper, Section 7, page 8). The Arbitration Committee also fully shares the Commission’s view that “the New York Convention is generally perceived to operate satisfactorily among practitioners” (Green Paper, Section 7, page 8).
6. Arbitration has become the normal way to resolve international business disputes, and is of unique importance to international commerce. It allows disputes to be efficiently

resolved out of court, thus diminishing the workload of courts throughout the EU. The success of international arbitration is largely due to the benefits of the New York Convention, as well as to the active support of legislators and courts throughout the world. It is also due to its private nature and to the flexibility of the arbitral process. The Arbitration Committee is of the view that the interface between arbitration and the Regulation should be addressed by fully taking those elements into consideration. The Arbitration Committee believes that the possible deletion of the arbitration exclusion from the Regulation should be considered on the basis of a careful study of its potential impact on both the effectiveness of arbitration agreements and the compliance by Member States with their obligations under the New York Convention.

7. The Arbitration Committee considers that the Commission should give due consideration to the fact that most of the national reporters who helped prepare the general study commissioned by it (Report on the Application of Regulation Brussels I in 25 Member States, by Prof. Dr. B. Hess, Prof. Dr. T. Pfeiffer, and Prof. Dr. P. Schlosser – the “Heidelberg Report”) were critical of a possible extension of the Regulation to arbitration (Heidelberg Report, § 108). Criticism was expressed by the reporters from Austria, Belgium, Cyprus, England, Finland, France, Germany, Hungary, Ireland, Malta, Netherlands, Scotland and Spain (Heidelberg Report, footnote 107). The view that an extension of the Regulation to arbitration would be undesirable is shared by most arbitration practitioners consulted in the preparation of this submission. The prevailing view within the arbitration community seems to be that a deletion of the exclusion would give rise to more difficulties than currently exist and would adversely interfere with the good functioning of the New York Convention.
8. The Arbitration Committee also considers that the Commission should give due consideration to the fact that the Lugano Convention, as adopted by the Council of the European Union on 27 November 2008 (OJEU, 10 June 2009), does not apply to arbitration, and that a deletion of the arbitration exception in the Regulation might give rise to inconsistent outcomes depending on which instrument applies.

The absence of significant problems in the interface between arbitration and the Regulation justifying the deletion of the arbitration exclusion

9. The Commission’s Report expresses the view that the interface between arbitration and the Regulation raises difficulties, as “parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court”. The Commission also takes the view that “the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain”, as is “the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award” and “the recognition and enforcement of judgments merging an award” (Report, Section 3.7).
10. The Arbitration Committee respectfully submits that, in practice, the interface between arbitration and the Brussels Convention (and now the Regulation) has given rise to few difficulties since the entry into force of the Brussels Convention.
11. According to the Heidelberg Report, the difficulties would essentially relate to the recognition of foreign judgments relating to the validity of an award or an arbitration

clause (Heidelberg Report, § 120). However, any proposed solution would have to be assessed in light of its effectiveness, its wider implications, and the gravity of the difficulties actually encountered in practice.

12. As to judgments relating to the validity of the award, problems are exceptional. The only occurrence in which a conflict arose between a decision annulling an award rendered in an EU Member State and a subsequent court decision in another Member State recognizing the annulled award is the *Putrabali* case (*Société PT Putrabali Adyamulia v/ Société Rena Holding and Société Moguntia Est Epices Civ.* 29 June 2007, Rev. Arb. 2007.507 note Gaillard, Journ. Dr. Int. 2007.1240 note Clay; Rev. Crit. Dr. Int. Pr. 2008.109 note Bollée, Cah. Arb. n°325 2007.14 obs. Pinsolle). However, as will be shown in subsequent sections of this submission, this situation is not considered in some Member States to be inconsistent with Article VII of the New York Convention, which the Regulation should not prevent Member States from applying.
13. So far as effectiveness is concerned, as shown by the *SNF v/ Cytec* case, the deletion of the arbitration exclusion would in any case not eliminate the potential for conflicting decisions, as an award could be recognised in a country other than the seat of the arbitration only to be subsequently invalidated at the seat. In *SNF v/ Cytec*, the award was first recognised and enforced by a final decision of the Paris court of appeals (*Société Cytec Industries v/ Société SNF SAS, Paris 23 March 2006*, Rev. Arb. 2007.100, obs. S. Bollée; confirmed by *Civ. 4 June 2008*, Journ. Dr. Int. 2008.1107, note A. Mourre) but then annulled in Belgium, the seat of the arbitration (*Société SNF SAS v/ Société Cytec Industries, Trib. of First Instance of Brussels, 8 March 2007*, Rev. Arb. 2007.303, obs. A. Mourre and L. Radicati di Brozolo). Such a conflict would not be prevented by the deletion of the arbitration exclusion, as the decision granting enforcement rendered in a country other than the seat would not be recognised at the seat on the basis of the traditional principle *exequatur sur exequatur ne vaut*.
14. As to judgments related to the validity of an arbitration agreement, the only case in which such a judgment rendered in a Member State was denied recognition in another Member State is the *Ficantieri* case (*Legal Department du Ministère de la Justice de la République d'Irak v/ Sociétés Fincantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerospazio*, Paris Court of Appeal, 15 June 2006, Rev. Arb. 2007.90, note Bollée; Europe 2006.28 note Idot; Dalloz, 2006.3035, obs. Clay). The denial of recognition was however due to the fact that the judgment of the Genoa court of appeal in this case was limited to the validity of the arbitration agreement. As a consequence, the Regulation was not applicable to that decision and the French court applied its domestic rules on the recognition of foreign judgments, which include the verification of the indirect jurisdiction of the foreign court (in the eyes of the French court, indirect jurisdiction did not exist in that particular case because the decision of the Genoa court was in breach of the principle of arbitral *Kompetenz-Kompetenz*). On the contrary, had the Genoa court decided on the validity of the arbitration agreement as well as on the merits of the case, its decision would have been recognised in France pursuant to Art. 33 of the Regulation. In fact, according to the European Court of Justice decisions in *Marc Rich* (*Marc Rich v/ Società Italiana Impianti*, Case C-190/89, ECR, I 3855, § 16) and *West Tankers* (*Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni Generali SpA v/ West Tankers Inc.*,

Case C-185/07, § 26), if the main subject matter of the dispute, such as a claim for damages, falls within the scope of the Regulation, then a preliminary issue concerning the validity of an arbitration agreement also falls within its scope. This may give rise to difficulties going forward, as parties may be tempted to commence proceedings on the merits in an EU jurisdiction in which they believe they may be able to obtain a ruling that the arbitration agreement is not valid or not applicable. That ruling, because it is made in the context of a claim the subject matter of which is the merits of the dispute and which therefore does come within the scope of the Regulation, will be entitled to recognition and enforcement under the Regulation. A party might then seek to rely on that judgment to seek to persuade the court at the seat to set aside an award or to persuade a court of another Member State to refuse enforcement of the award in circumstances where, under that member state's law, the arbitration agreement would be valid. This in turn could lead effectively to a race to obtain and enforce an award before the court dealing with a claim on the merits rules on the validity of the arbitration agreement. However, whilst this might suggest that there would be merit in an amendment to Article 34 of Regulation so as to permit Member States' courts to refuse the recognition of judgments which disregard what would under their law be a valid arbitration agreement, or judgments which are incompatible with an arbitration award which would be upheld under their law, the issues identified would not be solved by the deletion of the arbitration exclusion.

15. It is true, as noted by the Heidelberg Report (§ 118), that the issue whether recognition of a judgment rendered on the merits of the dispute in violation of an arbitration agreement constitutes a manifest breach of public policy pursuant to Article 34-1 of the Regulation has not yet been resolved. The European Court of Justice decisions in *Krombach (Dieter Kombrach v/ André Bamberski, Case C 7/98, 28 March 2000, ECR I 1935)* and *Maxicar (Renault S.A. v/ Maxicar SpA and Orazio Formento, Case 38/98, 11 May 2000, ECR I 2973)* would seem to indicate a negative answer to that question, due to the restrictive definition of public policy which prevails under the Regulation. At any rate, the Arbitration Committee submits that this particular question could be clarified by the European Court of Justice at the earliest opportunity, with no need to delete the arbitration exclusion.
16. Another area of concern to the Commission is the recognition and enforcement of judgments merging an arbitration award (Report, Section 3.7, page 9; Heidelberg Report, § 119). The Arbitration Committee submits that the issue is not a major one, and that it could also be clarified by the European Court of Justice at the earliest opportunity, with no need to delete the arbitration exclusion.
17. Finally, the Commission's Report identifies the existence of procedural devices such as anti-suit injunctions in support of arbitration as a source of potential difficulties (Report, Section 3.7, page 9). However, this issue has now been addressed by the European Court of Justice in *West Tankers*, and there does not appear to be any need to delete the arbitration exclusion to prevent the use of such device in the European Union.
18. In sum, the Arbitration Committee has not identified any major source of potential difficulties in the interface between arbitration and the Regulation, and certainly none

that would justify a sweeping change of the law and the uncertainties and potential difficulties to which we now turn.

Issues to be considered should the Commission be minded to propose the deletion of the arbitration exclusion

19. The reference in the Green Paper to a “partial” deletion of the arbitration exclusion (Section 7, page 9) is unclear. The Arbitration Committee wonders what could be the possible scope of a “full” (as opposed to “partial”) deletion of the exclusion. For present purposes, the Arbitration Committee assumes that, in the event of a deletion of the exclusion, the Regulation would only apply to court proceedings relating to arbitration proceedings, as opposed to the actual arbitration proceedings.
20. The first question addressed by the Commission is that of court proceedings in support of arbitration. As a possible action to improve the current situation, the Green Paper suggests to delete the arbitration exclusion and to “grant exclusive jurisdiction for such proceedings to the Courts of the Member State of the place of the arbitration, possibly subject to an agreement between the parties” (Green Paper, Section 7, page 9). On this point, the Arbitration Committee observes the following:
 - a) First, it should be recalled that the paramount principle of arbitration is party autonomy. Accordingly, the seat of the arbitration is usually chosen by the parties, directly or indirectly. When the parties do not choose the seat of the arbitration in the arbitration agreement, they generally agree that such choice will be made by the arbitral tribunal (*e.g.* pursuant to Article 16 of the UNCITRAL Arbitration Rules) or by an appointing authority. In the event of any changes to the Regulation, these should therefore in no way limit party autonomy as to the choice of the seat of the arbitration.
 - b) The issue remains, however, whether a uniform rule should be included in the Regulation to determine the seat of the arbitration in the absence of a direct or indirect choice of the parties. This issue would only arise in *ad hoc* arbitrations where the parties would not have adopted rules, such as the UNCITRAL Rules, which address the issue of the seat. In institutional arbitrations or *ad hoc* arbitrations conducted under rules which deal with the issue, national courts have no role to play in determining the seat of the arbitration. In these limited cases, the Green Paper suggests, following the proposal made by the Heidelberg Report, that the seat of the arbitration be connected “to the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement” (Green Paper, footnote 14, page 9; Heidelberg Report, § 124). The Arbitration Committee considers that such a uniform rule would not eliminate the potential for forum shopping, as the Regulation offers, in many instances, several options to the plaintiff. For example, the plaintiff has an option between the courts of the place of domicile of the defendant (Article 2) and the courts of the place where the obligation is to be performed (Article 5-1 (a)). The Arbitration Committee thus submits that it would be inappropriate, by including a reference to the rules of jurisdiction of the Regulation, to offer one of the parties, effectively at his own instance and without agreement or consent of the other party, a possibility to place the seat of the arbitration in one place rather than another.

- c) The Arbitration Committee stresses, in this respect, that the seat of the arbitration is generally chosen due to its neutrality as well as to the quality of the local arbitration law and the support given by the courts to arbitration. If a uniform default rule is to be introduced, it would therefore be preferable that it makes reference to a neutral connecting factor.
- d) The Arbitration Committee is also concerned about the scope of the exclusive jurisdiction proposed in the Green Paper. The Arbitration Committee considers that such exclusive jurisdiction should not apply to provisional measures or to evidentiary measures, in respect to which the parties should be free to resort, as provided by Article 31 of the Regulation and if permitted by the local arbitration statute (in some jurisdictions, there are limitations on the possibility of seeking provisional measures in court once the arbitration proceedings have been initiated), to a judge of any jurisdiction where the provisional measures are to be enforced or where the evidence is located. This may be a far more efficient course than the two-stage process of first seeking a ruling from the courts of the place of arbitration which would then have to be enforced elsewhere. In this respect, the Arbitration Committee finds the Green Paper's proposal that the deletion "might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31)" (Green Paper, Section 7, page 9) unclear. As the European Court of Justice held in *Van Uden (Van Uden Maritimes BV v/ Kommanditgesellschaft in Firma Deco-line, Case C 391/95, 17 November 1998, ECR I 7091 § 24)*, when the parties agree to submit their dispute to arbitration, jurisdiction to order provisional measures cannot be determined on the basis of the Regulation's jurisdiction rules (such as Article 2 and Article 5). The European Court of Justice also decided (*ibid*, § 25) that, in such a case, provisional measures can nevertheless be ordered by national courts based on Article 24 of the Brussels Convention (Article 31 of the Regulation) if there is a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the Court before which those measures are sought. The Arbitration Committee finds that the principles established in *Van Uden* are appropriate and should not be affected by the revision of the Regulation.
21. One of the consequences of the deletion of the arbitration exclusion would be the automatic recognition of judgments deciding on the validity of the arbitration agreement or of an arbitral award (Green Paper, Section 7, page 9). Such decisions would benefit from the simplified recognition mechanism provided in Article 33 of the Regulation, possibly with no further opposition procedure if the exequatur of judgments is to be suppressed within the EU, as proposed by the Commission (Green Paper, Section 1). The Arbitration Committee is of the view that, when the judgment invalidates the arbitral agreement or the award, such a situation would create a potential conflict with the New York Convention.
22. As for judgments relating to the validity of an arbitration agreement, Article II of the New York Convention obliges each contracting State to recognise and enforce an arbitration agreement in writing under which the parties undertake to submit to arbitration all or any disputes between them with respect to a legal relationship

concerning a subject matter capable of settlement by arbitration. As a consequence, the automatic recognition of a judgment invalidating an arbitration agreement for reasons not admitted by the New York Convention would amount to a breach of said Convention. The Arbitration Committee submits that a situation where the Regulation would prevent a Member State from conducting any assessment of the reasons why the court of another Member State invalidated an arbitration agreement would not be compatible with that Member State's obligations under Article II of the New York Convention.

23. As to judgments relating to the validity of an award, the Arbitration Committee believes that their automatic recognition would be undesirable since arbitral awards can be set aside in one Member State on grounds which are not recognised in other Member States, and may even be contrary to fundamental legal principles of some Member States. In this context it must be recognised that whilst the New York Convention provides a degree of conformity, it does not entirely eliminate differences between Member States on enforcement, particularly where public policy issues are concerned. Decisions to set aside an award for breach of public policy in the Member State where it has been rendered, for example, would circulate within the European Union, thereby preventing enforcement in other Member States where the award would not be in contradiction with local public policy and should be recognised under the New York Convention. In other words, the deletion of the arbitration exclusion could lead to the application of lower standards throughout the European Union.
24. The Arbitration Committee therefore considers that the deletion of the arbitration exclusion is unwarranted. However, were the Commission nevertheless minded to propose its deletion, the Arbitration Committee is of the view that Member States should be entitled to examine the basis of judgments deciding on the validity of awards (as opposed to judgments deciding on the substance of a dispute). The Arbitration Committee submits, in this respect, that the inclusion in the Regulation of a provision inspired by Article IX of the Geneva Convention could be studied. For example, there could be an exception to the general rules applicable to the recognition of judgments such that a judgment rendered in a Member State on the validity of the award benefits from the Regulation only if (i) it has been rendered at the seat of the arbitration and (ii), in case of annulment of the award, the annulment decision was made on one of the grounds set out in Article V-1 (a) to (d) of the New York Convention.
25. Another proposal included in the Commission's Green Paper is to address the "coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal" by giving "priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity and scope of the arbitration agreement" (Green Paper, Section 7, page 9). Such proposal would apply in case of parallel court proceedings (e.g. a proceeding related to the constitution of the arbitral tribunal and an action on the merits before the courts of another Member State).
26. The Arbitration Committee considers that such a proposal would not be consistent with the parties' express decision to settle their difference by arbitration. Basically, the result would be to force a party having bargained for arbitration to sue in court in order to paralyse a suit brought before the courts of another Member State in disregard

of the arbitration agreement (as, for example, in the *West Tankers* case). The result may well be to increase the potential for parallel proceedings, rather than to reduce it. In addition, the proposal does not appropriately take into account the diversity in the Member States' arbitration laws. Under French law, for example, the arbitral tribunal has absolute priority to decide on its own jurisdiction, unless the court finds that the arbitration agreement is *manifestly* null, void or inoperative (so-called negative effect of the principle of arbitral *Kompetenz-Kompetenz*). In other countries, if an action is brought before the court on a matter covered by the arbitration agreement, the court must refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed, and the arbitral proceedings may nevertheless be commenced or continued, and an award made, while the issue is pending before the court. This principle is drawn from the UNCITRAL Model Law, Art. 8. In certain countries (such as Germany, see ZPO, Art. 1032(2)), an application may be made to the court prior to the constitution of the arbitral tribunal to determine whether arbitration is admissible. In all cases, however, the general principle is that parallel court proceedings ought not to result in a stay of the arbitration.

27. A provision seeking to avoid parallel proceedings should therefore take these rules into account. With reference to the proposal made in the Heidelberg Report (§ 133) for a new Article 27 A of the Regulation, the Arbitration Committee is therefore of the opinion that it should be amended so as to make clear that the stay is to be issued even where the parallel court proceedings are aimed at obtaining a decision on the *prima facie* existence, validity or scope of the arbitration agreement, or where the decision on the existence, validity or scope of the arbitration agreement is to be made in the first instance by the arbitral tribunal itself.
28. Such a formulation differs from the Heidelberg Report's proposal in that it covers all court and arbitral tribunals' decisions permitting the arbitration to proceed (including those decisions which are limited, as is the case in France, to deciding that the arbitration agreement is not manifestly null and void or inoperative). Such a provision would be compatible with the state of the law in all Member States. It would at the same time prevent parallel proceedings and protect the effectiveness of the arbitration agreement.
29. The Arbitration Committee is not in favour, as suggested by the Green Paper, of setting "time limits for the party which contests the validity of the arbitration agreement" before the courts of a Member State (Section 7, page 9). The Arbitration Committee suggests that this issue is better dealt with by national laws, in compliance with the principle of procedural autonomy.
30. Another aspect is the possible *lis pendens* between proceedings before the courts of a Member State in disregard of the arbitration agreement and actions to enforce an award. In practice, the situation would be the following: party A and party B are linked by an arbitration agreement. Party A sues before the courts of a Member State requesting a declaration of invalidity of the arbitration agreement and a decision on the merits, while party B initiates arbitration proceedings. An award is rendered while the court proceedings are still pending. Party B seeks the enforcement of the award, and party A resists the enforcement pleading the invalidity of the arbitration agreement and that the question is pending before another court first seized. In that situation, if the arbitration exclusion were to be deleted, Article 27 of the Regulation could apply,

thereby forcing the court in the country of enforcement to stay the enforcement proceedings until the court first seized in breach of the arbitration agreement decides on its validity. A distinction should however be made according to whether the enforcement of the award is sought at the seat or in another Member State.

31. If enforcement of the award is sought at the seat of the arbitration, the courts of the seat should benefit from the priority proposed by the Green Paper to decide whether the arbitration agreement is valid or enforceable. Such courts should therefore not have to stay.
32. If, on the contrary, enforcement is sought in a Member State other than the seat of the arbitration, a difficulty may arise as such courts would not benefit from the priority mentioned above. In such a situation, the courts of the place of enforcement should be released from their obligation to stay under the *lis pendens* rule, even if enforcement has not been sought at the seat. Such a solution would be in line with the ruling of the European Court of Justice in *Owens Bank (Owens Bank Ltd. v/ Fulvio Bracco and Bracco Industria Chimica SpA, Case C-129/92, 20 January 1994)*, according to which the Brussels Convention is not applicable to the enforcement in a Member State of a judgment rendered in a third country. The contrary solution would lead to a return to the “double exequatur” requirement suppressed by the New York Convention (*i.e.* the requirement that the award be first granted exequatur at the seat before it can be enforced in other countries). The Arbitration Committee considers that forcing the courts of a Member State requested to enforce a foreign award to stay the enforcement proceedings until the court of another Member State seized in disregard of the arbitration agreement decides on the validity and scope of the arbitration agreement would amount, for the former Member State, to a breach of the New York Convention. Pursuant to Article VI of the New York Convention, Contracting States are not permitted to stay enforcement proceedings, except if actions to set aside or to suspend the award are pending at the seat of the arbitration.
33. The Arbitration Committee draws the Commission’s attention to the basic principle of the New York Convention that an award can be enforced in a country other than that of the seat even if it has not been declared enforceable in that country. The Regulation should therefore not create within the European Union a situation that would be less favourable than that existing in other States under the New York Convention. Doing so would not only create a conflict between the Regulation and the New York Convention (see § 32 above), but would also be detrimental to EU countries as venues for international arbitrations as it would probably lead parties to select non-EU countries as the seat of their arbitrations.
34. The Arbitration Committee also suggests that the release of the obligation to stay enforcement proceedings where proceedings on the validity of the arbitration agreement are pending in another Member State should apply regardless of whether the seat of the arbitration is within or outside the European Union. The reason is that, the New York Convention being universal, a Member State would breach its international obligations by staying enforcement proceedings for reasons not provided for by the Convention, regardless of whether the award was or was not rendered in a Member State.

35. In order to “reduce the risk that the [arbitration] agreement is considered valid in one Member State and invalid in another”, the Green Paper proposes to introduce in the Regulation “a uniform conflict rule connecting to the law of the place of the arbitration” (Section 7, page 9). The Arbitration Committee would like to make two observations in this respect.
36. First, the Regulation does not deal with conflict of laws and does not appear to be the most appropriate instrument to deal with the law applicable to the arbitration agreement, a question which is already, albeit indirectly, dealt with by Article V-1 (a) of the New York Convention. The Arbitration Committee recalls that arbitration agreements are excluded from the scope of Regulation EC 593/2008 on the law applicable to contractual obligations (Rome I) pursuant to Article 1-2(e). Introducing a choice of law rule for arbitration agreements in the Regulation would be inconsistent with the rationale of this exclusion.
37. Second, the proposal would raise difficulties when the seat has not been chosen directly or indirectly by the parties. In such case, assuming the Regulation were to be modified to provide that the seat be in the Member State whose courts would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement (Green Paper, footnote 14, page 9), the result would be that the law applicable to the arbitration agreement would be determined on the basis of rules of conflict of jurisdiction which would not ensure a sufficient connection between the dispute and the applicable law and would open the way to forum shopping (see above, § 20-b).
38. Finally, the Green Paper addresses the provisions that could be included in the Regulation to facilitate the recognition of arbitral awards within the EU. To that effect, the Green Paper suggests that “arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award” (Section 7, page 9). The Arbitration Committee would welcome such a rule, which would enhance the effectiveness of arbitral awards, it being understood that the recognition and enforcement of arbitral awards would in all cases remain subject to the New York Convention and to the applicable national arbitration laws.
39. The Commission also proposes “to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community”. The Arbitration Committee is not in favour of such a proposal, which would be inconsistent with the New York Convention. The Arbitration Committee would rather favour the inclusion in the Regulation of a rule inspired from the Geneva Convention, as stated above in § 24 of this position paper.

Conclusion

40. In synthesis, the Arbitration Committee responds to Question 7 of the Green Paper as follows:
- there seems to be no compelling reason for deleting the arbitration exclusion; such a deletion would actually adversely affect the

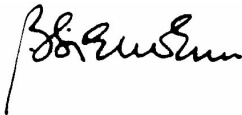
effectiveness of arbitration agreements and the circulation of arbitral awards;

- were the Commission nevertheless to propose the deletion of the arbitration exception, the Regulation should include specific rules in order to preserve the effectiveness of arbitration agreements and the compatibility of the Regulation with the New York Convention;
- In particular, the following suggestions should be considered:
 - amend Article 34 of the Regulation so as to permit Member States' courts to refuse the recognition of judgments which disregard what would under their law be a valid arbitration agreement, or judgments which are incompatible with an arbitration award which would be upheld under their law;
 - limit the proposed exclusive jurisdiction of the courts of the Member State of the seat of the arbitration to ancillary measures, to the exclusion of provisional and evidentiary measures in support of the arbitration, which should be available in any country where such measures are to be enforced;
 - avoid connecting the seat of the arbitration, in the absence of a direct or indirect choice of the parties, with the Member State whose courts would have jurisdiction over the dispute under the Regulation in absence of an arbitration agreement, as such a rule would favour forum shopping;
 - avoid including in the Regulation any rule of conflict of laws relating to the arbitration agreement;
 - if priority were given to the courts of the seat of the arbitration to decide the validity and scope of the arbitration agreement, the relevant provision should apply also where the decision on the validity of the arbitration agreement is to be made in the first instance by the arbitral tribunal itself and should be drafted so as to make it clear that the priority applies even if the courts of the seat of the arbitration are requested to rule on *prima facie* existence, validity or scope of the arbitration agreement;
 - include in the Regulation a principle according to which a judgment rendered in a Member State on the validity of an award benefits from the Regulation only if (i) it has been rendered at the seat of the arbitration and (ii), in case of annulment of the award, the decision was made on one of the grounds set out in Article V-1 (a) to (d) of the New York Convention;

- release the courts of a Member State requested to enforce an arbitral award, regardless of whether the award was rendered within or outside the European Union, from the obligation to stay the proceedings pursuant to Article 27 of the Regulation in case of parallel proceedings.

Date: 15 June 2009

On behalf of the Arbitration Committee,
Its Co-Chairs:



Pierre Bienvenu



Guido Santiago Tawil

ANNEX

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