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The Regulation of International Arbitration by European Law: What Does the Future Hold?

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The relationship between Arbitration and European Judicial Private Law has not always been easy. The bedrock European Law principle in this field, as embedded in the European Council Regulation (EC) No. 44/2001 of December 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Judgment Regulation"), is the free movement of judgments in the European Judicial Area. Arbitration law, in contrast, is diverse, each country having is own rules and its own conceptions of the status and effects of international awards.

The Judgment Regulation, as well-known, does not apply to arbitration, which is expressly excluded from its scope of application by Article 1 (2) d ("the Arbitration Exception"). The current revision process of the Judgment Regulation has potential far-reaching consequences on the law of arbitration in the European Union. If arbitration is included in the scope of the Regulation, as suggested by a recent Green Paper of the European Commission dated April 21, 2009, many of the principles presently applied in certain jurisdictions, such as the negative aspect of *Kompetenz-Kompetenz*, the legal autonomy of the arbitration agreement and the recognition of awards annulled in their country of origin would have to be revisited. The arbitration law of EU Members States would in many respects have to be changed according to uniform rules compliant with principles such as the free circulation of judgments and mutual trust between jurisdictions. Choice of law rules would have to be introduced, while new procedures meant to allow the courts of the seat of the arbitration to decide, in a binding manner for other courts, on the validity and scope of the arbitration agreement would have to be introduced. The Commission report and Green Paper opens a consultation expiring on June 30, 2009. Depending the outcome of this 70 days consultation, the face of arbitration in Europe might completely change.

The 70 days that might shake Arbitration in Europe

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The Judgment Regulation, as well-known, does not apply to arbitration, which is expressly excluded from its scope of application by Article 1 (2) d ("the Arbitration Exception"). The Arbitration Exception has given rise to significant doctrinal debates as to its scope, meaning and effects (see, e.g. in favour of the Arbitration Exception, Mourre, *Faut-il un statut communautaire de l'arbitrage?* ASA Bull., Vol. 23, No. 3, 2005 p. 409; in favour of its suppression, Van Houtte, *Why Not Include Arbitration in the Brussels Jurisdiction Regulation?*¸ Arb. Int. Vol. 21 No. 4 (2005), pp. 509 – 521). It may be fair to say that the case law does not support the statement that the Arbitration Exception has raised insurmountable difficulties. In the 40 years passed since the Brussels Regulation was adopted, only three times has the European Court of Justice had to deal with referrals relating to arbitration. The first was in the well-known *Marc Rich* case, to decide whether the Arbitration Exception applies to ancillary proceedings relating to the appointment of an arbitrator. We seem to have lived with the answer, handed down in 1991, without major difficulties. Then came the *Van Uden* decision in 1998, to confirm that court's jurisdiction to deal with provisional measures is subject to the Regulation within the European Union, even if the parties agreed on an arbitral agreement. Finally, the last episode occurred with the much debated judgement in *West Tankers*, relating to the compatibility of anti-suit injunctions in aid of the arbitration with the Judgment Regulation. The Court's "no" could certainly not be a surprise to anyone, considering the previous condemnation of this type of relief in *Turner*. It is certainly true that, in some occurrences, the Arbitration Exception has given rise to contradictions of judgments. This has been the case in *Fincantieri*, where French courts enforced an award rendered in France in spite of a decision of the Rome Court of appeal according to which the arbitral agreement was null and void. It has also been the case in *Putrabali*, where French courts enforced an arbitral award that had been set aside in England.

Whether this limited number of inconsistencies requires a sweeping change of law by suppressing the Arbitration Exception is of course a question open to debate. The European Commission seems to opine that it is indeed the case. In a Report to the European Parliament and to the Council and the European Economic and Social Committee (COM (2009) 174 Final), the Commission submits that "*the interface between the Regulation and arbitration raises difficulties*", and that "*even though the 1958 New-York Convention is generally perceived to operate satisfactorily, parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court; procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of the other Member States of their jurisdiction under the Regulation; there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings; the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain; the recognition and enforcement of judgments merging an arbitral award is uncertain; and, finally, the recognition and enforcement of arbitral awards, governed by the NY Convention, is considered less swift and efficient*

than the recognition and enforcement of judgments" (Report, § 3.7).

The Judgement Regulation is now under a revision process. Pursuant to article 73 of the Regulation, the Commission was to present to the European Parliament a Report on its application no later than five years after its entry into force. The Report, which excerpts are quoted above, was released on April 21. Its conclusions are based on the "Heidelberg Report" prepared by Prof. Dr. B. Hess, Prof. Dr. T. Pfeiffer, and Prof. Dr. P. Schlosser (Verlag C.H. Beck München, 2008; see also *Cahiers de l'arbitrage*, Recueil Vol. IV p.151). The Commission Report is accompanied by a "Green Paper", which purpose is to launch a broad consultation on possible ways to improve the operation of the Regulation with respect to the points raised in the Report. Of particular focus is point 7 of the Green Paper, addressing the issue of the *interface between the Regulation and Arbitration*, where a suppression of the Arbitration Exception is contemplated. The April 21 Green Paper is submitted to public consultation until June 30. Depending on the feedback of the arbitration community, the Commission will or will not endorse the proposal to suppress the Arbitration Exception. These 70 days might thus entirely change the future of Arbitration in the European Union.

The Heidelberg Report has been prepared on the basis of 25 national reports, which reflected a general consensus in favour of the Arbitration Exception. In particular, almost all the national reports reflected the idea that the 1958 New York Convention is perceived to operate satisfactorily, and that a suppression of the Arbitration Exception would not enhance the effectiveness of arbitral agreements and arbitral awards in Europe. Still, the Heidelberg Report endorsed the idea of suppressing the exception. Although the Green Paper acknowledges that "*it would seem appropriate to leave the operation of the* [NY] *Convention untouched*", it submits to the public consultation certain proposals "*to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings*".

The Green Paper envisages "*a (partial) deletion of the exclusion of arbitration from the scope of the Regulation*". Although it is unclear what a "partial deletion" could mean, the Paper clearly delineates its consequences.

First, court proceedings in support of arbitration would come within the scope of the Regulation, and a special rule allocating jurisdiction in such proceedings would have to be created. To that effect, it is proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration. Of course, the question is then to set uniform standards to define the seat of the arbitration. As is well known, the solutions adopted in different jurisdictions in this respect are diverse. In a footnote, the Green Paper suggests that the seat of the arbitration would be determined by reference to "*the agreement of the parties or the decision of the arbitral tribunal*". In absence of agreement of the parties, however, a choice of laws rule would have to be introduced, by connecting the seat to "*the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement*".

Another potentially far-reaching consequence of the suppression of the Arbitration Exception is that the jurisdiction to issue provisional measures in support of the

arbitration would be submitted to "*all the Regulation's jurisdiction rules*", and not only to Article 31, as it is the case since ruling of the European Court of Justice in *Van Uden*. The Green Paper is mute, however, on a number of important issues: will provisional measures include evidentiary measures? If yes, what will be the interplay between the Judgment Regulation and the Evidence Regulation?

An obvious consequence of the suppression of the Arbitration Exception will be the recognition of judgments deciding on the validity of an arbitration agreement (e.g. the Court of Rome decision in *Fincantieri*) or an arbitral award (e.g. the High Court decision setting aside the *Putrabali* award). This might of course be the end of the *exception française* in this field too, although it is not excluded to see French courts going on the barricades to try circumventing the new community rules. Whether this is advisable will of course depend from the perspective from which arbitration is perceived. But we will all need to be aware that in a European Union enlarged to 27 States, the principle of mutual trust which is at the core of European law might produce unwarranted results for the users of arbitration. At the very least, a careful choice of the seat of the arbitration will become even more important.

The other side of the coin would of course be that arbitral awards which are enforceable under the NY Convention could benefit from a rule "*which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award*". In the current situation of European law, an award can only prevent the recognition of a contrary judgment if it has been enforced (exequatur) in the requested jurisdiction. The solution envisaged by the Green Paper would therefore consist in assimilating an award rendered in a Member State to a judgment. A further step forward would be "*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*". In other words, an award rendered in France and to which the exequatur would be granted in France, would be enforced in any other Member State, with no requirement of additional exequatur. The proposal would be in line with the idea of a suppression of exequatur for judgments, and would undoubtedly be in favour of the efficiency of arbitration. The contrary situation, where judgments would freely circulate with no need for an exequatur (under the revised Regulation), whereas awards would still need to be recognised and enforced in each single country, would certainly be detrimental to arbitration. An alternative to this system would be to adopt at the European level a uniform recognition rule inspired from Aricle IX of the Genva Convention (the Green Paper contemplates "*taking advantage of Article VII of the NY Convention to further facilitate at EU level the recognition of arbitral awards*").

Where the Green Paper enters dangerous waters is, however, when it addresses "*the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal*". The issue here is that of the so-called "Italian Torpedoes" which gave rise to the *West Tankers* case (in that case, a Sicilian Torpedo). For example, parties A and B have an arbitration agreement providing for *ad hoc* arbitration by three arbitrators in Paris. Party B anticipates an arbitration request by Party A and sues at the court of its domicile (say, the Court of Craiova, Romania), where it believes that it will be better treated than his opponent. Party B requests to the Court of Craiova to decide that the arbitral agreement is null and void,

or that it does not apply to the dispute. Party A serves a request for arbitration and appoints an arbitrator. Party B refuses to do so. Just like in *March Rich*, Party A goes to the court of the seat to request the appointment of the second arbitrator. Party B objects that the arbitral agreement is null and void or inoperative. In the current state of French law, the court would appoint the arbitrator unless the arbitral agreement is *manifestly* void or inoperative. As arbitration is not included in the scope of the Judgment Regulation (and *March Rich* confirmed that proceedings for the constitution of the arbitral tribunal fall within the scope of the exclusion), the court does not have to pay attention to the proceedings in Craiova. Now, however, if the Arbitration Exclusion was suppressed, the *lis pendens* provision of Article 27-1 of the Judgment Regulation would apply. That provision obliges, where proceedings involving the same cause of action and between the same parties are brought in the courts of different Members States, the court second seized to stay the proceedings until such time as the jurisdiction of the court first seized is established. In the case at hand, the same question (whether the arbitral agreement is valid or operative), would be pending between the same parties before the two courts. The fact that the parties agreed on an arbitration agreement would not prevent the application of Article 27, for exactly the same reasons that led the European Court of Justice to decide in *Gasser* that the *lis pendens* rule applies even in presence of a choice-of-court agreement.

In order to avoid this unwarranted result, the Green Paper suggests a solution which we believe would be a step backwards for arbitration, namely to concentrate the litigation of the validity or applicability of the arbitration agreement before the courts of the seat of the arbitration. In other words, in order to avoid parallel proceedings, Party A would have to seek a declaratory judgment in France.

The first problem which arises here is that, in many jurisdictions, there is no such procedure, and the law would therefore have to be amended to create it. In addition, in order to be efficient, a declaratory action would have to be decided in a short time-limit. Is that realistic?

Further, there is the problem to know what would happens in jurisdictions which admit the negative effect of *Kompetenz-Kompetenz* and limit themselves to verifying that the arbitration agreement is not manifestly void or inoperative. Is it conceivable that a decision ascertaining that the arbitration agreement is not manifestly void or inoperative would bind the courts of another Member State where a declaratory action or an action on the merit would have been brought? Strictly speaking, such decision does not decide on the existence, validity and scope of the arbitral agreement, but defers this issue to the arbitral tribunal first. Alternatively, would it be possible to expand the Green Paper proposal to arbitral tribunals as well as courts. The Green Paper proposal would then have to be read as follows: "*One could, for instance, give priority to the courts of the Member State where the arbitration takes place* ***or the arbitral tribunals*** *to decide on the existence, validity and scope of the arbitration agreement*". Still, the backdrop of such a proposal would be to instate a difference of regime between arbitrations having their seat in and out of the European Union.

Another fundamental aspect of the problem would be the potential divide that the Regulation would create between *ad hoc* and institutional arbitration. In an ICC

arbitration taking place in Paris, for example, the problem that we just described would not exist, because the arbitral tribunal would be appointed by the institution and the arbitrators would be able to render their award in spite of the parallel proceeding in Craiova. However, the *lis pendens* issue would still reappear at the enforcement stage. Once the award will have been rendered, and assuming the Craiova court would not have yet finally decided upon its own jurisdiction (some courts are indeed slower than arbitral tribunals), any EU court requested to enforce the award would be faced with a *lis pendens* objection, as Party B would certainly oppose the enforcement on the basis that the arbitration agreement is void or inoperative. In order to avoid this result, the priority contemplated by the Green Paper in favour of the courts of the seat should include the courts having to deal with the enforcement of the award. Even in this case, the problem would remain if enforcement is sought in a EU court other than the court of the seat. In practice, the situation would re-introduce a form of double exequatur.

The Green Paper proposes to address these concerns by introducing two new concepts. The first would be that of "*a strengthened cooperation between courts seized, including time-limits for the party which contests the validity of the agreement*". The second would be the introduction of a uniform choice of law rule concerning the validity of the arbitration agreement. The conflict of laws rule would connect to the law of the State of the place of the arbitration. It is unlikely that these proposals will suffice to resolve the complex *lis pendens* problems arising. The result would be, for example, to determine the law applicable to the arbitration agreement by applying rules of jurisdiction whenever the seat has not been determined directly or indirectly by the parties (as the default rule would be, according to the Green Paper, the courts having jurisdiction in absence of an arbitration agreement). This would be all the more difficult that, in many instances, the regulation opens jurisdictional options to the plaintiff.

These issues are complex. The consequences of a suppression of the Arbitration Exception are far reaching. The balance between arbitration and community law is subtle. Arbitration law is at the same time diverse and universal, whereas Community law strives towards uniformity and is driven by political and institutional objectives.

This is not to say that the need for coordination of arbitration and court proceedings should not be addressed. The issue is however whether such concerns would not be better addressed in a specific international arbitration law instrument rather than in a regional community law regulation, with the risk of fragmenting each Member State's arbitration laws.

Whatever the answers to those questions are, the authors urge the arbitration community to put forward their views by replying to the public consultation by the June 30, 2009 deadline.

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