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« Circulez, il n'y a rien à voir ! ». A Response to Professor Hess

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Professor Hess is the author of the chapter of the Heidelberg Report on the interplay between arbitration and the Regulation 44/2001 ("the Regulation"). As such, and quite understandably, he actively promotes the suggestion that the arbitration exception should be deleted from the Regulation.

The Heidelberg proposal has been followed by a Green Paper of the European Commission and by a public consultation, which has given rise to numerous reactions from the arbitration community. Many of these reactions expressed a variety of serious concerns on the impact that the extension of the scope of the Regulation to arbitration related court litigation could have. Those concerns relate to possible conflicts between the Regulation and the New York Convention due to the automatic recognition of judgments invalidating arbitration clauses and arbitral awards for reasons inconsistent with the New York Convention, as well as to the recognition of judgments inconsistent with an arbitration awards. They also relate to possible lis pendens situations between proceedings initiated in breach of an arbitral award and proceedings to set the arbitration in motion or to enforce an award. Finally, the suggestion that the lis pendens rule of Article 27 of the Regulation could be set aside in case of a declaratory action before the courts of the country where the arbitration has its seat raises legitimate concerns with respect to the negative effect of the competence-competence principle, as well as to the rush to courts that it might provoke (on these concerns, see the responses to the Commission's public consultation, and in particular the position taken by the International Bar Association Arbitration Committee, *see* also our previous post on these issues).

Those concerns, according to Prof. Hess, are misplaced. In an article posted on www.conflictsoflaw.net , which will soon be also published in the 2010-1 issue of the Cahiers de l'arbitrage/The Paris Journal of International arbitration, Prof. Hess submits that they stem from a "misunderstanding" of his intentions (footnote 32). He also promises that "the implications of the proposal will be rather limited" and that "the present state of affairs will largely remain unchanged". With due respect, this is wishful thinking. The deletion of the arbitration exception, if adopted, will on the contrary have profound and unpredictable consequences on the law of arbitration in EU Member States.

Prof. Hess' is quite keen to convince the arbitration community that his proposal is arbitration friendly. The Heidelberg proposal would indeed be thought to offer post-West Tankers an alternative to anti-suit injunctions in order to protect arbitration against torpedo actions ("the

starting point of the Heidelberg Report was the West Tankers decision of the ECJ"). Yet, it is doubtful that drafters' primary intention was to remedy West Tankers, for the Heidelberg Report was drafted and published many months before the sinking by the ECJ of pro-arbitration anti-suit injunctions. At any rate, there are good reasons to believe that the medicine would be worst than the illness it is suppose to cure.

Prof. Hess's confidence that his proposal is innocuous seems to be based on the assumption that "the New York Convention provides for a uniform law", and that there is thus "a general assumption that the courts of its contracting parties will apply its provisions equally". As all courts of the Union should be trusted in an equal manner, "there is no reason to oblige the courts of a contracting party in a regional framework to verify the validity of the agreement individually". In other words, mutual trust between Members States would command to give the same deference to all courts decisions in the Union, which may be fine in Aldous Huxley's best of all worlds, but is probably far from the reality of the Union. Prof. Hess himself recognises, by the way, that the distrust towards State intervention in arbitration proceedings has been caused by "the limited degree of uniformity created by the New York Convention which does not entirely eliminate differences between the national jurisdictions", which acknowledgement is rather difficult to conciliate with the assumption that the New York Convention "provides for a uniform law".

Be as it may, there should be no serious argument that there is indeed no "general assumption" that courts in Member States apply the New York Convention "equally". It is indeed not the case. Quite to the contrary, there are considerable differences in the way different jurisdictions apply the New York Convention. This is, first, because the generality of the terms of the New York Convention permit courts to disregard its spirit while formally complying with its literal terms (for example by applying a wide interpretation of the concept of public policy). And, second, because the New York Convention is not a convention of uniform law (like, for example, the Vienna CISG). Its scope is not to replace the national laws on arbitration, but to provide for a minimal threshold for the enforcement of arbitration agreements and foreign arbitral awards. As such, the Convention permits Member States to apply more favourable rules. In short, the Convention's application and interpretation falls back on national arbitration law (on the nature of the New York Convention and the more-favourable rule *see* A. Mourre, A propos des articles V et VII de la Convention de New York et de la reconnaissance des sentences annulées dans leur pays d'origine: où va-t'on après les arrêts Termo Rio et Putrabali ? rev. arb. vol. 2008, Iss. 2 pp. 263-298). On the contrary, international works such as the successful UNCITRAL Model Law are model uniform instruments with a defined aim to harmonize national arbitration legislations.

It is in any case rather doubtful that, as submitted by Prof. Hess, "the prevalence of the New York Convention would be ensured by Article 71 JR, guaranteeing the New York Convention's priority as a so-called 'special convention'". If it were so, French courts would retain the possibility of enforcing in France, based on article VII of the New York Convention, an award annulled in another Member State, which is the exact contrary of what the Heidelberg report intends to achieve. Article 71 refers to special conventions relating to court jurisdiction and enforcement of judgments in special matters, which arguably does not encompass the New York Convention.

It would therefore be necessary, for the sake of clarity, to add to Article 71 an additional provision stating that: "Nothing in the present Regulation will affect the proper operation of the New York Convention".

One of the difficulties with the Heidelberg proposals is that it ignores the variety of cultures and

legal realities that characterize arbitration. The Heidelberg Report is indeed impregnated by the idea that, if there is a dispute on the validity or enforceability of the arbitration agreement, it is for the courts to decide such dispute upfront. However, such a perspective, which is present in the laws of the United Kingdom and Germany, is totally absent in the French and Swiss perspectives (and Switzerland is now about to adopt the negative effect of Kompetenz-Kompetenz regardless of the seat of the arbitration – *see* Georg von Segesser/Dorothee Schramm latest post for an update on the legislative works being done in this respect). The way Prof. Hess approaches the problem is telling: the Heidelberg proposal does "not intend to increase satellite or parallel litigation in cases where the arbitration clause is undisputed" [emphasis added]. And he further considers that, would the Heidelberg proposals be adopted, "when the arbitration agreement is undisputed, parties may immediately initiate arbitration proceedings without any recourse to State courts" [emphasis added]. Considering that the parties may start their arbitration if they agree that there is a valid arbitration agreement is hardly an innovative proposition. But the reverse of the medal is interesting: if there is no agreement, courts should step in before the arbitration is started. Of course, from that perspective, the suggested declaratory action fits nicely in the picture.

Prof. Hess concedes that "even if the clause is disputed, Member States shall be free to provide a system of negative competence-competence where the arbitral tribunal decides on the validity of the clause". This is acknowledged: the Regulation as amended would not invalidate Article 1458 of the French Code of Civil Proceedings. Whilst this might provide some comfort, Prof. Hess is however totally silent on the operation of article 27 of the Regulation in case of a conflict between an action in the merits in breach of the arbitration agreement and an action to put the arbitration in motion before the juge d'appui at the seat of the arbitration (e.g. the French juge d'appui. The question is of course relevant in case of an ad hoc arbitration where the parties did not select an appointing authority).

The easy answer could of course be that the decision of the juge d'appui according to which the arbitration shall proceed is a court decision and is thus able to set aside the lis pendens principle according to the proposed new article 27A. Is that so sure?

The proposed new article 27A is clear: it says that the lis pendens principle will be set aside "if a court of a Member State that is designated as the place of the arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement". First, arbitration agreements which do not provide for the seat of the arbitration would be left unprotected. But more importantly, declaratory relief is what it is (unless the Commission intends to change the concept): a declaration, in the present case a declaration that the arbitration agreement is valid or enforceable. A French juge d'appui however takes no such decision. When seized of an action to put the arbitration in motion (and the same applies if the court is seized on the merits), a French court will limit itself to ascertain that the arbitration agreement is not manifestly null and void or inoperable. And this is a very demanding standard for parties who submit that there is such a manifest nullity or inoperability: according to French case law, it can only be so if the alleged nullity or inoperability is evident and does not need any complex analysis of the facts (*see* recently Cass. 1st Civ. 7 June 2006, Jules Verne c/ Sté ABS, rev. arb. Vol. 2006 Iss. 4, pp. 945 – 953 , note E. Gaillard, JDI Vol. 2006 Iss. 3 pp. 1384, note A. Mourre). Courts have been as far as deciding that the juge d'appui can only declare the arbitration agreement manifestly void or inoperable if there is no possible contrary solution (on this issue, *see* O. Cachart, Le contrôle de la nullité ou de l'inapplicabilité manifeste de la clause compromissoire, rev. arb. Vol. 2006 Iss. 4, pp. 893 – 908). Otherwise, it is for the arbitral tribunal to decide. There is, in other words, no declaration from the French juge d'appui as to the validity or applicability of

the arbitration agreement.

In sum, the proposed new article 27A will not prevent a party having first started merit proceedings in breach of the arbitration agreement, and submitting before the court seized in the merits that the arbitration agreement is manifestly void or inoperative, from relying on the lis pendens rule to impose a stay to the French juge d'appui having to decide that the arbitration agreement is not void or inoperative.

In order for the Heidelberg proposal not to hamper the operation of the negative effect of competenz-competenz, the new Article 27A would have to be drafted as follows:

"A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to the existence and scope of the arbitration agreement (i) if a court of a Member State that is designated as the place of the arbitration is seized for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement, or (ii) if a judge at the seat of the arbitration has been seized to put the arbitration in motion or has been seized of a difficulty relating to the constitution of the arbitral tribunal, or (iii) if an arbitral tribunal, sitting in or outside the European Union, has been seized of said question" (accordingly, see the IBA position paper, § 25-28).

The issue that then arises is of course that many jurisdictions, like France, take quite a liberal approach as to the applicability of the arbitration agreement to non signatories, with the consequence that the above proposition would lead to generalise in the European Union the French arbitration friendly conception that arbitral tribunals have a priority in assessing their own jurisdiction, including with respect to non signatories. Are Prof. Hess and the Commission ready to endorse that principle? That would certainly be a considerable step forward for the laws on arbitration in Europe.

Another aspect of the lis pendens conundrum regards the enforcement of awards. Presumably, Prof. Hess' proposed Article 27A would prevent any lis pendens situation between an action in the merits in breach of the arbitration agreement and an enforcement action at the seat of the arbitration. As a matter of fact, in case of a dispute on the award's validity at the seat of the arbitration where a party would base its argument on the invalidity of the arbitration agreement, the court would be required to decide whether said agreement is indeed valid or enforceable, and its decision would be taken as equivalent to the declaration required by the proposed article 27A. But what if enforcement is sought in another country? The proposed Article 27A would then not protect the award and the Regulation's automatic stay provision would then have the effect of preventing a party from enforcing the award.

It would therefore be necessary to include in the Regulation a new Article 27B as follows: "Article 27 shall not apply to the court of a Member State requested to enforce an arbitration award" (accordingly, the IBA position paper, § 40).

Finally Article 34 of the Regulation would need to be amended so to avoid the automatic recognition of judgments having disregarded a valid arbitration award or annulled an arbitral award on the basis of local standards. A new article 34A would therefore need to be included, as follows:

"A judgement shall also not be recognised:

a) if it has been rendered in disregard of an arbitration agreement that is valid under the law of the

country of recognition;
b) as regards judgments rendered on the validity of an award, if (i) it has not been rendered by the courts of the country where the arbitration has its seat, or (ii) in case of annulment of the award, if it was not made on one of the grounds set out in Article V (1) (a) to (d) of the New York Convention" (accordingly, see the IBA position paper, § 40).

Encore un effort, Messieurs les réformateurs….

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