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European Parliament Committee Expresses Views on Arbitration and Court Jurisdiction

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The discussion on the position of arbitration in the Brussels Jurisdiction and Enforcement Regulation (Regulation 44/ 2001) has now reached the Committee on Legal Affairs of the European Parliament.

Just to remind those less familiar with the issue: the present Regulation, as well as the preceding Jurisdiction Convention, allowed courts in EU countries to assume jurisdiction over a contract in spite of an arbitration clause whenever that court decided that the arbitration clause, although binding under the law of the contract and the law of the seat of arbitration, was invalid under its domestic law. They can do so because Art. II of the New York Convention, that obliges state courts to refer disputes to arbitration whenever there is a valid arbitration agreement, does not indicate under which law that validity has to be assessed.

Belgian courts thus for instance frequently assume jurisdiction over the termination of Belgian distributor agreements, although governed by foreign law, because a mandatory 1961 statute forbids arbitration. On January 14, 2010 the Belgian Court of Cassation once more has confirmed that an arbitration clause in a distribution contract governed by Californian law and validly providing for ICC arbitration in Paris under the proper law of the contract and under the law of the seat of arbitration, was nevertheless null and void under the Belgian 1961 statute. Consequently the lower court was entitled to grant substantial compensation for termination under the Belgian 1961 statute. In the case at stake the Californian manufacturer had not even bothered to start an arbitration – probably because he considered the Belgian judgment unenforceable in the USA. Matters would be different when the manufacturer would have assets within the European Union and the Belgian judgment would have been enforceable all over the European Union under Regulation. He could have started the arbitration expecting that the arbitrators would not have granted compensation or less compensation under Californian law. The award, however, would have a limited impact. Its enforceability or recognition under the New York Convention would not block the enforcement of the Belgian judgment elsewhere in the European Union under Regulation 44/ 2001.

The English West Tankers decision, which lead to parallel proceedings before an Italian court and English arbitrators because the Italian court decided that under Italian law the arbitration clause was not effective, has drawn much international attention but is another illustration of the inconvenience of parallel proceedings.

The Jurisdiction Regulation will be amended by 2011. Whether and how the Regulation should avoid parallel arbitration and court proceedings as well as ignorance of the award at the enforcement stage, is being heavily debated for many months. The Heidelberg Report suggested to better integrate arbitration within the Regulation. In its Green Book the European, Commission solicited comments and suggestions from the arbitration community. The consultation was broad: over one hundred suggestions were submitted, going from a full integration of the arbitration process in the Regulation to its absolute exclusion.

It is interesting that the Committee on Legal Affairs of the European Parliament has opted for the latter extreme in its Report on the Implementation and Review of Regulation 44/2001 of a few days ago, i.e. June 28, 2010: the absolute exclusion.

The Committee thus wants to undo the Marc Rich decision. In that case the European Court had decided that a judgement on the merits remains under the Jurisdiction Convention, i.e. the predecessor of Regulation 44/2001, even when the respondent has objected to the state court's jurisdiction because of an arbitration clause. The Committee would also exclude such judgment from the scope of the Regulation: "not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question are excluded from the scope of the Regulation". The practical implication of this approach would be that a judgment becomes not enforceable under the Regulation as soon as the Respondent invokes an arbitration clause – even if this clause would be blatantly invalid.

With regard to the court's powers to sustain arbitration proceedings, the Committee clearly prefers the pre- West Tankers world where the seat of the arbitration had full autonomy to avoid court proceedings elsewhere:

> "Whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights,….) must continue to be available and the effect of such procedures … must be left to the law of those Member States as was the position prior to the judgment in West Tankers".

Although the Committee wants the new Regulation to absolutely exclude arbitration from its scope, it admits arbitration nevertheless through the backdoor. Whenever a judgment on the merits was rendered because the court deemed the arbitration clause invalid, the Regulation would deny enforcement whenever that court "disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied". Under the New York Convention an award may not be enforceable whenever under the law of the country of enforcement, there is no valid arbitration clause. For the Committee a judgment from an EU country would become unenforceable whenever, under the law of the country of enforcement, there would be a valid arbitration clause.

The Committee furthermore does not want to give exclusive jurisdiction to the court of the seat for ancillary court proceedings such as the nomination, challenges and replacement of arbitrators, the setting aside of the award:

> " Exclusive jurisdiction could give rise to considerable perturbations It appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand".

One can deplore that in this way courts of many jurisdictions may interfere with the arbitration proceedings. Probably it would be useful to define the ancillary proceedings which will be of the exclusive competence of the court of the seat while recognizing that other courts, with a sufficient link with the case, may take provisional measures.

The Committee's proposal clearly opts for arbitration. As soon as an arbitration clause is at stake, each EU state is freed from the jurisdictional constraints of the Regulation. However, judgments rendered will nevertheless be enforceable under the Regulation in a court of another EU state as long as the view of that court on the validity and scope of the arbitration clause is compatible with that of the court which rendered the judgment.

The Committee is certainly not the whole European Parliament, which may reach completely different conclusions. Moreover, the European Commission most probably will elaborate its own proposal by the end of this year. However, the Committee's report is certainly the start of intensive discussions among the Community bodies.

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