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Submission of the Association for International Arbitration in relation to the Green Paper released in connection with the review of Regulation 44/2001

The Association for International Arbitration (« AIA ») is an association based in Brussels (Belgium). Its object is to promote international arbitration as a means of resolving disputes arising in the course of international trade and investment in any part of the world. Its members are law professionals – arbitrators, attorneys, in-house counsel, academics - worldwide.

The AIA welcomes the opportunity given by the Commission to make comments on the proposals to include arbitration in the scope of Regulation 44/2001 contained in the Report and its supporting Green Paper (hereafter globally referred to as the « Green Paper ») released on April 24, 2009 in relation to the review of Regulation 44/2001.

The AIA has set up a working group to prepare a submission to the Commission on the aspects of the Green Paper affecting international arbitration. Please find the list of the names of the chairman and of the members of the working group at the bottom of this document.

This communication sets out the conclusions reached by the working group of the AIA.

At the outset of this submission, it seems befitting to set out the aims and objectives that are globally attractive for international arbitration to function effectively.

The aims are to provide the international community with a swift arbitration process based on clear and concise rules, procedures and conventions and a clear and non conflictual enforcement system of arbitral awards internationally.

The objectives are to arrange for an international arbitration process, within the framework laid down by both Private and Public International Law, to be effective and available on a global scale. The effectiveness of this process is measured by the extent to which it allows for a swift resolution of conflicts and a resumption of trade and commerce between the parties whenever possible.

It is believed that any improvement or furtherance of international arbitration by means of a new legal instrument will fail its purpose if these aims and objectives are not properly supported.

It is respectfully submitted, as will be more amply demonstrated hereinbelow, that the reform envisaged by the Green Paper does not meet those standards.

The proposals set forth by the Green Paper, if implemented, would be far reaching. It is believed that the deletion of the exclusion of arbitration from the scope of the Regulation advocated by the Green Paper, far from leaving untouched the operation of the New York Convention, would cause the Contracting States to be in breach of their obligations under that Convention. It would also have a similar effect upon the Member States which are party to the Geneva Convention on commercial arbitration of 1961.

Another problem, which appears to have been omitted by the Green Paper, is the impact of the proposals upon the functioning of arbitration between enterprises of the European Community and those which are outside. The goal pursued by the Green Paper, insofar as arbitration is concerned, is strictly regional. It is to extend the goal of the Regulation, namely ensuring the circulation in Europe of judgments made in Europe and establishing rules for deciding the jurisdiction of courts in cases of disputes affecting a defendant domiciled in Europe or certain assets located in Europe, to arbitral awards and arbitration proceedings.

It is submitted that this way of thinking is not adapted to the universal nature of arbitration. If adopted, the proposals of the Green Paper would produce a regionalization of the law of arbitration in the European Union which would not serve the commercial and economic interest of the users of arbitration in Europe and which could result in the European Union being perceived, and possibly branded by persons or institutions infused with malevolent intentions, as an area in which the New York Convention no longer applies.

Moreover, the Commission's proposal does not respect the fact that arbitration should be independent and diverse in its nature (e.g. arbitration should not incorporate any binding precedent effects from previous arbitration proceedings). Community law does not serve these goals, as it strives towards uniformity and is essentially driven by political incentives. Therefore, in as far as concerns should be addressed, this should

rather be done through a specific international arbitration law instrument than through regional community law.

As a consequence, the arbitration exception should not be suppressed. It is true that in its Report to the European Parliament, the Council and the EESC of 21 April 2009, on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Commission found that difficulties arise from the interface between the Regulation and arbitration and that conflicts between parallel court and arbitration proceedings arise when the court does not uphold the arbitration clause while the arbitral tribunal decides to uphold this clause. We admit that, in some occurrences, the Arbitration Exception has given rise to contradictions. However, this limited number of inconsistencies is not sufficient to justify a sweeping change of law.

I Conflicts with international conventions on arbitration

A - The New York Convention of 1958

All Member States are Contracting States of the Convention.

The framework in which the Convention operates is simple: Contracting States have the power to review requests for recognizing and enforcing foreign awards and may do so provided the grounds on which a refusal is based are taken from a list approved by the Convention. Contracting States are also entitled, under Article VII of the Convention, to apply less stringent criteria than those laid down by the Convention. In other words, if a Contracting State wishes to enforce a foreign award in a situation where it would be permissible to refuse the enforcement pursuant to the Convention, it may do so without being in breach of its obligations under the Convention.

1/ The Green Paper's proposal that a judgment of a court of a Member State ruling on the recognition of an award be given effect in all other Member Countries deprives the other Member States of the right given to them by the Convention to appreciate for themselves the recognition of a foreign award.

The subject-matter of the Convention is the recognition and the enforcement of arbitral awards. The subject-matter of the Regulation is the recognition and enforcement of foreign judgments. These are entirely different things and it would be entirely inappropriate to allow the rules regarding judgments, even when dealing

with arbitral awards, to take precedence over those regarding awards. This is not what the Contracting States to the Convention bargained for.

What the Green Paper aims at, is to treat the whole territory of the European Union as if it were one territory with respect to the Convention. The Convention contains no provision allowing the adherence of Regional Economic Integration Organisations, as does for instance the Hague Convention on choice of courts agreements. The proposal contained in the Green Paper would result in the European Union becoming de facto a party to the New York Convention as a Regional Economic Integration Organisation.

Even if that fundamental legal hurdle could be overcome, the goal of making the EU an integrated territory for arbitration through a reform of recognition procedures does not seem very realistic.

Taking a look at this subject from an empirical standpoint, and based on an observation drawn from the experience of some of the members of the working group, it would appear that the general practice of enforcing judgments from one Member State in another is far from the concept of automatic recognition of decisions promoted by the Regulation. Courts are sometimes reluctant to automatically recognize judgments from other Member States, particularly if these countries have a very different system of procedural laws and procedural concepts. It is submitted therefore that replacing the system of recognizing awards by a system of recognizing judgments, as advocated by the Green Paper, is not likely to facilitate the recognition and enforcement of awards.

This observation, along with comments made below in other parts of this submission, also suggest that to be effective, a unified system of enforcement and recognition of arbitral awards can work only if a harmonized consensus can be reached beforehand on the rules and concepts governing arbitration, such as for instance, to name a few, the definition of an arbitration agreement, the formal requirements applicable to awards, the arbitrability of disputes, the contents of international public policy and the grounds for setting aside awards. No such consensus presently exists between Member States. Obtaining a consensus will be a difficult task to accomplish, not just because rules governing arbitration are as much found, if not more, in national jurisprudence than in state laws, but also because countries which are very favourable to arbitration may not be inclined to become aligned with those not so favourable.

2/ The Green Paper also proposes that all disputes regarding the validity and the scope of arbitration agreements be resolved in a declaratory action before the courts of the seat of the arbitration, to the exclusion of any other court. The logic of this proposal would require arbitrators to suspend the conduct of the arbitration for

which they would have been appointed until the issue of their jurisdiction is first resolved by the appropriate court of law.

This would result in the doctrine of « Kompetenz-Kompetenz » which favours the right of arbitrators to rule on their own competence, subject to the control of courts, becoming a dead letter.

Under article II .3 of the Convention, courts of Contracting States, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, must refer the parties to arbitration at the request of one of the parties unless they find that the arbitration agreement is null and void, inoperative or incapable of being performed. Even if no finding to the effect that the arbitration agreement is null and void is made, the arbitration tribunal is not precluded from making such a finding in the course of the arbitration proceedings.

The Convention is therefore supportive of the doctrine of « Kompetenz-Kompetenz ».

In the Contracting States which take into account the negative effect of the doctrine of « Kompetenz-Kompetenz », courts will refrain from referring the parties to arbitration only if they find the arbitration agreement to be manifestly invalid, inoperative or incapable of being performed.

Whether or not courts of Contracting States apply the negative effect of the doctrine of « Kompetenz-Kompetenz », they have the power under the Convention to refer the parties to arbitration when seized of an action in a matter in respect of which the parties have made an arbitration agreement.

The proposal of the Green Paper would deprive them of this power in violation of the Convention.

In this respect, it should be noted that in West Tankers, which dealt with an anti-suit injunction issued by the court of the seat of the arbitration, the European Court of Justice decided that anti-suit injunctions are incompatible with Regulation 44/2001 because such injunctions deprive courts of the Member States, which are seized of an action in a matter in respect of which the parties have made an arbitration agreement, of the power conferred to them by the New York Convention to refer the parties to arbitration.

In doing so, the European Court of Justice has clearly established in West Tankers that as a matter of European law, the New York Convention has primacy over Regulation 44/2001.

3/ The Convention gives Contracting States the right to make the so-called « commerciality reservation » whereby the Convention will be applied by any such State only to awards relating to disputes arising out of legal relationships considered as commercial under the national law of the State making the reservation.

The proposals of the Green Paper would cause the right given to Contracting States to opt for or against the commerciality reservation ineffective.

If a court sitting in a State having made the commercial reservation were to decide in a matter deemed to be not commercial that an award cannot be enforced, that decision would under the Green Paper be recognized in all other States, including those having not made the commercial reservation. This would be in contradiction with the right of these other States given to them by the Convention not to opt for the commercial reservation. And vice versa.

4/ The Green Paper suggests that the decision of the court of a Member State annulling or setting aside an award should be recognized in all other Member States.

Article VII of the Convention allows courts of a Contracting State to disregard a foreign judgment annulling a foreign award and to enforce such awards insofar as the purpose of Article VII is to enable the enforcement of arbitral awards to the greatest extent.

Although courts of some Member States have not availed themselves of the opportunity offered by Article VII, others like France, Belgium and the Netherlands, have to varying degrees enforced arbitral awards annulled abroad.

The proposal of the Green Paper not only runs against the purpose of Article VII but is also in violation of the rights of the Contracting States given to them by the Convention.

B- The Geneva Convention of 1961

15 Member States are also parties to the Geneva Convention of 1961.

1/ The Green Paper proposes that all disputes regarding the appointment of arbitrators be referred to the court having jurisdiction over the seat of the arbitration.

In ad hoc arbitration, under Article IV of the Geneva Convention, save as between States having ratified the Arrangement of Paris of December 17, 1962, the power to

appoint an arbitrator, in the event that a party fails to appoint his arbitrator is bestowed upon the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence.

Similarly, if the parties cannot agree on the appointment of a sole arbitrator, the claimant shall apply for the necessary action at his option to the President of the competent Chamber of Commerce of the place of the seat of the arbitration agreed upon or to the President of the competent Chamber of Commerce of the respondent's habitual place of residence.

These provisions are inconsistent with the proposal of the Green Paper.

2/ Article V of the Geneva Convention requires that a party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so during the arbitration proceedings. Article V states further that parties which fail to timely raise a jurisdictional plea in the arbitration proceedings are barred from raising any such plea in subsequent enforcement court proceedings.

Article VI.3 states that where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null or void or had lapsed shall stay their ruling until the arbitral award is made, unless they have good and substantial reasons to the contrary.

The proposal of the Green Paper to have all claims relating to the jurisdiction of arbitrators, including those relating to the existence of the arbitration agreement, adjudicated exclusively by the court having jurisdiction over the seat of the arbitration, is incompatible with Articles V and VI of the Geneva Convention.

3/ Article IX of the Geneva Convention restricts the right of a Contracting State to refuse the recognition of awards set aside in another Contracting State. According to Article IX, the setting aside of an award in a Contracting State may be a ground for refusing the enforcement of that award only if such setting aside has been made for the reasons which in effect are those listed in paragraphs (a) to (d) of Article V.1 of the New York Convention.

The proposal of the Green Paper to compel the recognition of the decision of the court of a Member State annulling or setting aside an award in all other Member States is against Article IX of the Geneva Convention.

II Implementation of the Green Paper's proposals to arbitration proceedings involving non-EU parties or a seat outside the EU

Several fact patterns must be looked at separately.

A – All parties are non-EU parties

The assumption is that the parties have chosen the place of arbitration within the EU. Requiring as is proposed by the Green Paper that all ancillary proceedings be decided exclusively by the court of the seat of arbitration would be either ineffective or could deter the parties from choosing a EU country as venue for the arbitration.

1/ If an issue arises with respect to the constitution of the arbitral tribunal, and if the parties are from countries which are Contracting States of the Geneva Convention, the exclusive jurisdiction rule imposed by the Green Paper could be disregarded by the parties if they preferred to apply the provisions of the Convention. However, doing so would not be without creating potential problems if the award could be ultimately set aside by the courts of the Member State where the arbitration took place on the ground that the composition of the arbitral tribunal was not in accordance with the law of that Member State.

Rather than taking this risk, the parties may prefer to choose a venue outside the EU.

2/ Another example can be found in the taking of evidentiary measures

A party may require the support of a court in the country of one of the parties to force the production of evidence there. The rule proposed by the Green Paper that the court sitting at the place of arbitration be given exclusive jurisdiction to rule on ancillary measures, including those relating to the taking of evidence, would be ineffective. It can be fairly assumed that the party in need of evidence will not hesitate to seek the support of the court sitting in the country where the required evidence could be procured.

B – All parties are EU parties and the seat is outside the EU

1/ The seat is in a State which is a party to the Lugano Convention

This is a situation of great practical importance as Switzerland is host to many international arbitrations, even between companies domiciled in the EU.

The exclusion of arbitration from the scope of application of the Lugano Convention would remain in force while it would be deleted from the revised Regulation.

It is unclear how these two sources of law could coexist. The Green Paper offers no clue in this regard as to what could happen.

Arguably, the Lugano Convention should prevail over the Regulation. If that is the case, the changes brought about by the revised Regulation would remain without effect. If not, one could anticipating a mess arising in relations between EU countries and Switzerland.

2/ The seat is in a country which is not a party to the Lugano Convention

The proposals tending to confer exclusive jurisdiction upon the court of the seat of arbitration will remain without effect.

Insofar as these proposals would result inter alia in the rejection of the « Kompetenz-Kompetenz » doctrine, parties for which this doctrine is an important feature of arbitration may prefer to choose a seat outside the EU where that doctrine is given effect.

C – At least one party, but not all parties, are domiciled outside the EU

1/ The example discussed in point A.1/ applies equally if the two parties are from countries are Contracting States of the Geneva Convention.

2/ The example discussed in point A. 2/ above is equally valid

Any party which needs the support of the court of the country to obtain evidence where the non-EU party resides will apply for an evidentiary order from that court if it needs to. By contrast, it will not be allowed to apply for an evidentiary order in the country where the EU party resides, even though an evidentiary order issued by the court of the seat of the arbitration might not be available or if available might not be practical to enforce in the country where the evidence is actually located.

3/ If the seat of the arbitration is not in the EU, the proposals tending to confer exclusive jurisdiction upon the court of the seat of arbitration will remain without effect.

As a consequence, depending on whether the seat of arbitration is within or without the territory of the EU, two sets of rules will be applied.

Furthermore, as discussed in point B.2/ above, parties may prefer to place the seat of the arbitration in a country which will be more respectful of the « Kompetenz-

Kompetenz » doctrine. This will result in arbitration business being delocalized outside the EU.

CONCLUSION

The present system has worked well for arbitration so far. The few cases where problems have occurred in the enforcement of arbitral awards within the European Union during the last 40 years do not justify the radical changes advocated by the Green Paper. The arbitration community does not feel the compelling need for such changes. It is also felt that the proposed changes, because of the risks and uncertainties which they would create, may cause EU parties as well as non-EU parties which for a number of reasons would otherwise choose a country of the EU as a seat of arbitration, to deter them from pursuing arbitration in the EU.

The Commission's proposal goes too far as it aims to bring all arbitration aspects under the scope of Regulation 44/2001. This would be a radicalisation of the already controversial perspective that was adopted in the Van Uden case (1998). In the Van Uden decision, the Court confirmed that court's jurisdiction to deal with provisional measures is subject to the Regulation even if the parties agreed on an arbitral agreement.

Besides this, to the extent that there is a need for improvements, for which neither the Report, nor the Green Paper has produced sufficient evidence, it is believed that they cannot be implemented by a Regulation.

As this paper demonstrates, the overhauling of the status of arbitration advocated by the Green Paper will cause a substantial interference with the obligations and rights of the Member States arising under the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards and the European Convention on International Commercial Arbitration of 1961 done at Geneva on April 21, 1961. Under the prevailing legal authority, art. 307 par. 1 of the EC Treaty applies to conventions concluded after January 1st 1958 on matters on which the EU acquired competence thereafter. As Regulation 44/2001 is based on Title IV Part III of the EC Treaty introduced by the Treaty of Amsterdam, this paper respectfully submits that Regulation 44/2001 cannot impose on Member States obligations which are inconsistent with the above-mentioned international conventions.

Association for International Arbitration

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