COMITÉ FRANÇAIS DE L'ARBITRAGE

FRENCH COMMITTEE ON ARBITRATION

Re : EC Green Paper on proposed modification of Regulation 44/2001

The French Committee on Arbitration (*Comité Français de l'Arbitrage*, CFA, hereafter "the Committee") welcomes the opportunity to comment on the Green Paper issued by the European Commission on the proposed modifications of Regulation 44. The Committee will focus on the modification relating to arbitration (i.e. Question 7). In relation to arbitration, the proposed modifications are major, in so far as the Green Paper suggests that arbitration should now be included in the scope of the Regulation. Given the importance of arbitration in international business, where it constitutes the usual means for resolving disputes, the proposal to include arbitration in the scope of Regulation 44 is likely to have profound implications, both from a legal point of view and from an economic point of view.

The Committee takes note that the proposals made by the Green Paper are rather general in nature. The Green Paper makes reference to the report issued in 2008 by Heidelberg University. This report contained detailed suggested modifications of Regulation 44, in particular with regard to arbitration. Many of the modifications suggested by the Heidelberg Report, and the Green Paper, raise significant difficulties, in particular concerning the relationship between the proposed new regime and the existing international instruments governing international arbitration, chiefly the New York Convention 1958 and the Washington Convention 1965, as well as the various national laws on arbitration.

At this stage, the Committee will limit its comments to those aspects that have been discussed in the Green Paper.

The Committee notes that the main modification proposed by the Green Paper, following in this regard the Heidelberg Report, is to include arbitration within the scope of Regulation 44. Yet, the Green Paper offers little justification, if at all, for this proposed inclusion. No concrete example of the difficulties alleged is given in order to justify this inclusion. When preparing the Heidelberg Report, its authors consulted arbitration specialists within the Member States. According to the Heidelberg Report, the overwhelming response from the specialists consulted was that arbitration was functioning satisfactorily within the Union, and that there was no need to regulate arbitration at the Community level nor to include arbitration within the scope of the Regulation. Moreover, arbitration was excluded from the recent Rome II Regulation dealing with applicable law. Arbitration was also excluded from the scope of the new Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 10 June 2009, which is replacing the Lugano Convention and which precisely refers to Regulation 44/2001. Against this background, it is surprising that neither the Heidelberg Report nor the Green Paper elaborates in any detail on the need for the inclusion of arbitration within the scope of the Regulation. This lack of justification raises a serious doubt as to the need for the proposed inclusion. Moreover, given that arbitration is functioning satisfactorily within the Union, there is little justification, if at all, to limit the autonomy of Member States in their ability to regulate arbitration. In other words, arbitration is best regulated at the level of Member States, which enjoy a significant autonomy in this regard, and, at the international level, by existing international conventions, in particular the New York convention. The addition of a supplementary layer, at the Community level, would be an unnecessary source of complication. Moreover, it is rejected by the vast majority of users and appears not to be justified by any reason.

Turning now to certain technicalities of the proposal made in the Green Paper, it is useful to examine these proposals in light of the legitimate expectations of the users of international arbitration. Users resort to arbitration for two main reasons: (i) the efficiency of arbitration and the absence of State court intervention; (ii) the neutrality of arbitration, that is the possibility of having the case heard by a neutral adjudicator, not being located in the country of one of the parties. In view of these reasons, the proposals made by the Green Paper create serious difficulties.

The Green Paper is based on the underlying idea that, prior to starting an arbitration, the parties should , in the event arbitral jurisdiction is disputed, apply to the courts of the seat of the arbitration in order to obtain a form of declaratory judgment on the validity and scope of the arbitration agreement. That decision would in turn be automatically enforceable throughout the European Union.

In terms of procedural efficiency, the likely outcome of this proposal is that, in practice, parties agreeing to arbitration will, in many cases, be forced to resort to State courts prior to starting their arbitration. However, parties enter into arbitration agreements precisely to avoid litigating before State courts, and this expectation would be defeated by the proposed modification.

A consequence of this detour through State courts, using the official language of such courts and not the "neutral language chosen for the arbitration, is that arbitration would be more costly and take longer than is currently the case in arbitration-friendly jurisdictions.

Moreover, this procedural inefficiency will be compounded by the criteria proposed for the determination of the seat of the arbitration. Under the proposed modification, if the seat of the arbitration has not been chosen by the parties, the seat will be determined by applying, by analogy, the rules that govern territorial jurisdiction in a litigation context under the Regulation. In practice, the principle will be that the domicile of the defendant is the seat of the arbitration, subject to the various exceptions found in the Regulation. As a result, the neutrality of the seat of arbitration, which is arguably one the greatest advantage of arbitration, would no longer be guaranteed. The claimant would have to conduct its arbitration in the jurisdiction of the defendant, and be subject to the supervisory jurisdiction of the courts of the defendant's country. This may discourage many parties from having recourse to arbitration under this regime.

Another source of difficulty is linked to the fact that the proposed court action for a preliminary determination of the validity and the scope of the arbitration agreement, presumably taking the form of a declaratory judgment, does not actually exist in many Member States. Rather, a number of Member States have adopted an opposite rule, according to which it is not at the beginning of the arbitration proceedings, but at the end of the arbitration proceedings, that domestic courts deal with any issue regarding the validity and scope of the arbitration agreement (the so-called negative effect of Competence-

Competence). Those jurisdictions take the view that the parties are better off by starting with the arbitration, subject to the subsequent review by the domestic courts. The difference between the two systems is a question of timing. It is always the courts of the seat of the arbitration which have the final say on the validity and the scope of the arbitration agreement, but this review is performed either prior to the beginning arbitration or after an award has been rendered.

In practice, the principle of an *a posteriori* review accords with the fact that arbitration is the usual and not an exceptional means for resolving disputes in international commerce. It is also in keeping with the expectations of the parties when they enter into an arbitration agreement. When the parties have entered into an arbitration agreement, domestic courts are not supposed to intervene, at least during the arbitration process. This principle has proven to be a very efficient tool for attracting arbitration to jurisdictions which apply it. . Implementing this rule at the European level would have the effect of attracting arbitrations within the border of the European Community. Implementing the proposal of the Report would have the opposite effect, as it inevitably leads to the result that State courts must be seized first.

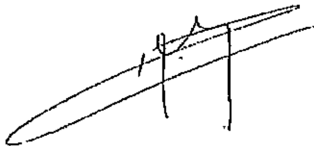
Another cause of concern stems from the automatic recognition of the State court judgments regarding the scope and validity of arbitration agreements. It is no secret that the Member States have differing views as to what is a valid arbitration agreement, what are the matters that can be arbitrated, and what is the proper scope of an arbitration agreement. Granting automatic recognition to judgments issued by those jurisdictions which are the less favorable to arbitration will automatically result in the lowest common denominator being applied throughout Europe. It will not take long to the users of international arbitration to realize that Europe is no longer an arbitration-friendly jurisdiction. This side effect will have significant consequences long term. It is therefore premature to envisage a system for the automatic recognition of Court judgments in relation to the validity of arbitration agreements.

In summary, it is doubtful that the proposed modifications will contribute to the promotion within Europe of arbitration as a means for resolving disputes and attain their proclaimed objective of simplifying issues allegedly arising from the existence of parallel State Court proceedings and arbitration proceedings. Rather, the proposed modifications will in all likelihood lead to theopposite result. They will significantly impair the procedural efficiency

of arbitration. They will imperil the recognition of arbitration, as an institution, within the European Union.

The business of international arbitration is not regional but worldwide. Jurisdictions, in Europe and outside Europe, compete to attract arbitration. As a result, should the proposed modifications be implemented, there is a significant risk that users of international arbitration will leave the European Union altogether as a place of arbitration and bring their arbitration to countries that are unaffected by this regime. This would be a regrettable result, given that European countries have historically been at the forefront of the promotion of arbitration, and have enjoyed great economic benefits from this position. This is why the Committee urges the European Commission to reconsider its decision to include arbitration within the scope of Regulation 44.

Paris, 15 June 2009



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The French Committee on Arbitration is an independent organization created in 1953 in the form of an "association" (Law of 1901), its purpose being the study, development and improvement of arbitration.
The Committee's main activities are directed towards the development of national and international arbitration and, in this respect, it publishes and distributes quarterly the *Revue de l'arbitrage*, organize debates or conferences and takes the initiative to review all questions of general interest relating to arbitration.
The 400 or so members of the Committee, are of different nationalities and professions, but they are essentially Academics and practitioners specialized in the arbitration field, enterprises or arbitration centers.