EMMANUEL GAILLARD

Agrégé des Facultés de droit
Professor of law, University of Paris XII
Head of the International Arbitration Group
of the law firm Shearman & Sterling LLP

Paris, 29 June 2009

By Letter and Email

Mr. Jacques Barrot
Vice-President

European Commission
Directorate-General Justice, Freedom and Security
Unit E2 – Civil Justice
B – 1049 Brussels

Dear Vice-President,

I greatly appreciate the opportunity to comment on the observations and propositions made by the European Commission in its Green Paper of 21 April 2009 on the review of Council Regulation (EC) No. 44/2001 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. The Commission's Green Paper suggests deleting the long-established arbitration exception from the Regulation, so that court decisions rendered in arbitration matters can now benefit from the simplified rules of recognition set out in the Regulation. It also recommends implementing a series of measures designed to "*ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.*"

In light of the arbitral case law and practice, which I have been teaching and practicing for the last 25 years (resume attached), I am convinced that the proposed measures would be highly detrimental to the future of arbitration in the European Union in the short and medium terms. They run counter to the legislation of EU countries that are most favorable to arbitration, could well deprive arbitration of its main attraction for the parties, and will probably create more problems than they solve. Of particular concern is the automatic recognition of judgments deciding on the validity of arbitration agreements or arbitral awards and the priority granted to the courts of the seat of arbitration to rule on the existence, validity and scope of the arbitration agreement.

The Green Paper's suggestion to give "*priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity and scope of an arbitration agreement*" is inopportune. It means that, in practice, applying to courts at the seat of arbitration will become a prerequisite to any arbitration proceedings conducted within the European Union. Any party initiating arbitration will need to seek a declaratory judgment at the seat of arbitration certifying the validity of the arbitration agreement—assuming such action is available, which is not the case in many EU Member States today, in order to preclude any parallel action from the defendant at the courts of its domicile. This requirement fundamentally contradicts the widely-accepted idea that

arbitration is the normal way for resolving disputes in international commerce. It is contrary to the will of the parties, who resort to arbitration precisely to avoid litigating before State courts, and it will necessarily entail supplementary costs and a waste of time.

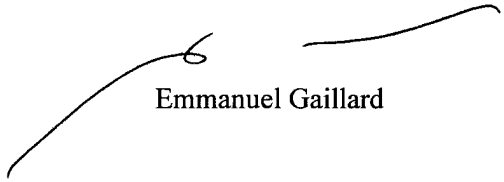
The same proposed rule implies that, at the enforcement stage, a court seized of a request for exequatur of an award will have to stay proceedings pending the decision of the courts at the seat of arbitration on the validity of the arbitration agreement. This requirement simply means re-introducing the "double exequatur" criterion—*i.e.* the requirement that the award be first granted exequatur at the seat of arbitration before it can be recognized and enforced in other countries—suppressed by the New York Convention in 1958. In practice, it will not take long for the parties and their counsels to realize that the European Union is no longer an arbitration-friendly place, and they will most certainly move away towards places where the Regulation does not apply.

It is well known that EU Member States have diverging views on arbitration and embrace differing criteria with regard to, for instance, the validity or scope of an arbitration agreement, the kind of disputes that are arbitrable and the procedural requirements applicable to the arbitration. Under the present regime, EU Member States can give effect to an arbitration agreement or an arbitral award by reference to the sole criteria listed in the New York Convention and their own conceptions of arbitration and public policy. Such regime is highly favorable to arbitration, for it increases the chances that an award be enforced in the maximum number of countries. No such possibility will exist in the future if, as the Green Paper suggests, judgments on the validity of arbitration agreements and awards are recognized and enforced throughout the EU territory without even an exequatur.

Finally, the Green Paper's proposals to address "*certain specific points relating to arbitration in the Regulation*" will probably be inapplicable. To take only one example, the Green Paper suggests introducing a uniform rule to determine the seat of arbitration—that rule would refer to the parties' choice or the decision of the arbitral tribunal, and, if the seat of arbitration cannot be defined on that basis, would designate the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement. In practice, where the seat of arbitration cannot be determined pursuant to the parties' agreement or a decision of the arbitral tribunal, the courts of the domicile of the defendant will always have jurisdiction to rule on the validity of the arbitration agreement or order provisional measures. This situation is precisely what the parties want to avoid when they resort to arbitration, *i.e.*, losing the neutrality of having their dispute settled in a forum independent from all parties' legal orders. In addition, given that Council Regulation (EC) No. 44/2001 offers several options to the parties with respect to jurisdiction—between, for instance, the domicile of the defendant (Article 2) and the place of performance of the obligation (Article 5), determining the seat of arbitration on the basis of this criterion will undoubtedly encourage forum shopping and prove problematic in practice. In the end, the proposed reform will most certainly create more problems than it solves, and will increase the number of parallel proceedings rather than reduce it.

For all these reasons, and given the fact that the Heidelberg Report—on the basis of which the Green Paper was prepared—acknowledges itself that the present regime has proven satisfactory for parties and practitioners, one can only recommend that the European Commission reconsider its decision to include arbitration within the scope of Council Regulation (EC) No. 44/2001.

Yours sincerely,



Emmanuel Gaillard

Encl.

Emmanuel Gaillard

114, Avenue des Champs-Elysées
75008 Paris
France
Telephone: (+33-(0)1) 53-89-70-00
Facsimile: (+33-(0)1) 53-89-70-70
Email: egaillard@shearman.com

Emmanuel Gaillard, born January 1, 1952, Chambéry (France).

Legal studies at Université Panthéon-Assas (Paris II). Agrégé des Facultés de droit in 1982.

Professor of Law, Université Lille II (1982–1986). Visiting Professor of Law, Harvard Law School (1984–1985). Professor of Law, Université Paris XII (1987-) (teaching Private International Law and International Arbitration Law). Lecturer at The Hague Academy of International Law on Legal Theory of International Arbitration (2007). Visiting Professor of Law, Geneva Law School and Graduate Institute of International and Development Studies (2009-).

Partner, Shearman & Sterling LLP. Founder and Head of Shearman & Sterling's International Arbitration practice (since 1986).

Member, Comité Français de l'Arbitrage (CFA), Comité Français de Droit International Privé, Swiss Arbitration Association (ASA). Former Chair of the International Arbitration Committee of the International Law Association (1989–1998). Chairman, International Arbitration Institute (IAI).

Appointed by France on the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes (ICSID). Former member of the Court, London Court of International Arbitration (LCIA) (2002–2007).

Expert, OECD panels on International Investment Law. Member, Working Group on the Revision of the UNCITRAL Arbitration Rules, United Nations Commission on International Trade Law (UNCITRAL).

Frequently appointed, by parties or arbitral institutions, as Sole arbitrator, Co-arbitrator or Chairman of arbitral tribunals. Expert on International Arbitration law before arbitral tribunals and domestic courts.

Principal publications :

Traité de l'arbitrage commercial international, Litec 1996.

Fouchard Gaillard Goldman on International Commercial Arbitration (E. Gaillard and J. Savage, eds.), Kluwer, 1999.

La jurisprudence du CIRDI, Pedone, 2004.

IAI International Arbitration Series No. 1, Annulment of ICSID Awards, Juris Publishing, 2004 (E. Gaillard ed.).

IAI International Arbitration Series No. 2, Anti-Suit Injunctions in International Arbitration, Juris Publishing, 2005 (E. Gaillard ed.).

IAI International Arbitration Series No. 3, Towards a Uniform International Arbitration Law?, Juris Publishing, 2005 (E. Gaillard ed.).

Yearly chronicle on ICSID case law in the *Journal du Droit International* (since 1986).

Numerous other contributions on International Commercial Arbitration, International Investment Law and Private International Law.