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## Terms of reference

### **Group of Experts on the interface between the Brussels I Regulation (Regulation 44/2001) and arbitration**

The Commission hereby invites applications from individuals with a view to establishing a list of experts who could be invited to participate in the Group of Experts dealing with the interface between the Brussels I Regulation (Regulation 44/2001) and arbitration.

#### **1. Background**

In April 2009 the Commission adopted a report on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(2009)174).

The report explained the relationship between Regulation 44/2001 (the "Brussels I" Regulation) and arbitration as follows:

Arbitration falls outside the scope of the Regulation. The *rationale* behind the exclusion is that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention, to which all Member States are parties. Despite the broad scope of the exception, the Regulation has in specific instances been interpreted so as to support arbitration and the recognition/enforcement of arbitral awards. Judgments merging an arbitral award are frequently (though not always) recognised and enforced in accordance with the Regulation. Provisional measures relating to the merits of arbitration proceedings may be granted on the basis of Article 31 provided that the subject-matter of the dispute falls within the scope of the Regulation<sup>1</sup>.

The study<sup>2</sup> shows that the interface between the Regulation and arbitration raises difficulties. In particular, even though the 1958 New York Convention is generally perceived to operate satisfactorily, parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court; procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation<sup>3</sup>; there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings<sup>4</sup>; the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of

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<sup>1</sup> Case C-391/95 (*Van Uden*).

<sup>2</sup> The study prepared by Prof. Dr. B. Hess, Prof. Dr. T. Pfeiffer, and Prof. Dr. P. Schlosser, is available at: [http://ec.europa.eu/justice\\_home/doc\\_centre/civil/studies/doc\\_civil\\_studies\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm)

<sup>3</sup> See Case C-185/07 (*West Tankers*).

<sup>4</sup> See Case C-190/89 (*Marc Rich*). Examples of such ancillary proceedings are proceedings aimed at appointing or removing an arbitrator, fixing the seat of arbitration, extending time limits, or appointing a court expert for the preservation of evidence.

judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain; the recognition and enforcement of judgments merging an arbitration award is uncertain; and finally, the recognition and enforcement of arbitral awards, governed by the New York Convention, is considered less swift and efficient than the recognition and enforcement of judgments.

At the same time as the report, the Commission launched a broad public consultation with the adoption of a Green Paper on the review of the Brussels I Regulation (COM (2009) 175). Question 7 of the Green Paper was on the interface between the Regulation and arbitration:

Arbitration is a matter of great importance to international commerce. Arbitration agreements should be given the fullest possible effect and the recognition and enforcement of arbitral awards should be encouraged. The 1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners. It would therefore seem appropriate to leave the operation of the Convention untouched or at least as a basic starting point for further action. This should not prevent, however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings.

The following suggestions were put forward by the Green Paper for comment:

In particular, a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties<sup>5</sup>.

Also, the deletion of the arbitration exception might ensure that all the Regulation's jurisdiction rules apply for the issuance of provisional measures in support of arbitration (not only Article 31). Provisional measures ordered by the courts are important to ensure the effectiveness of arbitration, particularly until the arbitral tribunal is set up.

Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award<sup>6</sup>. This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One

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<sup>5</sup> If this approach is followed, uniform criteria should permit to determine the place of arbitration. The general study suggests to refer to the agreement of the parties or the decision of the arbitral tribunal. If the place cannot be defined on that basis, it is suggested to connect to the courts of the Member State which would have jurisdiction over the dispute under the Regulation in the absence of an arbitration agreement.

<sup>6</sup> This is particularly important, for instance, if the award is set aside for violation of mandatory rules of Community law (e.g. competition law).

could, for instance, 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. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention.

Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award. An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community. Still another solution suggested consists of taking advantage of Article VII New York Convention to further facilitate at EU level the recognition of arbitral awards (a question which might also be addressed in a separate Community instrument).

## **2. *Group of Experts***

The Commission may consult the group on any matter relating to arbitration and the Brussels I Regulation. The group's task shall be to help the Commission to consider how best to

- To strengthen the effectiveness of arbitration agreements;
- To ensure good coordination between judicial and arbitration proceedings;
- To enhance the effectiveness of arbitration awards

The Group of Experts shall issue opinions or reports to the Commission at the latter's request or on its own initiative, taking into due consideration the implementation and further development at EU level of the revision of the Brussels I Regulation and any related developments.

## **3. *Composition***

The group shall be composed of 15 members. The members shall be appointed by the Commission. The Group of Experts is established for a 2 year period that can be extended by the Commission.

## **4. *Eligibility***

Applications may be submitted by natural persons who are nationals of an EU country or, if appropriate, of an acceding country, European Economic Area country or third country.

The members of the group of experts shall be appointed from specialists with expertise and experience in arbitration at national and international level:

- a. inter-governmental and international organisations or associations;
- b. individuals with experience deriving from academic research for public or private universities or institutes in Member States.
- c. practitioners in the field of arbitration
- d. administrations of the Member States ;

Prospective experts are expected to currently hold or have held a position within a relevant stakeholder listed above. They are expected to have:

- skills and knowledge appropriate to the areas of activities in which they might be asked to assist;
- a high level of professional achievement in the arbitration field and must have at least 5 years of relevant work experience;
- an appropriate language skills, including, a demonstrable ability to work in English or French

The above will be assessed on the basis of CVs and the completed application form.

## **5. *Call for applications***

Applications may only be submitted by filling in the model application form (Annex 1), attached to the Call for applications, and submitting a CV. Applicants are asked to clearly state in their application the area of arbitration in which they possess particular expertise and it should be accompanied by material demonstrating that the proposed member meets the above conditions.

Applications should be sent by **17 May 2010** at the latest either by email or letter to the following address:

European Commission

Directorate-general Justice, Freedom and Security

Unit E/2 Secretariat

Rue Montoyer 59, 2/74

1049 BRUSSELS

Belgium

[JLS-coop-jud-civil@ec.europa.eu](mailto:JLS-coop-jud-civil@ec.europa.eu)

Each application will be examined on the basis of the criteria set out above. The Commission will inform applicants of the outcome of the call and in particular of whether they have been included or not in the list of experts.

In view of the transparency policy of the European Institutions and the need to inform the public of the identity and qualifications of the experts advising the Institution, general

personal data will be made publicly available<sup>7</sup> in accordance with the provisions of Regulation (EC) No 45/2001<sup>8</sup> in the Register of Expert Groups for as long as the membership upholds and/or until removal from the public site is requested.

## **6. *Final determination of group composition***

The Commission shall decide upon the composition of the group of experts on the basis of proposals submitted in response to the call for applications.

The Commission will take the following criteria into account when assessing applications:

- proven competence and experience, including at European and/or international level, in areas relevant to arbitration and cross border civil and commercial litigation under the Brussels I Regulation;
- the need to strike a balance within the group of experts in terms of representativeness of applicants, gender and geographical origin;

The members shall inform the Commission in good time of any conflict of interests which might undermine their objectivity.

The list of members of the group of experts will be published on the Internet site of DG JLS. The names of members are collected, processed and published in accordance with the provisions of Regulation (EC) No 45/2001<sup>9</sup>.

Members shall be appointed for a 2-year renewable term and shall remain in office until such time as they are replaced or their terms of office ends.

Members may be replaced for the remainder of their term of office in any of the following cases:

- (a) where the member resigns;
- (b) where the member is no longer capable of contributing effectively to the group's deliberations;
- (c) where the member does not comply with Article 339 of the Treaty;
- (d) where the member has failed to inform the Commission in good time of conflict of interests.

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<sup>7</sup> Data will be published in the Register of Expert Groups: [http://ec.europa.eu/secretariat\\_general/regexp/](http://ec.europa.eu/secretariat_general/regexp/)  
<sup>8</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regards to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8 of 12.1.2001, p.1)

<sup>9</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ Legislation 8 of 12.1.2001, p.1.)

## **7. Confidentiality**

To ensure the necessary security of sensitive information, experts called upon to participate in expert groups will have to sign a non-disclosure agreement (NDA). Throughout their work they shall observe complete confidentiality of the information and documents brought to their attention.

## **8. Operation**

The group shall elect a Chairperson and two vice Chairpersons from among its members acting by a simple majority.

The group shall normally meet on Commission premises in accordance with the procedures and schedule established by it. The Commission shall provide secretarial services for the meetings of the group. Representatives of interested Commission services may attend meetings of the group.

The Commission may publish, in the original language of the document concerned, any summary, conclusion, or partial conclusion or working document prepared by the group.

## **9. Compensation**

Travel expenses (but not overnight expenses) of the experts invited to participate in meetings will be reimbursed by the Commission.

Meeting expenses are reimbursed within the limits of the annual budget allocated to the group by the responsible Commission services.