European Commission
Directorate General Justice, Freedom an Security

Re: Green Paper on the review of Reg. (EC) 44/2001- arbitration

In its Green Paper the Commission is putting forward a number of questions concerning a better operation of the Regulation. I only want to comment on question 7, namely the “interface between the regulation and arbitration”.

The Commission correctly starts with the statement that “Arbitration is a matter of great importance to international commerce”. However, there is a tendency to include mandatory arbitration clauses in consumer and in employment contracts. In the US, this tendency has found support by the case law of the US Supreme Court (Buckeye Check Cashing Corp. v John Cardegna, 546 U.S. 449 = 126 S.Ct. 1204 (2006). These arbitration clauses are usually imposed unilaterally to the weaker party of a contract, be it a consumer or an employee.

In the EU, the European Court of Justice, in its Claro Judgment C-168/05 (2006) ECR I-10421 had to decide whether the national court, in an action for annulment of an arbitration award against a consumer, can on its own motion determine the unfairness of the arbitration clause. The Court answered positively, thereby expressly excluding the question of whether the clause as such was violating Directive 93/13 which it left to the national court. Once this court is convinced of the unfairness of the clause, overriding concerns of consumer protection according to Art. 3 (1) t) EC as implemented by Dir. 93/13, “.. as measure which is essential to the accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory..” (para 37), require the court “to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier” (para 37).

The Court however was not called upon to decide on whether the arbitration clause as such is unfair either under Dir. 93/13 (despite being mentioned in the indicative list in lit. (q) of Annex 1), or can be set aside in analogy to jurisdiction clauses according to Art. 17 of Reg. 44/2001 for consumer and Art. 21 for employment contracts in cross-border litigation. In my paper: More Clarity through Claro? European Review of Contract Law, 2007, 41-61, I have
argued to apply the rules on jurisdiction clauses *per analogiam* to pre-contractual arbitration clauses.

Even though the case law of the ECJ allows a certain *ex-post* protection of consumers and probably also employees after having been condemned under an arbitration award, it is not yet clear whether the national court seised by a consumer (or an employee) can set aside *ex officio* an arbitration clause denying its competence. Most legal writers concerned with arbitration matters seem to defend a sort of “competence-competence” of the arbitrator. This argument certainly holds true in commercial matters – and can perhaps be made more effective along the lines in the Commission Green paper – but is at odds with the Commission initiatives to improve the legal protection of the consumer, in particular by offering a range of (non-binding) ADR mechanisms. Mandatory arbitration clauses in consumer (and employment) contracts would frustrate these efforts of the Commission and should therefore be disallowed within the scope of application of Reg. 44/2001. I have forwarded this argument in Micklitz/Reich/Rott, Understanding EU Consumer Law, 2009, paras 7.41, 8.25.

I therefore suggest that the arbitration exception in Reg. 44/2001 be formulated as follows:

Art. 1 (2) lt d):

**commercial** arbitration