Conference Report: “International Civil Procedure and Brussels Ibis” – 50th Anniversary of the T.M.C. Asser Instituut, Den Haag

In 2015, the T.M.C. Asser Institute celebrates its 50th anniversary (http://www.asser.nl/asser-50-years/). On this occasion, its Private International Law Section organized on 19 March 2015 the Symposium “International Civil Procedure and Brussels I bis”.

The first panel discussed recent developments on the EU level in the context of the Brussels I bis Regulation. Ian Curry-Sumner, Voorts Juridische Diensten, presented thoughts on a possible future recast of Brussels II bis. The Commission conducted a consultation on the functioning of this Regulation from 15 April 2014 until 18 July 2014 (http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm) and published results (https://ec.europa.eu/eusurvey/publication/BXLIIA) but beyond these steps no further action has been taken so far. According to Article 65 of the Regulation the Commission should have presented no later than 1 January 2012 its first report on the application of the Regulation, based on information by the Member States, and should have accompanied this Report with proposals for adaption if necessary. Curry-Sumner submitted several of such proposals, e.g. in relation to making more precise the geographical scope of the Regulation or for making the Regulation more coherent with the Hague Convention on Protection of Children in order to reduce complexity in

international cases.

Andrea Bonomi, Université de Lausanne, presented procedural issues of the Succession Regulation. He discussed the jurisdictional system of the Regulation as being one of comprehensive scope leaving no room for residual jurisdiction (except for Article 19). Bonomi drew attention to the risk of concurring proceedings under the subsidiary jurisdiction of Article 10, coupled with lis pendens rules in Article 17 that are limited to concurring proceedings before the courts of Member States. Given various „correction mechanisms“ for „reuniting“ *forum* and *ius* such as e.g. in Article 6 lit. a empowering the court seized to exercise discretion to decline jurisdiction, the question was raised whether the dogma of legal certainty so far excluding *forum non conveniens doctrines* may become or even may have already become obsolete. The author of these lines asked whether the broad definition of „court“ in Article 3(2) may possibly include arbitral tribunals since the Succession Regulation does not exclude „arbitration“ as opposed to, for example, the Brussels I bis Regulation in its Article 1(2) lit. d. Even if arbitral tribunals are no „courts“ in the sense of the Succession Regulation the question of potential effects of the Succession Regulation on arbitration remains. One may hold that the Regulation implicitly establishes a fully mandatory system that excludes the derogation of the jurisdiction of the (Member) state courts, one may also hold that the Regulation leaves the decision about the arbitrability to the applicable national law but requires an arbitral tribunal with a seat in a Member State to apply the choice-of-law rules provided for by the Regulation, one may finally hold that arbitration is not affected in any way by the Regulation despite its silence on this issue.

Francisco Garcimartín Alférez, Universidad Autónoma de Madrid, reported that the Commission evaluated the Insolvency Regulation positively in principle but identified certain

needs for reform (Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, COM(2012) 744 final, p. 2 et seq.). These relate to (1) the inclusion of pre-insolvency proceedings, (2) the precision of the central connecting factor of the COMI, (3) the better coordination of main and secondary proceedings, (4) the publicity of insolvency proceedings and (5) insolvency of groups of companies. As regards the inclusion of pre-insolvency proceedings, Garcimartín pointed out that under the recast the English scheme of arrangement would still not be covered. He further explained the new system of rebuttable presumptions for establishing the COMI including „suspect periods“ of three and six months respectively in which the presumptions do not apply. Article 6 now allows consolidating insolvency and related non-insolvency proceedings. A large part of the new provisions concern duties of cooperation in case of insolvency of groups of companies (Chapter V). Garcimartín expressed scepticism as to the benefit and practical impact of these provisions. The recast of the Insolvency Regulation was adopted by the European Council last week, and the European Parliament will presumably adopt it in May. Most of the provisions will not take effect until 2017.

Finally, Jasnica Garasic, University of Zagreb, explained the system and details of the European Account Preservation Order. Garasic made clear that the EAPO allows creditors to preserve funds in bank accounts under the same conditions in all Member States of the EU (except the UK and Denmark) without changing the national legal systems. Rather, creditors are able to choose the interim protection procedure of the EAPO in cross-border cases.

The second panel focused on the Brussels I bis Regulation and forum selection clauses. Xandra Kramer, Erasmus University Rotterdam, provided for data material on the frequency of the use of forum selection clauses and the various interests and

aims involved, e.g. choosing a forum because of an interest in the substantive *lex fori* or avoiding certain fora etc. Kramer also showed for the USA that forum shopping seems to pay off since the success rate of claims after referring the proceedings to another court on the grounds of *forum non conveniens* drops from 58% to 29%. As regards the Hague Forum Selection Convention, it was reported that the deposit of the ratification by the EU is expected for July which means that three months later the Convention will enter into force.

Christian Heinze, University of Hannover, explained the new lis pendens rules in Articles 29 et seq. of the Brussels I bis Regulation. He made clear to what extent the new rules rely on previous concepts or concepts from the Hague Convention and how far these rules introduce true novelties. In particular, Articles 33 et seq. were scrutinized and compared to traditional *forum non conveniens* notions. Heinze suggested that as opposed to *forum non conveniens* doctrines, Articles 33 et seq., in particular in light of Recital 23 and 24, do not allow to take account of choice of law or substantive law aspects but only of genuinely procedural aspects when it comes to the question whether the second seized Member State court should stay its own proceedings. Heinze also drew attention to the fact that taking account of the prospects of recognition of the future judgment from the earlier third state proceedings inevitably threatens uniformity since recognition of third state judgments is subject to non-unified national law of the Member States – as does the question whether a proceeding is "pending" in the sense of Articles 33 et seq.

Finally, Vesna Lazi?, T.M.C. Asser Instituut, Den Haag, presented on the protection of weaker parties in connection with forum selection and arbitration clauses. Lazi? particularly drew attention to the protection under the Unfair Terms in Consumer Contracts Directive. Indeed, lit. q of Schedule 2 provides that clauses excluding or hindering the consumer's right to take legal action or exercise any other

legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract, may be held unfair. Even if "arbitration" is excluded from the scope of the Brussels I bis Regulation this Regulation and its protective provisions for consumers may still serve as a measure for assessing whether the consumer's right to take legal action is unduly hindered.

In the discussion, the author of these lines asked the panel what standard should be applied for assessing whether there is an "agreement" in the sense of Article 31(2). If there is such an agreement in favour of a Member State court, a non-chosen Member State court must stay its own proceedings, as soon as the "chosen" court is seized as well. There were different views on this crucial issue for the functioning of the new *lis pendens* rule. For example, it was held that this was a non-issue since it was proof enough for a high likeliness of an agreement if the defendant in the first proceedings before the non-chosen court starts instituting further proceedings before the chosen court. However, if a party is determined to abuse as aggressively as possible the mechanisms of the *lis pendens* rule, things might well be different and another type of torpedo may emerge. The majority held that the non-chosen court should at least have the power to review the existence of an agreement to a certain extent. Indeed, Recital 22 Sentence 4, according to which the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute before it, should not be understood as excluding any review.

The third panel dealt with enforcement under the Brussels I bis Regulation. Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne, discussed the regime for provisional measures, Marta Requejo Isidro, Max Planck

Institute for International, European and Regulatory Procedural Law, Luxembourg, reported on enforcement under Brussels I bis and under special European civil procedure Regulations and finally Paul Beaumont analysed the Brussels I bis Regulation in relation to other instruments of unification on the global level, in particular in relation to the Lugano Convention, the Hague Judgments Project and the 1958 New York Convention on the recognition and enforcement of arbitral awards in light of Article 73(2) (Regulation "shall not affect" the 1958 Convention) and Recital 12 (Convention "takes precedence" over Regulation) of the Regulation. In essence, Beaumont suggested a general priority of arbitral awards over judgments about the same issue between the same parties rendered by Member State courts, even if the award comes years later than the judgment. In the discussion it was made the observation that this approach may conflict with *res iudicata* principles and thus may violate the public policy in the sense of Article V(2)(b) New York Convention which would of course be a matter of interpretation of the New York Convention as such.

It will be no surprise for those who know about the excellence of the Asser Instituut to be informed that the Symposium provided for first-class analysis and discussion of most central and current trends and developments in International Civil Procedure of European provenance. The large audience of the Symposium was perfectly right not only in congratulating the Institute to its 50th birthday but also the organisers of the birthday party.