

Towards a European Commercial Court?

The prospect of Brexit has led a number of countries on the European continent to take measures designed to make their civil justice systems more attractive for international litigants: In Germany, the so-called “Justice Initiative Frankfurt”, consisting of lawyers, judges, politicians and academics, has resulted in the creation of a special chamber for commercial matters at the District Court in Frankfurt which will, if both parties agree, conduct the proceedings largely in English (see here). In France, an English-language chamber for international commercial matters was established at the Cour d’appel in Paris, adding a second instance to the English-speaking chamber of commerce at the Tribunal de commerce in Paris (see here). In the Netherlands, the Netherlands Commercial Court and the Netherlands Commercial Court of Appeal will soon begin their work as special chambers of the Rechtbank and the Gerechtshof Amsterdam (see here). And in Belgium, the government plans to establish a Brussels International Business Court (see here). Clearly: the prospect of Brexit has stirred up the European market for international litigation.

The interesting question, however, is whether the above-mentioned measures will yield much success? Will Germany, France, the Netherlands or Belgium manage to convince internationally active companies to settle their disputes on the European continent rather than in London? Doubts are in order. To begin with, the many national initiatives vary considerably in detail and, thus, send rather diffuse signals to the business community. Moreover, most of the measures that have been taken or are being planned so far, notably those in Germany and France do not go far enough. They focus too much on English as the court language and neglect other factors that contribute to the outstanding success of London as a place for settling international disputes. This includes, for example, a pronounced service mentality that goes hand in hand with a strict orientation towards the special litigation needs of international companies. In any case, it is doubtful whether the withdrawal of London from the European judicial area can be compensated through national initiatives.

So, what can the remaining Member States do to offer European and other companies an attractive post-Brexit forum to settle their disputes? In a soon to be

published study for the European Parliament I suggest a package of measures, one of which envisions the establishment of a European Commercial Court. This Court would complement the courts of the Member States and offer commercial litigants one more forum for the settlement of international commercial disputes. It would come with a number of advantages that national courts are not able to offer.

Advantages

To begin with, a European Commercial Court would be a truly international forum. As such it could better respond to the needs of international commercial parties than national courts which are embedded in existing national judicial structures. In particular, it could better position itself as a highly experienced and neutral forum for the settlement of international disputes: just like an international arbitral tribunal, it could be equipped with experienced commercial law judges from different states. These judges would ensure that the Court has the necessary legal expertise and experience to settle international disputes. And they would credibly signal that the Court offers neutral dispute settlement that is unlikely to favour one of the parties. A European Commercial Court could, therefore, offer commercial parties much of what they get from international commercial arbitration - without sacrificing the advantages associated with a state court.

A European Commercial Court, however, would not only enrich the European dispute settlement landscape and offer international commercial litigants an additional, an international forum for the settlement of their disputes. It could also participate more convincingly in the global competition for international disputes that has gained momentum during the past years and triggered the establishment of international commercial courts around the world: Singapore, for example, opened the Singapore International Commercial Court in 2015 to offer a special court for cases that are “of an international and commercial nature”. Qatar has been running the Qatar International Court and Dispute Resolution Centre (QICDRC) for a number of years by now. Abu Dhabi is hosting the Abu Dhabi Global Markets Courts (ADGMC) and Dubai is home to the International Financial Centre Courts (DIFC). And in 2018 China joined the bandwagon and created the China International Commercial Court (CICC) for countries along the “New Silk Road” as part of the OBOR (One Belt, One Road) initiative. The establishment of a European Commercial Court would be a good

and promising response to these developments. The more difficult question, however, is whether the EU would actually be allowed to establish a new European court?

Competence

Under the principle of conferral embodied in Article 5 TEU, the EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. With regard to the establishment of a European Commercial Court the EU could rely on Article 81 TFEU. This provision allows the EU to adopt measures to improve judicial cooperation in civil matters having cross-border implications. In particular, it allows the EU to adopt measures that improve access to justice (Article 81(2) lit. e) TFEU) and eliminate obstacles to the proper functioning of civil proceedings (Article 81(2) lit. f) TFEU). A European Commercial Court could be understood to do both: improving access to justice and eliminating obstacles to the proper functioning of civil proceedings. However, would it also fit into the overall European judicial architecture? Above all: would the CJEU accept and tolerate another European court?

Doubts are in order for at least two reasons: first, according to TEU and TFEU it is the CJEU that is entrusted with the final interpretation of EU law. And, second, the CJEU has recently - and repeatedly - emphasized that it does not want to leave the interpretation of EU law to other courts. However, both considerations should not challenge the establishment of a European Commercial Court because that Court would not be responsible for interpreting European law, but for settling international disputes between commercial parties. It would - like any national court and any arbitral tribunal - primarily apply national law. And, as far as it is concerned with European law, the Court should be entitled and required to refer the matter to the CJEU. A European Commercial Court would, therefore, recognize and, in fact, defer to the jurisdiction the CJEU.

Challenges

The establishment of a European Commercial Court would be a good response to the many challenges international commercial litigation is currently facing. In order to succeed, however, the Court would have to be accepted by the business community. To this end the Court would require staff, equipment and procedures

that meet the highest standards of professional dispute resolution. In addition, the Court would have to be fully integrated into the European judicial area and benefit from all measures of judicial cooperation, in particular direct enforcement of its judgments. Ensuring all this would certainly not be easy. However, if properly established a European Commercial Court would enrich and strengthen the European dispute resolution landscape. And it would contribute to the development of a strong and globally visible European judicial sector.

What do you think?