New Book: Recognition of Judgments in Contravention of Prorogation Agreements

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Must a foreign judgment be recognised in which a jurisdiction agreement has been applied incorrectly, i.e. in which a court wrongly assumed to be competent or wrongly declined jurisdiction? Within the European Union, the basic answer is a rather straightforward "yes". Recognition can only be refused on the grounds set forth in Article 45(1) Brussels I*bis* Regulation, and unlike Article 7(1)(d) of the recently adopted HCCH Judgments Convention, none of them covers this scenario. What is more, Article 45(3) Brussels I*bis* expressly states that the jurisdiction of the court of origin, save for certain instances of protected parties, may not be reviewed, not even under the guise of public policy.

Why, then, should one bother to read the book by Niklas Brüggemann, *Die Anerkennung prorogationswidriger Urteile im Europäischen und US-amerikanischen Zivilprozessrecht* (Mohr Siebeck) on the recognition of judgments in contravention of prorogation clauses in European and US-American law? The first and rather obvious reason can be found in the second part of the title. The book contains a concise, yet nuanced overview of the law of jurisdiction agreements in the US (in German). To the knowledge of this author, it has been 12 years since the last comparable work was published (Florian Eichel, *AGB-Gerichtsstandsklauseln im deutsch-amerikanischen Handelsverkehr* (Jenaer Wissenschaftliche Verlagsgesellschaft) – which dealt with recognition only in passing and was limited to German and US law). Thus, this new book can be recommended to anyone with sufficient command of the German language who is interested in this particular aspect of US civil procedure, whose concepts – if one even dares to use that term – partly differs from European ideas.

The second and main reason to concern oneself with Brüggemann's book, however, is his proposition for a new ground of refusal of recognition: a new Article 45(1)(e)(iii) Brussels I*bis* for which he even offers a draft. To this end, the

author comprehensively analyses jurisdiction agreements within the Brussels I*bis* framework. While Article 31(2) Brussels I*bis*, one of the main innovations of the Recast, has indeed "enhance[d] the effectiveness of exclusive choice-of-court agreements" (Recital 22 Brussel I*bis*), Brüggemann argues that the Regulation still safeguards jurisdiction agreements insufficiently. He points out several situations (e.g. asymmetrical agreements, mere derogation agreements) that Article 31(2) Brussels I*bis* does not cover in the first place. He also argues in some detail that the court first seised is allowed to examine the jurisdiction agreement in question with regard to the existence of an agreement and its formal validity; its assessment would be binding upon other courts in line with *Gothaer Allgemeine* (ECJ Case C-456/11). This in turn would lead to a race to the courts and even to a race between the courts. (The latter metaphor is only partially convincing, for it is unlikely that the judges will intentionally accelerate their respective proceedings in order to "beat" the other court.)

Brüggemann goes on to argue that when it comes to jurisdiction agreements it is contradictory to make an exception to the principle of mutual trust in the *lis pendens* context but to strictly adhere to it in the recognition context. He demonstrates that, in particular, default judgments by a derogated court pose a significant risk for the defendant – one with which US civil procedure arguably deals more effectively. Alas, this appears to be the only instance in which the author's comparative analysis, as interesting it is in and of itself, contributes to his broader point. He concludes by pointing out parallels to jurisdiction in insurance/consumer/employment matters (safeguarded at the stage of recognition by Article 45(1)(e)(i) Brussels I*bis*) and exclusive jurisdiction (safeguarded at the stage of recognition by Article 45(1)(e)(ii) Brussels I*bis*), and by suggesting that a special ground for refusal of recognition would have positive effects on the internal market.

While the abovementioned Judgments Convention is too recent to feature in the book, the author was able to consider its draft in a separate, albeit somewhat oddly positioned, chapter. Conspicuously absent is any specific discussion of the issue of damages for the violation of a choice of court agreement (see this recent post). The omission is certainly justifiable as Brüggemann is only concerned with procedural safeguards for jurisdiction agreements. But maybe such a remedy under substantive law could obviate or at least lessen the need for a separate ground of refusal of recognition? All in all, however, the author has carefully built

a compelling case for an addition to Article 45(1) Brussels I*bis*.