Report on the ERA conference of 29-30 October 2020 on 'Recent Developments in the European Law of Civil Procedure'

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On 29-30 October 2020, ERA – the Academy of European Law – organized a conference on "Recent Developments in the European Law of Civil Procedure", offering a comprehensive overview of civil procedural matters at the European and global level. The program proved very successful in conveying the status quo of, but also a prospective outlook on, the topics that currently characterise the debates on cross-border civil procedure, including the Brussels I-bis Regulation and 2019 HCCH Judgments Convention, the digitalisation of access to justice, the recent developments on cross-border service of documents and taking of evidence, and judicial cooperation in civil and commercial matters in the aftermath of Brexit.

For those who did not have the opportunity to attend this fruitful conference, this report offers a succinct overview of the topics and ideas exchanged over this two-day event.

Day 1: The Brussels I (Recast) and Beyond

The Brussels regime, its core notions and the recent contributions by the CJEU via its jurisprudence were the focus of the first panel. In this framework, Cristina M. Mariottini (Max Planck Institute Luxembourg) tackled the core notion of civil and commercial matters (Art. 1(1)) under the Brussels I-bis Regulation. Relying, in particular, on recent CJEU judgments, among which C-551/15, *Pula Parking*; C-308/17, *Kuhn*; C-186/19, *Supreme Site Services*, she reconstructed the functional test elaborated by the CJEU in this area of the law, shedding the light on the impact of recent developments in the jurisprudence of the Court, i.a., with respect to immunity claims raised by international organizations.

Marta Pertegás Sender (Maastricht University and University of Antwerp) proceeded then with a comprehensive overview of the choice-of-court agreement regimes under the Brussels I-bis Regulation and the 2005 Hague Convention on choice of court agreements. Relying, inter alia, on the CJEU case law on Article 25 of the Brussels I-bis Regulation (C-352/13, *CDC Hydrogen*; C-595/17, *Apple Sales*; C-803/18, *Balta*; C-500/18, *AU v. Reliantco*; C-59/19, *Wikingerhof* (pending)), she highlighted the theoretical and practical benefits of party autonomy in the field of civil and commercial matters.

The interface between the Brussels I-bis Regulation and arbitration, and the boundaries of the arbitration exclusion in the Regulation, were the focus of Patrick Thieffry (International Arbitrator; Member of the Paris and New York Bars) in his presentation. In doing so he analysed several seminal cases in that subject area (C-190/89, *Marc Rich*; C-391/95, *Van Uden*; C-185/07, *West Tankers*; C?536/13, *Gazprom*), exploring whether possible changes were brought about by the Brussels I-bis Regulation.

The evolution of the CJEU's jurisprudence vis-à-vis the notions of contractual and non-contractual obligations were at the heart of the presentation delivered by Alexander Layton (Barrister, Twenty Essex; Visiting Professor at King's College, London). As Mr Layton effectively illustrated, the CJEU's jurisprudence in this field is characterized by two periods marking different interpretative patterns: while, until 2017, the CJEU tended to interpret the concept of contractual matters restrictively, holding that "all actions which seek to establish the liability of a defendant and which are not related to a contract" fall within the concept of tort (C-189/87, *Kalfelis*), the Court interpretation subsequently steered towards an increased flexibility in the concept of "matters relating to a contract" (C-249/16, *Kareda*; C-200/19, *INA*).

The principle of mutual trust of the European Area of Freedom, Security and Justice vis-à-vis the recent Polish judicial reform (and its consequential backlash on the rule of law) was the object of the presentation delivered by Agnieszka Fr?ckowiak-Adamska (University of Wroc?aw). Shedding the light on the complex status quo, which is characterized by several infringement actions initiated by the European Commission (C?192/18, *Commission v Poland*; C?619/18, *Commission v Poland*; C?791/19 R, Commission v Poland (provisional measures)) as well as

CJEU case law (e.g. C?216/18 PPU, *Minister for Justice and Equality v LM*), Ms Fr?ckowiak-Adamska also expounded on the decentralised remedies that may be pursued by national courts in accordance with the EU civil procedural instruments, among which public policy, where available, and refusal by national courts to qualify Polish judgments as "judgments" pursuant to those instruments.

The second half of the first day was dedicated to the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In this context, it is of note that the EU, among others, has opened a Public Consultation into a possible accession to the Convention (see, esp., Thomas John's posting announcing the EU's public consultation). While Ning Zhao (Senior Legal Officer, HCCH) gave an overview of the *travaux preparatoires* of the 2019 HCCH Convention and of the main features of this instrument, Matthias Weller (University of Bonn) delved into the system for the global circulation of judgments implemented with the Convention, highlighting its traditional but also innovative features and its potential contributions, in particular to cross-border dealings.

The roundtable that followed offered the opportunity to further expound on the 2019 HCCH Judgments Convention. Namely, Norel Rosner (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission) explained that the EU has a positive position towards the Convention, notably because it facilitates the recognition and enforcement of EU judgments in third countries and because it will help create a more coherent system of recognition and enforcement in the EU Member States of judgments rendered in other (of course, non-EU) Contracting States. The roundtable also examined the features and objectives of Article 29, which puts forth an "opt-out" mechanism that allows Contracting States to mutually exclude treaty obligations with those Contracting States with which they are reluctant to entertain the relations that would otherwise arise from the Convention. As Ms Mariottini observed, this provision – which combines established and unique characters compared to the systems put forth under the previous HCCH Conventions – contributes to defining the "territorial geometry" of the Convention: it enshrines a mechanism that counterbalances the unrestricted openness that would otherwise stem from the universality of the Convention, and is a valuable means to increase the likelihood of adherence to the Convention. Matthias Weller proceeded then to explore the consequences of limiting a Contracting State's objection window to 12 months from adherence to the Convention by the other Contracting State and raised the

case of a Contracting State whose circumstances change so dramatically, beyond the 12-month window, that it is no longer possible to assure judicial independence of its judiciary. In his view, solutions as the ones proposed by Ms Fr?ckowiak-Adamska for the EU civil procedural instruments may also apply in such circumstances.

Day 2: European Civil Procedure 4.0.

Georg Haibach (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission), opened the second day of the conference with a detailed presentation on the ongoing recast of the Service Regulation (Regulation (EC) No 1393/2007). Emphasizing that the main objective of this reform focuses on digitalization – including the fact that the proposed recast prioritises the electronic transmission of documents – Mr Haibach also shed the light on other notable innovations, such as the possibility of investigating the defendant's address.

The Evidence Regulation (Council Regulation No. 1206/2001), which is also in the process of being reformed, was at the core of the presentation delivered by Pavel Simon (Judge at the Supreme Court of the Czech Republic, Brno) who focuses not only on the status quo of the Regulation as interpreted by the CJEU (C-283/09, Wery?ski; C-332/11, ProRail; C-170/11, Lippens), but also tackled the current proposals for a reform: while such proposals do not appear to bring major substantive changes to the Regulation, they do suggest technological improvements, for instance favouring the use of videoconference.

In her presentation, Xandra Kramer (University of Rotterdam and Utrecht University) analysed thoroughly two of the CJEU judgments on "satellite" instruments of the Brussels I-bis Regulation: the EAPO Regulation (Regulation No. 655/2014); and the EPO Regulation (Regulation No. 1896/2006). C-555/18, was the very first judgment that the CJEU rendered on the EAPO Regulation. Xandra Kramer remarked the underuse of this instrument. In the second part of her lecture, she identified two trends in the judgments on the EPO Regulation (C?21/17, Caitlin Europe; Joined Cases C?119/13 and C?120/13, ecosmetics; Joined Cases C?453/18 and C?494/18, Bondora), observing that the CJEU tries, on

the one hand, to preserve the efficiency of the EPO Regulation, while at the same time seeking to assure an adequate protection of the debtor's position.

In the last presentation of the second day, Helena Raulus (Head of Brussels Office, UK Law Societies) explored the future judicial cooperation in civil matters between the EU and the United Kingdom in the post-Brexit scenario. Ms Raulus foresaw two potential long-term solutions for the relationship: namely, relying either on the 2019 Hague Convention, or on the Lugano Convention. In her view, the 2019 Hague Convention would not fully answer the future challenges of potential cross-border claims between EU Member States and the UK: it only covers recognition and enforcement, while several critical subject areas are excluded (e.g. IP-rights claims); and above all, from a more practical perspective, it is still an untested instrument. Ms Raulus affirmed that the UK's possible adherence to the Lugano Convention is the most welcomed solution among English practitioners. Whereas this solution has already received the green light from the non-EU Contracting States to the Lugano Convention (Iceland, Norway, and Switzerland), she remarked that to date the EU has not adopted a position in this regard.

The conference closed with a second roundtable, which resumed the discussions on the future relations between the EU and the UK on judicial cooperation in civil law matters. Christophe Bernasconi (Secretary General, HCCH) offered an exhaustive review on the impact of the UK withdrawal from the EU on all the existing HCCH Conventions. From his side, Alexander Layton wondered if it might be possible to apply the pre-existing bilateral treaties between some EU Member States and the UK: in his view, those treaties still have a vestigial existence in those matters non-covered by the Brussels I-bis Regulation, and thus they were not fully succeeded. In Helena Raulus's view, such treaties would raise competence issues, since the negotiating of such treaties falls exclusively with the EU (as the CJEU found in its Opinion 1/03). As Ms Raulus observed, eventually attempts to re-establish bilateral treaties between the Member States and the UK might trigger infringement proceedings by the Commission against those Member States. The discussion concluded by addressing the 2005 Hague Convention and it is applicability to the UK after the end of the transition period.

Overall, this two-day event was characterized by a thematic and systematic approach to the major issues that characterize the current debate in the area of judicial cooperation in civil and commercial matters, both at the EU and global

level. By providing the opportunity to hear, from renowned experts, on both the theoretical and practical questions that arise in this context, it offered its audience direct access to highly qualified insight and knowledge.