Report on the First German IC²BE-Workshop

Cross-border enforcement of claims within the EU – Stocktaking and perspectives. Informed Choices in Cross-Border Enforcement – „IC²BE“

On 13th of April 2018, the first German workshop within the framework of the EU-project “IC²BE - **I**nformed **C**hoices in **C**ross-**B**order **E**nforcement“ took place at the Institute for Comparative and Private International Law at the Albert-Ludwigs-University Freiburg. The workshop on the subject “Cross-border enforcement of claims within the EU – Stocktaking and perspectives” was aimed at an exchange between academics and practititioners. Almost 50 lawyers, judges and academic experts on the subject of international civil procedural law took the opportunity to obtain new perspectives on the whole issue. In five panels, the respective questions were first presented from an academic point of view, followed by a comment from a practitioner. Finally, there was a panel discussion.

1. Introduction to the Research Project

In his opening speech, the project coordinator *von Hein* outlined the relevant Regulations. He emphasized that the practical relevance of these Regulations has remained rather marginal so far. This should be a sufficient reason to examine the underlying causes on the one hand and the possible future of the so called “second generation” Regulations on the other hand. On this basis, *von Hein* presented the project “IC²BE”.

2. Recognition and Enforcement under Brussels I*bis*: New or Old Paradigm?

In the first session concerning Brussels I*bis, Prof. Dr. Gerald Mäsch,* Münster, described how for a long time, it had merely been an expression of comity to recognize and enforce foreign judgements. The introduction of Brussels I did not change this pcture completely: the necessity of obtaining an exequatur and many statutory reasons for barring the recognition and enforcement of judgements remained. Even though the exequatur was abolished in 2012, the Brussels I*bis* Regulation fell short of the Commission’s radical proposal from 2010[1], as it includes several grounds for refusing recognition and enforcement (Art. 45 ff.; also referred to as “reverse exequatur”). Hence, Brussels I*bis* cannot be considered the quantum leap that it was supposed to become. If one measures the “second generation” Regulations against this state, one can understand, why the abolition of the EEO is demanded.

[1] Proposal dated from 14.12.2010, KOM (2010), 748 final.

Dr. Max Peiffer, Munich, highlighted in his following presentation that the Brussels I*bis* Regulation may not have achieved a substantive, but nevertheless an important procedural paradigm shift form a lawyer's perspective. Due to the elimination of the exequatur, a faster enforcement is possible and Art. 39 Brussels I*bis* allows access to the "full arsenal of enforcement opportunities". Furthermore, Brussels I*bis* reduced the translation requirements. Courts can only request a translation now, if compelling reasons exist. In practice, this is very rare.
However, he still perceives a need for the "second generation" Regulations, since they can be a significantly sharper tool than Brussels I*bis*.

3. The EEO in the System of European Law on Civil Procedure

In the second panel concerning the EEO, *Prof. Dr. Ivo Bach*, Göttingen, argued that this regulation only lives a "wallflower existence", although it has quite attractive sides. He illustrated this argument with the ECJ judgment in the case *Trade Agency Ltd v Seramico Investments Ltd*[2] showing that under Brussels I (*bis*) it could be dangerous to litigate in a state where the creditor cannot enforce his claim. The EEO reduced this risk, since certain objections can no longer be raised in the enforcement state. Especially the elimination of the public policy clause had to be considered as positive – real public policy clause constellations are very rare and in extreme cases, the ECHR could still oblige the violating recognizing state to compensate the concerned party. In contrast, the limitation of controlling the proper service of process is negative, as mistakes are frequently made here, which can especially be harmful in cases of default.

From a lawyer's point of view, *Prof. Dr. Andreas J. Baumert* described the EEO as an interesting tool from the creditor's point of view, but criticised an inadequate protection of debtors. There are no actions against violations of fundamental rights – it would take too long until proceedings are brought before the ECHR. Therefore, the review of public policy cases in the enforcement state should not be renounced. Moreover, in his opinion there is a massive language problem in practice. The fact that a claim is uncontested could not justify fast proceedings in all cases.

4. The EPO in the System of European Law on Civil Procedure

Associate Professor Dr. Bernhard Ulrici, Leipzig, first pointed out the partially distinctive scope of application of the EPO Regulation compared to Brussels I*bis* or the EEO Regulation. From the existing differences and similarities arises not only a choice between the Regulations, but also the possibility of combinations: One could use the EPO Regulation as an incomplete main proceeding in the sense of a preceding procedure. There is admittedly still room for improvement, e.g. concerning the potentially problematic

[2] *Trade Agency Ltd* v *Seramico Investments Ltd* [2012] C-619/10.

Art. 6(2) EPO Regulation. Overall, a generalisation of the approach of Brussels I*bis* would be an improper step back for the enforcement of uncontested monetary claims though.

Subsequently, *Dr. Knut Messer*, who is a judge at the Central German Court for the European Order for Payment Procedure in Berlin-Wedding, conceded that there are certainly problems with the application of the EPO. For instance, about 80 to 90% of the forms are incorrectly used or not filled in completely. Furthermore, the assessment of the applicability of the Regulation and the courts' own jurisdiction are sometimes very complex to adjudicate. Nevertheless, in general the proceeding has proven itself effective. Improvements, like the introduction of a pan-European uniform remedy for the case of incorrect or lacking service of documents would be desirable, though.

Dr. Bartosz Sujecki, Amsterdam, who is admitted both to the Dutch and the German bar, reported on the situation in the Netherlands where many lawyers do not know the EPO Regulation and those who do know the proceeding take advantage of this circumstance: Because the national order for payment procedure was abolished in the Netherlands in 1992, many recipients initially put the relevant letter aside without further consideration. Moreover, the transition to ordinary proceedings that was originally designed to happen automatically does not work in many cases as the courts inquire about this. The enforcement of European orders for payments in the Netherlands on the other hand works well. Overall, the European order for payment procedure is the only tool of the second generation, which is well-integrated into the Dutch legal system.

5. The Revised ESCP in the System of European Law on Civil Procedure

Prof. Dr. Stefan Huber, Tübingen, opened the fourth panel and stressed that the ESCP is applied even more rarely than the other Regulations of interest. Then he addressed the statement that the reason for this used to be the low threshold for the amount in dispute of 2000 € and that an increase to 5000 € (since 2017) was required. For this amount, in his opinion the term "small" claims does not fit anymore. In addition, it is questionable if an entirely written proceeding is reasonable. The final reform act should have at least declared an oral proceeding as mandatory if the value in dispute exceeds 2000 €, which also had been part of a former proposal. All in all, the reform of the ESCP brought numerous improvements but many inconsistencies to other instruments persist.

From a lawyer's point of view, *Dr. David Einhaus*, Freiburg, emphasized that the small claims proceeding had proven itself to be useful in practice. Typical cases of application are claims from professionals for being compensated for the services that they have performed, for example doctors or craftsmen's claims. In particular, the liberal

European place of jurisdiction for services and the broad prorogation possibilities make the Regulation attractive. For the future, it would be necessary to clarify whether the Regulation also covers constellations involving third countries. In summary, the small claims proceeding should be endorsed because it closes the gaps left by other Regulations show.

6. The EAPO in the System of European Law on Civil Procedure

Dr. Denise Wiedemann, Max-Planck-Institute, Hamburg, presented the EAPO Regulation, the youngest of the examined Regulations (in force since 18th January 2017). A big advantage of this instrument is the possibility to gain information on the localization of the debtor's assets; insofar a title has already been obtained. A disadvantage on the other hand would be that jurisdiction lies with the court of the main proceedings and the court at the location of the assets is not competent. Also, enforcement and effect of the order of attachment are not regulated completely and finally, which often necessitates a recourse to national rules.

From a lawyer's perspective, *Dr. Nils H. Harbeck*, Hamburg, described the use of the EAPO Regulation as rather efficient. However, he pointed out the creditor's difficulty in sufficiently proving the danger of the relocation of assets abroad. Moreover, the debtor's account details are only handed over after the main proceedings are initiated. Furthermore, the creditor only receives a confirmation that the account exists, while it remains unclear whether there are actually assets. Measured against the risk that the account could be empty, the proceeding in its current state is too expensive.

7. Conclusion

The objective of the workshop was to take stock regarding the Regulations of the so-called "second generation" as well as to assess their perspectives. With that in mind, the merger of scientific and practical positions turned out to be fertile ground. All of the Regulations appear to have certain practical advantages even after Brussels I*bis* entered into force but there is still room for further improvements. This applies in particular to formalities like the cross-border service or translation of documents. There was consensus on the fact that the mentioned Regulations suffer from a comparatively low visibility. Therefore, it seems necessary to not only further disseminate knowledge on the Regulations in the near future but, in the medium to long term, also to further consolidate them by resolving the existing uncertainties and incompatibilities.