Themis 2011

Germany 1

Observation File

Fourth Working Session

While the team of the Netherlands 1 had the opinion that Regulation 44/2001 (Brussels I) was not applicable on arbitration cases *de lege lata* due to an exception to the scope of application, Germany 2 argued that the regulation should be interpreted otherwise.

Germany II stated that although arbitration as a concept means in fact to avoid courts if there are different understandings/interpretation and serious problems of one party with the decision of the arbitrator state court proceedings remain necessary anyway. After that, a story about practical problems of arbitration was told, which was a nice and cute "torpedo action" to distract the attention from the actual topic. After that they came to the arbitration system of the New York Convention which was criticised as not being mandatory (only at request of the parties and unless the national court that is concerned with this matter decides that an agreement is null and void or not practicable). In addition to that, the procedure according to NY Convention was criticised to be more time-consuming and more expensive, because there was not simply recognition and after that enforcement**.**
Furthermore they stated – referring to the examples above – that the system has already been broken. It was concluded that Brussels I was applicable side by side with NY Convention.

The team of the **Netherlands I** stated that there was no legal gap if Regulation 44/2001 (Brussels I) is not applicable because of the NY Convention regime, which is satisfactory because of its very broad scope of application. They pointed out that the principle of subsidiarity means that EU regulation should only be make EU law if it is necessary. Nevertheless they admitted that there is the "Green paper" of the commission of the year 2010 that suggests an amendment to Rome I, which indicates that the European Commission is of the opinion that something should be changed.
They emphasized the differences of legal cultures in Europe and the value of these difference and therefore one national legal system should not be preferred. Additionally, they emphasized also the principle of freedom of contracting and stated that harmonisation is contradictory to this principle.
They concluded the national courts should be free to resolve conflicts on their own.

Our opinion is that practical problems should be a sufficient reason for explicitly widening the scope of application instead of applying it beyond its clear wording to come to a practically wished for result. And the fact that the system has already been broken does not lead to the assumption that courts should create law on their own but in contradiction to that to the assumption that the european legislator should change something by creating a new regulation that solves these problems *de lege ferenda*. The German team did not sufficiently grounded their wide interpretation.

The weak point of the argumentation of the Dutch team was that arbitration works in practice, but admitted that 5% of the relevant cases still went to court in the end anyway. Even if it is only 5%, there is still a practical need because due to the principle of "no denial of justice" justice must be given in any case.

In our opinion there is a need for a change of the current European regulation due to problems of enforceability.