Kluwer Arbitration Blog

A Response to Alexis Mourre

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Does a blind law professor intend to destroy the benefits of the New York Convention? Reading the post of Alexis Mourre, I was wondering whether I should react to it, as the post refers to my opinion at least incompletely. However, as I'm still convinced that a fair and open discussion is beneficial, I would like to make the following four annotations to his response: (1) I do not (longer) propose to delete the arbitration exception of the Judgments Regulation (JR) entirely; (2) the proposal of the Heidelberg Report is completely in line with Articles V and VII of the New York Convention; (3) the IBA Arbitration Committee's proposals of enlarging the grounds of non-recognition under Article 34 JR run counter to the paramount objective of the current reform of the Regulation which shall abolish exequatur proceedings; (4) finally, despite of Alexis Mourre's concerns, the proposals of the Heidelberg Report are compatible with the French practice of the negative "kompetenz-kompetenz".

1. Alexis Mourre is not correct in stating that I am promoting a complete deletion of the arbitration exception in the Brussels I Regulation. It is true that this was the initial proposal of the Heidelberg Report. However, reacting to some of the critics on this proposal, I've modified my opinion. Just read the guest editorial at conflict of laws (an article which has been requested explicitly by A. Mourre for the Cahiers de l'Arbitrage by the way) where I suggested not to delete the arbitration exception of Article 1 (2) lit. d) JR entirely, but to replace it by a more restricted formulation.

The new provision shall clarify that the Regulation applies to declaratory relief under the (proposed) Articles 22 (6) and 27 (A) as well as to supportive measures under Articles 22 (6) and 31. For the sake of clarity, I would like to reiterate it here. The provision could read as follows:

> "The Regulation shall not apply to ….
> (d) Arbitration, save supportive measures and declaratory relief proceedings as provided for under Articles 22(6), Article 27A and Article 31."

However, I would like to stress that this proposal does not change the basic idea of the Heidelberg Report which is found in the proposed Articles 22 (6) and 27A of the Judgment Regulation. The proposal is explained in detail in the guest editorial of 14 February 2010 at conflict of laws.

2. The main argument of Alexis Mourre relates to the inconsistent application of the New York Convention by the courts of its contracting parties. He stresses the fact that the New York

Convention does not provide for a uniform law. I agree – but the objective of the NYC is certainly to provide for a uniform regime on the recognition of arbitral clauses and awards (this seems to me to be the reason why States ratified the convention). In this respect Alexis Mourre refers to Articles V (1) (c) (public policy clause) and VII (escape clause) of the New York Convention. He argues that these provisions clearly demonstrate that a different interpretation of the convention is still possible and is applied. Again, I agree. However, the real question is whether the EU-Member States are still free to interpret and apply the public policy exception of Article V NYC individually. In this respect, Alexis Mourre does not mention the ECJ's judgment in case C-126/97, Ecco Swiss. In this case, the ECJ expressly urged the courts of the Member States to review arbitral awards under the NYC for their compliance with mandatory EU law (paras. 36 and 39). I suppose that Alexis Mourre agrees that the courts of all EU Member States must apply EU law in a coherent and uniform way. At present, most mandatory laws which apply in the context of the public policy exception of Article V NYC are found in EU law – I only mention the following examples: cartel law; company law; consumer protection law; further the principles of due process of law as well as procedural fairness (Articles 6 ECHR; 47 CFR). Accordingly, the public policy clause of Article V (1) (c) of the New York Convention must be interpreted coherently within the EU – eventually, the courts of the Member States must refer questions on the interpretation of mandatory EU law to the ECJ (Article 267 TFEU).

It must be mentioned here that this specific situation within the European Union is the main argument for the adoption of a regional regime in Europe aimed at supporting arbitration in the framework of the NYC. As I explained in the guest editorial on conflict of laws, a main reason for such a regional framework is the need of the European Judicial Area for a coherent enforcement of mandatory European law. This need also exists in the framework of arbitration (an argument not addressed by Alexis Mourre). In this respect the situation within Europe is distinctively different from the situation in so-called third states. The NYC plays a considerable role in the case law of the ECJ – but it is not regarded as a "distinct world" detached from the needs of the Internal Market – the ECJ held quite the contrary (see Ecco Swiss, para. 38). In addition, Article VII of the NYC does not give the green light to EU-Member States to derogate from mandatory EU-law in the context of the recognition of arbitral awards. In this respect, the decision of the Cour de Cassation in Putrabali seems to be doubtful in my opinion.

3. The third argument forwarded by Alexis Mourre relates to the proposals of the IBA Committee on International Arbitration regarding the reform of the Regulation Brussels I. According to these proposals, the grounds of non-recognition provided for in Article 34 of the Regulation should be enlarged and include arbitral awards. With all due respect, this proposal completely runs counter the objective of the ongoing reform of Brussels I which shall reduce the grounds of non-recognition and replace exequatur proceedings by the principle of mutual trust. This objective is clearly expressed by the first question of the EU-Commission's Green Paper on the Reform – I do not want to discuss the issue here in more detail.

4. Finally, Alexis Mourre expresses concerns regarding the proper operation of the proposed Articles 22 (6) and 27A JR with regard to the French doctrine of the negative "kompetenz-kompetenz". In this respect, he stresses the fact that a French juge d'appui does not give a declaratory judgment on the validity of an arbitration clause. The judge will send the parties to arbitration unless he finds that the clause is manifestly null and void. Again, the drafters of the Heidelberg Report were well aware of this practice in France. However, as French procedural law explicitly provides for declaratory relief in the context of arbitration (if the juge d'appui finds that the clause is manifestly void) it seems to me to be possible that a French juge d'appui who is

seized by a party under Article 22 (6) JR will stay his proceedings and send the parties to arbitration. If the arbitral tribunal finds that the clause is effective, it may give an interim award. The French juge d'appui can endorse the award (by a declaratory judgment). This judgment will be recognised in all other EU-Member States and the prevalence of the arbitration proceeding will be assured. I agree with Alexis Mourre that the proposal will entail a (limited) change of the practice in France. However, it seems to be feasible that the French courts will adopt their practice to the framework of Articles 22 (6) and 27A JR in order to preserve the importance of Paris as the "home of international arbitration".

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