BEING RIGHT IS NOT ENOUGH: THE INTERNATIONAL REGULATION OF NATIONAL RECOGNITION AND ENFORCMENT OF FOREIGN JUDGMENTS AND AWARDS

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ABSTRACT

Two bodies of rules govern International relations (IR), international public law and international private law (IPL). Each country has its own IPL appointing which legal order the national courts should apply in disputes involving more than one state. Consequently, recognition and enforcement of judgments and awards are subject to an international co-operation and ruled by different international conventions with different geographical scope. This important harmonisation, facilitating international cooperation on a daily basis, is rather ignored within the academic disciplines of IR, Peace and Conflict Studies, Euro-integration as well as other related fields. This article contributes to filling this relative neglect. More specifically, the article compares some aspects of the recognition and enforcement of judgments under the Brussels I Regulation (44/2001) with the recognition and enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (1958). The article argues that it might be a good idea to collect the legislation of the two conventions into a new, single convention, dealing with judgments and award simultaneously.

Key words: international law, recognition and enforcement of judgements, international conventions, international cooperation.

АПСТРАКТ

Со меѓународните односи управуваат два корпуса - меѓународното јавно и меѓународното приватно право. Секоја земја има можност со сопствениот правен поредок да го реди начинот на кој националните судови ќе го применуваат меѓународното приватно право во оние случаи кои вклучуваат повеќе од една држава. Според тоа, признавањето и примената на пресудите и одлуките се предмет на меѓународна соработка и се уредени со различни меѓународни конвенции во различен географски опсег. Оваа значајна хармонизација, која ја олеснува меѓународната соработна на дневна основа, е доста запоставена во рамките на академските дисциплини, како што се: Меѓународните односи, Истражувањето на мирот и конфликтите, Европските интеграции, како и во другите сродни полиња. Оваа статија има намера да ја пополни оваа евидентна празнина. Поконктретно, таа прави споредба на некои аспекти на признавањето и примената на пресудите согласно бриселската регулатива (44/2001) со оние кои важат согласно Њујоршката конвенција за признавање и примена на странски арбитражни одлуки (од 1958 година). Овој текст укажува дека би било добро легислативата од двете конвенции да се консолидира, односно да се произведе нова, единствена конвенција, која истовремено би се однесувала и на пресуди и на одлуки.

Клучни зборови: меѓународно право, признавање и спроведување на пресуди, меѓународни конвенции, меѓународна соработка.

1. Introduction

A dispute can be solved in different ways. Most disputes are solved by the disputing parties themselves or by assistance of a third party, e.g. a mediator, facilitator or negotiator. Only a small number of disputes are settled by judicial procedures.

If two (or more) parties cannot agree, there exist, in principal, two ways to finally settle a dispute, either through litigation or arbitration. In both cases the proceeding leads to a decision – a judgment or an award, respectively – which in the end can be enforced compulsorily. The decision or solution to a dispute presented by a mediator or negotiator (known as ADR, Alternative Dispute Resolution) is neither binding, nor possible to enforce compulsorily. Hence, litigation and arbitration can, from a legal point of view, be considered as competing methods to *finally* solve a dispute.[1]

Since the Treaty of Westphalia (1648) and, in the wake, the establishment of a new world order, legislation has traditionally been considered being, in principal, the exclusive concern of

[1] Johan Kvart and Bengt Olsson: *Tvistlösning genom skiljeförfarande: En presentation av den nya lagen om skiljeförfarande* (Stockholm, Nordstedts Juridik, 1999), p. 29; and, Klaus Peter Berger: "Understanding International Commercial Arbitration", in Center for Transnational Law (ed.): *Understanding Transnational Commercial Arbitration* (Münster, Quadis Publishing, 2000), pp. 8f. See also, Alan Redfern and Martin Hunter: *Law and Practice of International Commercial Arbitration*, (London, Sweet and Maxwell, 1999, 3rd ed.), pp. 23ff.

the sovereign state. The ruling principle of this world order, known as an 'international society',[2] is *rex est imperator in regno suo* (the king is emperor in his own realm), specifying that sovereigns are not subject to any higher political authority and that every king is independent and equal to every other king or ruler. This is the principle of internal sovereignty.[3] But the fact that a ruler can do what he likes to his own subjects does not mean that he can do what he likes – either as a matter of law or as a matter of power politics – to other states. The ruler's external sovereignty is limited. States are dependent on each other, they are interdependent and co-operation between them is necessary.[4] This fact is more distinct today than ever before. Currently we live in a 'global world, characterised by above all time-space compression and territorial dissolution. The world is gradually developing into one single place'.[5]

International relations are, simply put, governed by two bodies of rules, international public law, on the one hand, and international private law, on the other. By the former concept are understood norms and rules valid for states in their mutual public relations. The latter concept refers to the body of rules regulating national jurisdiction, and recognition and enforcement of foreign judgments and awards. International public law is material law while international private law is formal law, i.e. it does not give any answers of how a dispute should be solved but only in which legal order the answers shall be sought, and when an answer is identified the questions about recognition and enforcement.[6]

The lowest common denominator of the two bodies of rules is *consent*. International law is made either by agreements or through the practice of states (customary law).[7] International private law is not international in the same sense as international public law. Each country has its own international private law appointing which legal order the national courts should apply in disputes involving more than one state.[8] The national regulations need to be harmonised. Hence, the recognition and enforcement of judgments and awards are subject to an international co-operation and ruled by different international conventions with different geographical scope. This important harmonisation, facilitating international cooperation on a daily basis, is rather ignored within the academic disciplines of International Relations, Peace

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[2] See e.g. Mikael Baaz: *The Use of Force and International Society* (Stockholm, Jure Förlag, 2009); and, Hedley Bull: *The Anarchical Society: A Study of Order in World Politics* (London, Macmillan, 1995, 2nd ed.).

[3] Robert H. Jackson: "The Evolution of International Society", in John Baylis and Steve Smith (eds.): *The Globalization of World Politics* (Oxford, Oxford University Press, 2001), p. 43. See also Mikael Baaz: *A Meta-theoretical Foundation for the Study of International Relations in a Global Era: A Social Constructivist Approach* (Göteborg, Padrigu Papers, 2002), Ch. 1 and 4.

[4] Peter Malanczuk: *Akehurst's Modern Introduction to International Law* (London, Routledge, 1999), p. 17.

[5] For a more thorough discussion about the concept of globalisation, see e.g. Anthony Giddens: *The Consequences of Modernity: Self and Society in the Late Modern Age* (Cambridge, Polity Press, 1990); and, David Held, et al.: *Global Transformations: Politics, Economics and Culture* (Cambridge, Polity Press, 1999). See also Mikael Baaz: "Meta-Theoretical Foundations for the Study of Global Social Relations from the Perspective of the New Political Economy of Development", *Journal of International Relations and Development*, 1999, vol. 2, no. 4, pp. 461-471.

[6] Christopher Forsyth: *Private International Law* (London, Butterworth and co. Publishers Ltd., 2005); and, Håkan Strömberg and Göran Melander: *Folkrätt* (Lund, Studentlitteratur, 1989), pp. 7f.

[7] Alan Boyle and Christin Chinkin: *The Making of International Law* (Oxford, Oxford University Press, 2007); and, Malcolm Shaw: *International Law* (Cambridge, Cambridge University Press, 2007, 6th ed.), Ch. 1 – 4.

[8] Christopher Forsyth: *Private International Law*, and, Håkan Strömberg and Göran Melander: *Folkrätt*, p. 8.

and Conflict Studies, Euro-integration, and other related fields. This short article is a small contribution to filling this gap. More specifically, the article compares some aspects of the recognition and enforcement of judgments under the *Brussels I Regulation* (44/2001) with the recognition and enforcement of arbitral awards under the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Award* (1958).[9] The aim is to present some general findings regarding the problems surrounding the recognition and enforcement of judgments and awards internationally.

The outline of this article is quite straightforward. It starts by briefly presenting the two conventions, their scope, applicability, and how they are related to one other.[10] After this, focus is turned to a comparison of some different aspects of the conventions regarding recognition and enforcement.[11] Finally, a summary of the findings and some final remarks are presented.

2. The Conventions

The aim of this section is to give a brief presentation of the Brussels regulation and the New York Convention, respectively.

2.1 The Brussels Regulation

According to the Article 293 of the Rome Treaty (1957), the Member States of the European Community (EC) '... shall ... enter into negotiations with each other with a view to securing for the benefit of their nationals ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards'.[12]

The result of these negotiations was eventually the Brussels Convention, concluded on 27 September 1968. The rules of this Convention were eventually extended to the states belonging to the European Free Trade Association (EFTA) by the Lugano Convention (1988). At a meeting in December 1997, the European Council instructed an *ad hoc* working party composed of representatives of the European Union (EU) and the EFTA States to undertake work to revise the Brussels and Lugano Conventions. The aim was greater efficiency in obtaining and enforcing

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[9] The documents referred to are, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (http://www.simons-law.com/instrument/links.asp?TI_Nr=1), hereafter the Brussels Regulations; and, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York, on 10 June 1958 (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html), hereafter the New York Convention. The sites were last visited 2009-08-18. A majority of arbitral awards are performed voluntarily. If a voluntary performance is not the case, the award needs to be enforced. According to Redfern and Hunter, two options are available regarding enforcement, on the one hand, commercial and other pressures, and, on the other hand, enforcement by court proceedings. Alan Redfern and Martin Hunter: *Law and Practice of International Commercial Arbitration*, pp. 444f. In what follows only the latter option of enforcement is discussed.

[10] When talking about the two documents in plural, I refer to the "conventions" rather than the convention and the regulation.

[11] In this short article it would reach too far to have an extensive methodological discussion. I therefore limit my methodological discussion by giving a reference to Michael Bogdan: *Comparative Law* (Stockholm, Nordstedts juridik), 1994. Regarding methodology, this book has served as my major source of influence.

[12] Art. 293, Treaty Establishing the European Community, hereafter the Rome Treaty (http://www.hri.org/ MFA/foreign/treaties/Rome57/). The site was visited 2006-06-16.

judgments in the EU. This work led to political agreement in the Council on 27 May 1999 and the Council formally adopted the Brussels I Regulation (Council Regulation, EC, 44/2001).[13]

The Brussels Regulation reaches, regarding important respects, beyond the aim of the Article 293 of the Rome Treaty. Especially important is that the regulation is not limited only to recognition and enforcement of judgments. It also includes – or put more correctly, has its focus on – common rules about the direct competence of national courts and there too related questions such as *lis pendens*.[14]

The Brussels Regulation applies in civil and commercial matters excluding revenue, customs or administrative matters, regardless the nature of the court or tribunal. It does not apply to the status or legal capacity of natural persons, matrimonial matters, wills and succession, bankruptcy or social security.[15] In one important respect, the Brussels Regulation is far more limited than the scope of the Article 293 of the Rome Treaty. The Regulation does not contain any rules about recognition and enforcement of arbitral awards. In fact, it is stated explicitly in the Article 1.2(d) that the Brussels Regulation shall not apply to arbitration. The background to this exception is that arbitration is regulated in other conventions, mainly the New York Convention, which is accepted by all member states of the EU.[16]

The Court of Justice of the European Union has, according to the so-called 'protocol of interpretation' (1971), competence to interpret the Brussels Regulation. The result of this protocol has been similarity and uniformity regarding the interpretation of the convention. Hereby, national fragmentation has been possible to avoid.[17] It has also been possible to uphold a high degree of predictability, which, in turn, promotes the rule of law.

2.2 The New York Convention

In 1923 and 1927, the Geneva Protocol and the Geneva Convention respectively, were signed within the auspices of the League of Nations.[18] These documents were a breakthrough for the idea that arbitration tribunals and awards should have international recognition far beyond what was the case at that time for judgments made by national courts.[19] The two documents were in 1958 replaced by the New York Convention.

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[13] Judicial Cooperation in Civil Matter: Jurisdiction, Recognition and Enforcement in Civil and Commercial Matters (http://europa.eu.int/scadplus/leg/en/lvb/l33054.htm). The site was visited 2009-08-18.

[14] See, chapter 6, 7 and 8, The Brussels Regulation.

[15] The Brussels Regulation, art 1.

[16] Birgitta Blom, et al.: *Karnov: Svensk lagsamling med kommentarer, 1999/2000, band 3* (Stockholm, Fakta Info Direkt, 1999), pp. 2892f, note 2 and 11.

[17] Birgitta Blom, et al.: *Karnov: Svensk lagsamling med kommentarer, 1999/2000, band 3*, pp. 2981 (note marked with *).

[18] See the Geneva Protocol, 1923 (http://www.interarb.com/vl/g_pr1923.htm); and, the Geneva Convention, 1927 (http://interarb.com/vl/g_co1927.htm). The sites were last visited 2009-08-18.

[19] For a more thorough discussion about the Geneva Protocol and the Geneva Convention, see Alan Redfern and Martin Hunter: *Law and Practice of International Commercial Arbitration*, pp. 453ff.

The basic principle of this convention is that arbitral awards should be recognised and possible to enforce in all member states.[20] The unique thing about this convention is that it is almost universally accepted.[21] The New York Convention is applicable to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. Furthermore, it applies to arbitral awards not considered as domestic awards in the state where the recognition and enforcement are sought.[22] It includes *ad hoc* as well as institutional arbitral awards.[23]

In an "ideal" world the New York Convention would be interpreted in the same way by courts everywhere. This is however not the case in the 'real' world. There are inconsistent decisions made under the New York Convention. This is a problem, but a problem that however should not be over-estimated.[24]

2.3 Summary

The two conventions are based on consent and they are complementary. The Brussels Regulations covers the scope, jurisdiction, recognition, and enforcement of judgments in civil and commercial matters within the EU (with the above mentioned exceptions). The New York Convention applies to all foreign awards, with few exceptions (see Articles II and V). Its geographical scope is almost universal. Thus, it is much easier, even after the revision of the Brussels Convention, to internationally get an award recognised and enforced than a judgment.

Geographically there exist no equivalent convention regarding judgments to the New York Convention of the recognition and enforcement of arbitral awards. By prominent commentators, the New York Convention has been characterised as the most successful international legal instrument within the domain of commercial law ever created.[25] This, the Brussels Regulation cannot match. But, on the other hand, the interpretation of the Brussels Regulation is more consistent and uniform than the interpretation of the New York Convention. Let us after this brief presentation of the conventions, turn to a comparison between the two of them regarding recognition and enforcement.

3. Recognition of Judgments and Awards

In what follows, the main content in the two conventions are presented and compared. We start with the Brussels Regulation, thereafter follows a presentation of the New York Convention.

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[20] The New York Convention, Articles II and V.

[21] Johan Kvart and Bengt Olsson: *Tvistlösning genom skiljeförfarande: En presentation av den nya lagen om skiljeförfarande*, p. 23.

[22] The New York Convention, Article I.1.

[23] The New York Convention, Article I.2.

[24] Alan Redfern and Martin Hunter: *Law and Practice of International Commercial Arbitration*, p. 462.

[25] Johan Kvart and Bengt Olsson: Tvistlösning genom skiljeförfarande: En presentation av den nya lagen om skiljeförfarande, p. 15.

3.1 The Brussels Regulation

The main principle of the Brussels Regulation is that a judgment given in a Member State within the scope of the convention should be recognised without the requirement of any special procedures. By recognition is understood that the judgment should be given positive as well as negative legal power. The substantial and personal scope of the legal power is in principal determined by the legal order of the State where the judgment is given, not by the State of recognition. The judgment shall be recognised automatically. No special stipulation or positive conditions need to be full-filled. In fact, the judgment does not even need to have gained legal force. If some of the negative conditions in the Articles 34 and 35 exist, recognition of a judgment should be refused. A judgment shall not be recognised under the Brussels Regulation if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.[26] This exception is only supposed to be used under exceptional circumstances. A judgment shall either not be recognised if it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.[27]

The purpose of the Article 34.2 is to protect the defendant's rights to a defence. If the judgment is irreconcilable with an earlier judgment given in a dispute between the same parties in the Member State in which recognition is sought, or if its is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed, then it shall not be recognised.[28]

Moreover, a judgment shall not be recognised if it conflicts with sections 3, 4 or 6 of Chapter II in the Convention, or in a case provided for in Art. 72. The exceptions given in Art. 34 and 35 are mandatory. Finally, a foreign judgment may never be substantially reviewed.[29]

3.2 The New York Convention

Each Member State should, according to the New York Convention, recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences arisen between them in respect of a defined legal relationship concerning a subject matter capable of settlement by arbitration. The term 'agreement in writing' should include an arbitral

[26] The Brussels Regulation, art. 34.1.

[27] The Brussels Regulation, art. 34.2.

[28] The Brussels Regulation, art. 34.3 and 34.4.

[29] The Brussels Regulation, art. 36.

clause or agreement, signed by the parties. The existence of a valid agreement to submit to arbitration hinders the parties to settle a dispute in court (*res judicata*).[30]

Each contracting party should recognise arbitral awards as binding and enforce them in accordance with the rule of procedures of the territory where the award is relied. It is not allowed to impose substantially more onerous conditions or higher fees or charges on the recognition of arbitral awards to which the convention applies that are imposed on the recognition of domestic arbitral awards.[31]

To obtain recognition, the party applying for recognition should, at the time of application, supply, the duly authenticated original award (or a duly certified copy) and the original agreement under which the parties undertake to submit disputes to arbitration (or a duly certified copy thereof). The award or agreement shall be produced in an official language of the country in which the award is relied upon. Certified translations are accepted as substitutes.[32]

Recognition of an award may be refused under certain circumstances. If the parties proof that they, under the law applicable to them, were under some incapacity or that the agreement is not valid according to the law subjected. An award can also be refused recognition if the party whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or otherwise was not able to present his case. If the award deals with a difference not contemplated by or not falling within the terms of submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration or the composition of the arbitral authority, or the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with law of the country where the arbitration took place, then the recognition may be refused. A not yet binding, or by a competent authority set aside or suspended award may be refused recognition.[33]

The court does not observe these grounds for refusal *ex officio*. Recognition of an arbitral award may also be refused if the competent authority in the country, where the recognition and enforcement is sought, finds that the subject matter of the difference between the parties is not capable of settlement by arbitration under the law of that country, or the recognition of the award would be contrary to the public policy of that country.[34] These latter grounds for refusing to recognise an award can be observed by the national court *ex officio*.

3.3 Conclusion

Recognition of judgments under the Brussels Regulation shall automatically and mandatory be refused if some of the exceptions in the Articles 34 and 35 exist. According to now prevailing

[30] The New York Convention, art II.

[31] The New York Convention, art III.

[32] The New York Convention, art IV.

[33] The New York Convention, art V.1.

[34] The New York Convention, art V.2.

however not in every detail undisputed understanding, the regulations in the Articles 34 and 35 should be considered *ex officio*.[35] Recognition of awards should be accepted if the subject matter of the dispute is capable of settlement by arbitration and a valid agreement to settle the dispute by arbitration exists. Awards may but does not necessarily need to be refused recognition if some of the circumstances mentioned in the Article V, the New York Convention, exist. Recognition may only be refused on the request of a party who can proof that a ground for invalidity exist, and should not be considered by the national court as *ex officio*. The national court, however, may invoke the ground for refusal found in the Article V.2. This is the difference compared to the recognition of judgments under the Brussels Regulation, under which national courts should invoke ground for refusing recognition (and enforcement) *ex officio*.

In substance, there exist similarities between the two Conventions regarding what is accepted as valid grounds to refuse recognition. Both Conventions stress violations of public policy and just proceeding, including the right to properly present ones case as valid grounds to refuse recognition. Under public policy should be understood the public policy of the enforcing country.

4. Enforcement of Judgments and Awards

Enforcement goes a step further than recognition. When a Court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award but also to ensure that it is carried out by using available legal sanctions.36

4.1 The Brussels Regulation

Regarding enforcement of judgments, it is stated in the Brussels Regulations that a judgment given in a Member State, which is (formally) enforceable, in that state should be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. This executive procedure cannot be replaced by any other national procedures.[37]

In the Article 39, there is a reference to annex II of the regulation, which stipulates where an application for enforcement shall be presented in the different Member States. The local jurisdiction should be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement. The procedure for making an application should be governed by the law of the Member State in which enforcement is sought.[38] Relevant documents should be attached to the application.[39] Judgments should be

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[35] Birgitta Blom, et al.: *Karnov: Svensk lagsamling med kommentarer, 1999/2000, band 3*, p. 2997, note 14.

[36] Alan Redfern and Martin Hunter: *Law and Practice of International Commercial Arbitration*, p. 449.

[37] The Brussels Regulation, art. 38.1. For special regulations regarding United Kingdom, see the Brussels Regulation, art 38.2. Regarding the exclusive nature of the executive procedures, see Birgitta Blom, et al.: *Karnov: Svensk lagsamling med kommentarer, 1999/2000, band 3*, p. 2998., note 162.

[38] The Brussels Regulation, art. 39.2.

[39] The Brussels Regulation, art. 40.3.

declared enforceable immediately on completion of the formalities in the Article 53 without any review under the Articles 34 and 35.[40] Under no circumstances may a foreign judgment be reviewed as to its substance.[41] No security, bond or deposit, however described, should be required of a party which in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is domiciled or resident in the state in which enforcement is sought.[42]

The regulations regarding enforcement are designed to secure quick and secure enforcement of foreign judgments. With only few exceptions the above-presented articles do not regulate the real enforcement of judgments; this is supposed to be regulated within the national legislation of each individual member. The rules are formal, not substantial.

4.2 The New York Convention

Regarding enforcement under the New York Convention the same rules as in the case of recognition is valid. This means that an award, which on valid ground is not recognised, is not enforceable. To be recognised and thereby, by extension, enforceable, the award must concern a matter, which may be decided by arbitrators, be in line with public policy, and fulfil some formal requirements. If this is not the case, the award may be refused enforcement. Furthermore, the award to be valid, it must not reach beyond the scope of the arbitral agreement or it has been presented too late. It must have followed just proceedings. The arbitrators must have been appointed correctly. Finally, if there is any other irregularity connected to the proceeding or the presented award that have influenced the outcome of the case, then the award is not enforceable.

4.3 Conclusion

The procedure of enforcement of judgments under the Brussels Regulation are formalised by the convention while the enforcement of awards under the New York Convention is more or less left to local standards. The Brussels Regulation use the word 'should' while in the New York Convention the more inexact word 'may' is used. Here lies the difference in exactness, which makes the former convention more predictable and clear than the latter. After this comparison let us now summarise our findings and add some concluding remarks.

5. Completion

The Brussels Regulations and the New York Convention, both based on consent and consensus, are complementary conventions with the aim to harmonise the recognition and enforcement of judgments and awards in the commercial domain. The former convention deals

[40] The Brussels Regulation, art. 41.

[41] The Brussels Regulation, art. 45.2.

[42] The Brussels Regulation, art. 52.

with judgments, the latter with arbitral awards. The Brussels Regulation is not applicable on the recognition and enforcement of awards and the New York Convention is not applicable on the recognition of judgments. The both conventions are (basically) formal rather than substantial. Their geographical scope respectively differs tremendously.

The Brussels Regulation is only applicable within the EU while the New York Convention is almost applicable universally (including within the EU). The legal status, regarding similar and uniform application, is much higher under the Brussels Regulation than is the case under the New York Convention, since the Court of Justice of the European Union stands as a guarantor for a homogeneous interpretation. Interpretation of the New York Convention, on the contrary, is dependent on local particularities. This difference should however not be over-estimated since the New York Convention in practice has proven to be very effective. Refusal of recognition and enforcement under both conventions are accepted with reference to public policy of the recognising country. This means that a country should not be forced to recognise or enforce a judgment and award that violates values important for the country in question. This principle should, however, be used, and it is in fact used very restrictively.

Other valid ground to refuse the recognition and enforcement of judgments are judgment in default, and some other 'technical' grounds referring to already existing judgments. The grounds for refusing enforcement and recognition under the New York Convention are more extensive. The reason for this is that a foreign national court does not present the award; in fact, individuals lacking legal knowledge (laymen) can present it. Arbitration is an essentially private process (however dominated by jurists). Therefore, the (procedural) risks are, regarding arbitration, believed to be greater and extra security requirements are called for. This, in a way, illustrates the 'unwillingness' of national legislatures to let go of the control of legal procedures to private entities. There is an intricate balance to uphold between security and freedom.

To conclude: it is, as argued by Redfern and Hunter, internationally easier to obtain recognition and enforcement of an international award than of a foreign court judgment, since the network of international (and regional) treaties providing for the recognition of international award is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments. In fact, this is recognised as one of the advantages of arbitration as a method of resolving international commercial disputes.[43] The New York Convention is vague in its language, allowing to each contracting party to decide if they should refuse recognition and enforcement of awards or not. Theoretically, the room to manoeuvre is rather big. But in practice, the interpretation of the convention has been rather uniformed. This can probably be understood with reference to the fact that the convention refers to disputes in the commercial domain – a domain in which the degree of (informal) consensus seems to be very high, and actually shows an increasing trend by the development of the UNIDROIT Principles of International Commercial Contracts, and, by extension, the

[43] Alan Redfern and Martin Hunter: Law and Practice of International Commercial Arbitration, p. 451.

development of a new *Lex Mecatoria*.[44] Furthermore, the tendency within arbitration today is an increase in the degree of institutionalization as well as anglification, something, that taken together vouches for increased harmonization and uniformity.[45]

In order to further harmony of the recognition and enforcement of judgments and awards in an era of globalisation(s), it could perhaps be a good idea to collect the legislation of both procedures within one convention, which in its construction draws upon the strengths of the two already existing conventions, namely a high degree of uniformity through an authoritative organ (like the Brussels Regulation) for interpretation and universal geographical reach (like the New York Convention). If this were done, everyday cooperation in international relations would become easier than it is today.

[44] The UNIDROIT Principles of International Commercial Contracts (2004) are available on http://www.unidroit.org/english/principles/contracts/main.htm. The site was visited 2006-06-16. For an interesting discussion about the new *Lex Mercatoria*, see Gesa Baron: "Do the UNIDROT Principles of International Commercial Contracts form a New Lex Mercatoria?" Arbitration *International*, 1999, vol. 15, no. 2, pp. 115-130.

[45] Claes Lundblad, visiting professor in Law, School of Business, Economics and Law, Göteborg University, inaugural lecture, "Development Tendencies in International Arbitration", 2006-04-18.

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