THE BARRIERS TO THE ENFORCEMENT OF FOREIGN JUDGMENTS AS OPPOSED TO THOSE OF FOREIGN ARBITRAL AWARDS

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Introduction

International trade and commerce has significantly increased during the last decades. Along with this development comes a boost in international litigation. Thus, several jurisdictions can become involved in the judiciary process. Hence, becoming familiar with the relevant procedures in international litigation is more relevant than ever before.[1] Especially the question of where and under what conditions a foreign judgment can be enforced in a second forum is meaningful in this context. Therefore, this article will focus on that particular issue. Precisely, the article analyses the departure grounds existing for the courts of a second forum to refuse enforcing a foreign judgment. The major attention will be drawn to the refusal ground of public policy.

After an analysis on when this barrier may operate, a comparison with the enforcement process of foreign arbitral awards, also with reference to the departure ground of public policy, will follow.

Concerning the enforcement of foreign judgments, the Council Regulation (EC) No 44/ 2001, known as the Brussels I Regulation, will be referred to. This regulation essentially replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968)[2] for all Member States of the European Union except for Denmark. For the latter the Convention of 1968 remains in effect.

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[1] Behr, Volker, 'Enforcement of United States Money Judgments in Germany', (1993-1994) 13 *Journal of Law and Commerce*, 211, 211.

[2] Hereinafter referred to as Brussels Convention.

Although there are some structural changes coinciding with the transformation of the Brussels Convention into a regulation,[3] most provisions are closely related, and the main structure as well as the fundamental principles and goals of these two instruments remain identical. The preliminary considerations of the Brussels I Regulation confirm this by expressing the desire for continuity between the Brussels Convention and the new Regulation. The demanded continuity also implies the necessity to interpret the provisions identically. Hence, the case law rendered under the Brussels Convention remains very important in terms of interpreting the Brussels I Regulation.[4] Therefore, when this comment refers to the Brussels Convention those considerations are as much relevant for the Brussels I Regulation.

With reference to the enforcement process of foreign arbitral awards the note bases upon the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).[5]

Contextually with this comment it is of particular interest for Australia as a Member State of the Hague Conference on Private International Law to mention the Hague Convention on Choice of Court Agreements. It was concluded in June 2005.

The Convention represents a culmination of more than a decade of negotiations concerning jurisdiction, recognition, and enforcement of judgments in civil and commercial matters. It is designed to promote international trade and investment through enhanced judicial co-operation.[6]

So far, Australia has been dealing with the enforcement of foreign judgments in the *Foreign Judgments Act 1991* (Cth).[7] The Act establishes a statutory scheme under which judgments of non-Australian courts can be enforced in Australia. Despite its advantages, there are disadvantages inherent in the Act. It is limited to money judgments, to superior courts (with a few exceptions), and to specified countries.[8] The Schedule of the Foreign Judgments Regulations 1992 (Cth) sets out those courts and

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3 Kennett, Wendy, 'Current Developments Private International Law The Brussels I Regulation', (2001) 50 *International and Comparative Law Quarterly*, 725, 725 f.

4 Pontier, Jannet A., Burg, Edwige, 'EU Principles on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters according to the case law of the European Court of Justice', 2004, p. 1f.

5 Hereafter referred to as New York Convention.

6 Brand, Ronald A., 'Introductory Note to the 2005 Hague Convention on Choice of Court Agreements', (2005) 44 *International Legal Materials*, 1291.

7 Hereafter referred to as Act.

8 Downes, Kylie, Hodge, Michael, 'Enforcing foreign judgments in Australia and Australian judgments in foreign jurisdictions', PROCTOR 24 (2) 2004, 27.

countries. Under the Convention these disadvantages do not occur to the same extent. The only resemblance is that the Convention is confined to the Contracting States.

> With relation to rules concerning recognition and enforcement of foreign judgments the Convention contains special provisions. Those resemble the ones under the Brussels I Regulation and the New York Convention. E.g., under Article 9 (e) recognition and enforcement can be denied if such would be 'manifestly incompatible with the public policy of the requested State'.

The public policy clause has always been a point of some concern. Thus, it might prevent some states from becoming parties to the Convention. However, due to the existence of these parallel provisions, the concerns of the parties to the Hague Conference could be relieved. This could be achieved by looking at the experience with the public policy clause under the Brussels I Regulation and its precursor. Firstly, the interpretation of public policy could follow the ideas under the Regulation. Thus, the latter could serve as a guideline. Secondly, the case law dealing with public policy under the Regulation demonstrates that the concerns are not as major as they might be perceived as.

The Necessity of Enforcement in a Second Forum

The necessity to enforce a judgment in a country other than the one where the judgment was delivered can arise from numerous reasons.

One reason why the court of a second forum might have to pay attention to a foreign judgment is that a defendant who succeeded in the original action in a foreign state could bring forward the foreign judgment in his favour to defend himself against a new action initiated by the original unsuccessful plaintiff in the enforcing forum.[9] Another reason is that an original judgment in favour of the plaintiff can be utilised to found a new action in the enforcing forum for the purpose of enforcement.[10] The literature summarises these reasons as using the foreign judgment either as a 'sword or a shield',[11] meaning either as an offensive or a defensive device.

Another important consideration leading to enforcement in a second forum is the question where the judgment debtor has assets. There will not be a problem if he has assets in the forum of the original court. However, if this is not the case the judgment will only be effective if the defendant either voluntarily complies with it or if it is

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9 Caffrey, Bradford A., 'Enforcement of Foreign Judgments', 1985, p. 149.

10 Ibid.

11 Caffrey, above n 9, p. 150.

enforceable in the country where he has assets, which logically will be a foreign country.[12]

Prerequisites to the Enforcement of a Foreign Judgment

Enforcing a foreign judgment in a second forum becomes relevant because there is no automatic enforcement process.[13] Rather than that, the party seeking enforcement has to satisfy certain requirements. Those are set out in the Brussels I Regulation.

Under Article 38 paragraph 1 of the Brussels I Regulation the interested party has to lodge an application to declare the judgment enforceable. As per Article 39, the application must be submitted to a competent court or authority, which is listed in the Annex to the Regulation. Article 40 paragraph 2 requires the applying party to provide an address for services of process within the area of jurisdiction of the court applied to. According to Article 40 paragraph 3 the applicant must attach certain documents to the application. These documents, mentioned in Article 53, are a certified copy of the judgment and a certificate as per Article 54.

In conclusion, there are not many procedural obstacles to overcome in the process of the application to enforce a foreign judgment. Therefore, difficulties in the procedure can only result from other provisions of the Brussels I Regulation. The examination of these provisions will follow in a later part of this article.

Departure Grounds Under the Brussels I Regulation

Article 41 of the Brussels I Regulation embodies the rule. According to this rule, a foreign judgment shall be declared enforceable immediately on the completion of the formalities mentioned in Article 53, prohibiting any review of the judgment under Article 34 and Article 35. The aforementioned provisions contain the departure grounds for the courts to refuse enforcement. Consequently, checking the judgment under those articles is only possible when either of the parties lodges an appeal to the competent authority.[14] This is set out in Article 45 paragraph 1 of the Regulation.

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12 Pryles, Michael, Waincymer, Jeff, Davies, Martin, 'International Trade Law', 2nd edition, 2004, p. 462.

13 Pryles, above n 12, p. 520.

14 Kennett, above n 3, 734.

Concluding from this, refusing the enforcement is to be handled as the exemption under the Brussels I Regulation[15].

However, Article 45 states that if an appeal is lodged the court has to refuse or revoke a declaration of enforceability on one of the grounds listed in Articles 34 and 35. Article 45 refers to those provisions under which the recognition of a foreign judgment can be refused and declares them applicable to the enforcement of a foreign judgment, too. Article 34 contains three departure grounds and Article 35 paragraph 1 establishes a further one. The list of the departure grounds within the sphere of the Regulation is exhaustive, meaning that no other reason will be accepted, no matter how profound it may be.[16]

One commonality of all departure grounds of the Regulation lies in the fact that they do not provide any discretion for the courts. Hence, if a court comes to the decision that the elements of the provisions are satisfied it has no choice but to refuse or revoke a declaration of enforceability. The wording of the Articles 34 and 35 implies this by saying 'shall not be enforced'.[17]

Another common feature is that either the judgment debtor, or the enforcing court sua sponte can set the departure ground in motion.[18]

The Public Policy Exception

Article 34 paragraph 1 of the Brussels I Regulation contains the public policy clause. According to the provision a court of the second forum must refuse the enforcement if such would be contrary to the public policy in the enforcing country.

Defining Public Policy

In order to understand when the public policy exception can be effectively used as a defensive device, it is essential to define its exact meaning. This however is where the problem begins. In fact, the public policy exception is considered as the least well-

15 Ibid.

16 Briggs, Adrian, 'Civil Jurisdiction and Judgments', 3rd edition, 2002, p. 440, para. 7.12.

17 Kaye, Peter, 'Civil Jurisdiction and Enforcement of Foreign Judgments', 1987, p. 1436.

18 Kreindler, Richard H., 'Transnational Litigation: A Basic Primer', 1998, p. 234.

defined departure ground.[19] Because of that, some legal writers and authorities fear an excessive abuse of the clause.[20]

Concerning an attempt of defining the meaning despite the arising difficulties, the first thing one needs to do is abandon the belief that there is a uniform or global understanding of public policy. This is not the case. Therefore, it is even more challenging to attribute a precise meaning to the provision. Owing to a lack of a universal definition, each jurisdiction must be analysed individually with regard to how it interprets the term.[21]

Another reason why it is difficult to approach the term of public policy is its character of a value phrase.[22] Defining value phrases is on the border to impossibility. Firstly, the priority of values differs from jurisdiction to jurisdiction. What might be of great interest and importance in one jurisdiction might be irrelevant in another one. Secondly, a value term implies not being static or permanent. It is rather subject to sociological and economic changes deriving from internal or external influences. Hence, the foundation of a public policy rule alters from time to time. Something that was considered inappropriate in the past might become generally accepted in the future or in the present and vice versa. Owing to the changes the courts are forced to redefine the term of public policy each time a party tries to invoke it.[23]

However, there is one feature to the clause, which all Member States of the Brussels I Regulation and outsider states with similar devices in an international treaty agree upon. That is that the public policy provision is to be handled as an escape clause to review only such cases that touch upon severe national concern. In other words, the clause should only operate in exceptional cases.[24] Because of that, there is a general agreement under which circumstances the reservation clause cannot be raised successfully. That is the case when there is only a variance –be it minor or major- between the law of the initial forum and that of the forum where enforcement is sought. To frame it differently, if the court of the second forum would obtain another

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19 Pittman, Jonathan H., 'The Public Policy Exception to the Recognition of Foreign Judgments', (1989) 22 *Vanderbilt Journal of Transnational Law*, 969, 970.

20 Minehan, Karen, 'The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?', (1995-1996) 18 *Loyola of Los Angeles International and Comparative Law Review*, 795, 796.

21 Kreindler, above n 18, p. 239.

22 Caffrey, above n 9, p. 212.

23 Caffrey, above n 9, p. 213.

24 Reuland, Robert C., 'The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention', (1992-1993) 14 *Michigan Journal of International Law*, 559, 591.

judgment than the court in the initial forum did, this does not suffice to invoke the provision.[25] Consequently, only a fundamental infringement can cause the pro-enforcement rule to give way to the exception.

Several jurisdictions attempted to provide a guideline of what such a fundamental infringement would have to be like.

This means that, under German law a court has to refuse enforcement in extreme cases in which a breach of the fundamental values of German law or of German state policy is threatened.[26] The German Code of Civil Procedure, Zivilprozessordnung, embodies this rule in section 328 number 4. It means that the enforcement of a foreign judgment may not touch upon the basic principles of German law or when enforcement would be unbearable.[27] Such a situation would especially arise if the enforcement would violate basic rights.[28]

In the United States a court has to deny enforcement of a foreign judgment if such enforcement 'injures the public health, the public morals, the public confidence in the purity of the administration of the law, or undermines that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel'.[29] Under English law a foreign judgment must 'offend against English concepts of liberty and humanity', such as a judgment that was supposed to be used to enforce a contract dealing with slavery and where the transaction upheld under the foreign judgment is prejudicial to the interests of the United Kingdom or its relations with friendly countries.[30]

The courts of the countries use different words in their definitions. Consequently, there is no identical definition. However, all these 'definitions' reveal many similarities. The most striking commonality is that all jurisdictions seem to require a breach so profoundly in its scope that it would totally undermine basic rights in case of an enforcement of the judgment.

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25 Fine, J. David, 'Defences Against Recognition or Enforcement of Interstate or Foreign Judgments', (1987) 61 *Australian Law Journal*, 350, 361; Pittman, above n 16, 970.

26 Behr, above n 1, 223.

27 Thomas, Heinz, Putzo, Hans, 'Zivilprozessordnung Kommentar', 27. Auflage, 2005, p. 537.

28 Above n 24, p. 538.

29 *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161, 169 (E.D. Pa. 1970).

30 *Foster v. Driscoll* [1929] 1 K.B. 470.

Procedural and Substantive Public Policy

Whether public policy will be affected when a foreign judgment is sought to be enforced in a second country can be judged from two different angles. On the one hand, there is procedural public policy and on the other hand, there is material or substantive public policy. The former aims at regulating the processes used by the rendering forum, starting with the initial service and finishing with delivering a judgment and the opportunity of an appeal. Thus, procedural public policy wants to ensure due process. It arises from the varying civil procedure systems of the Member States. In contrast to that material public policy does not examine the procedure followed in the foreign country itself. It rather focuses on the effects of enforcing the foreign judgment in the second forum. A breach of material public policy occurs when the court of the country of origin has applied a law, which establishes such a great affront to principles of law of the forum where enforcement is sought that would make it impossible to enforce the judgment there.[31]

Case Law Dealing with the Public Policy Exception

As was seen in the antecedent passages defining the notions of public policy remains mainly to the national courts. Hence, it is very likely that each court will apply the reservation clause differently. Then there is a growing fear that the clause could take on a life of its own and turn into a catchall provision instead of serving the purpose of a 'ground of last resort'[32] only.[33]

Whether this fear is justified will be examined now. The article will therefore examine the question of how free the Member States of the European Union really are in defining the term of public policy. In order to do so, it is essential to consider the case law of the European Court of Justice. The court dealt with the aforementioned question in the case of *Krombach v. Bamberski.* There, the court profoundly discussed the problems that are likely to arise under Article 27 paragraph 1 of the Brussels Convention, now Article 34 paragraph 1 of the Brussels I Regulation.

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31 Newton, Justin, 'The Uniform Interpretation of the Brussels and Lugano Conventions', 2002, pp. 376 f.

32 Pittman, above n 19, Jonathan H., 970.

33 Vest, Loudon Lindsay, 'Cross-Border Judgments And The Public Policy Exception: Solving The Foreign Judgment Quandary By Way of Tribal Courts', (2004-2005) 153 *University of Pennsylvania Law Review*, 797, 799.

Facts of Dieter Krombach V. André Bamberski

Dr Krombach, the defendant, is a German physician. In 1982 he gave an injection to the 14-year-old French daughter of his girlfriend. Both had stayed at his home in Germany. The girl, Kalinka Bamberski, died on the day after she had received the injection. Hence, criminal proceedings against Dr Krombach were initiated in Germany. However, due to a lack of evidence these proceedings were discontinued. This is why the victim's father, Mr Bamberski, the plaintiff, started criminal proceedings against the defendant in France. Krombach was committed for trial in the Paris criminal court on a charge of voluntary homicide. In the course of these proceedings the plaintiff also claimed damages in an adhesion action for pain and suffering. The French Criminal Court claimed it had jurisdiction over the dispute because of the victim's French nationality. The court ordered the defendant to appear in court, which he did not do. Instead, his two lawyers tried to appear on his behalf. However, the court ruled that under Article 630 of the Code of Criminal Procedure that because the accused had failed to appear in person no counsel could represent him. Hence, the written statements of the defendant's lawyers were not admitted in the trial. Eventually, the court delivered a judgment in absentia against Krombach pronouncing a criminal sentence and at the same time awarding damages to the plaintiff. After these judgments had been rendered Mr Bamberski applied to the German District Court, the Landgericht, to enforce the judgment for damages in accordance with the Brussels Convention. The court granted the application. In response to that Krombach appealed to the Oberlandesgericht, the Appellate Court, and ultimately to the Bundesgerichtshof, the Federal Supreme Court. He asserted that the French judgment against him was rendered in violation of Article 27 paragraph 1 of the Brussels Convention, thus being contrary to the German public policy if enforced in Germany. The Federal Supreme Court was sympathetic to the defendant. Yet, the court was not certain about the impact of the Brussels Convention. It therefore asked the European Court of Justice for a preliminary ruling on the interpretation of Article 27 paragraph 1.

Issues of the Krombach Case

With the submission of Germany's Federal Supreme Court pending at the European Court of Justice the judges in Luxembourg had to address the following questions:

Firstly, it was relevant to determine whether a court of the state in which enforcement is sought can take into account under Article 27 paragraph 1 of the Brussels Convention regarding a defendant domiciled in that state the fact that the court of the state of origin based its jurisdiction solely on the victim's nationality.

The second question was whether the state in which enforcement is sought can take into account under the public policy clause regarding a defendant domiciled in that state the fact that the court of the state of origin refused to allow the defendant to have his defence presented unless he appeared in person.

The court had to reply to these questions in the glare of the relationship governing the Brussels Convention and the ECC Treaty. Since the former was based on Article 220 of the Treaty (now Article 293 ECC), the European Court of Justice has consistently held that basic rights are an essential part of the general rules of law whose observance the court has to supervise. In order to do so, the court refers to the constitutions of the Member States as well as to guidelines provided by international treaties for the protection of human rights on which the Member States have collaborated or which they have signed. Therefore, the European Convention on Human Rights is significant in this context.[34] Another important aspect for the court to take into account is the aim of the Brussels Convention. One of its major objectives is to facilitate to the greatest possible extent the free movement of judgments and a very quick enforcement process within the Member States.[35] The competence of the European Court of Justice to interpret the Convention derives from the adoption of Protocol 3 on June 3, 1971.[36]

Decision of the Krombach Case

In general, the court decided that the Contracting States remain free in principle to determine the contents of public policy according to their own national concepts. This statement implies that a domestic standard may be applied. Simultaneously, the court ruled that the boundaries of that concept are a matter of interpretation of the Brussels Convention.[37] Therefore, although the European Court of Justice must not determine the details of the public policy clause, it is still necessary for the court to review the limits within which the national courts may take recourse to the public policy reservation when trying to refuse the enforcement of a judgment delivered in another member state.[38]

With reference to the first question the court came to the conclusion that the court of the state in which enforcement is sought cannot take into account under Article 27 paragraph 1 of the Brussels Convention the fact that the court of the state of origin

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34 Lowenfeld, Andreas F., 'International Litigation and Arbitration', 2nd edition, 2002, p. 459.

35 Lowenfeld, above n 34, 458.

36 Minehan, above n 20, 808.

37 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 22.

38 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 23.

based its jurisdiction solely on the nationality of the victim of a criminal offence.[39] Article 28 of the Brussels Convention confirms this finding.

As for the second question, the European Court of Justice responded that the national courts are allowed to take recourse to the public policy clause if the state of origin refused to allow the defendant to have his defence presented unless he appeared in person.[40]

Contextually with the second issue of *Krombach v. Bamberski* Articles 29 and 34 of the Brussels Convention become relevant. Those provisions prohibit any review of the foreign judgment as to its substance. Therefore, a court of the state in which enforcement is sought may not refuse enforcement solely on the ground that there are discrepancies in the legal rules of the Contracting States. To invoke the clause it is not sufficient that the court of the second forum might have come to a different decision. Because of that, a referral to the public policy provision is only possible when the enforcement of the foreign judgment would be 'at variance to an unacceptable degree'[41] with the legal rules, the enforcing court is bound by. Setting the bar high to satisfy the elements of the departure ground once more demonstrates its exceptional character. The cases in which the clause operates successfully relate to situations in which the guaranteed rights of the state of origin and of the Brussels Convention did not suffice for the protection from a grave breach of a party's fundamental rights. The main emphasis is placed on constitutional rights in this context.[42] One of those basic rights is to provide for a fair process. The latter includes the entitlement to present an effective legal defence in court.[43] The accused does not forfeit entitlement to this right just because he or she does not appear in person.[44]

When asking for a preliminary ruling on the Krombach case the German Federal Supreme Court was most uncertain about the interpretation of Article II of the Protocol of the Brussels Convention. In that provision the right of an effective defence without appearing in person is only recognised for those persons who are prosecuted for an unintentionally committed offence. Hence, the right to be defended without appearing personally shall not apply to persons prosecuted for offences, which are serious enough to deny that right.[45] Without hesitation, the European Court concluded

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39 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 34.

40 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 45.

41 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 37.

42 Behr, above n 1, 223.

43 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 44.

44 *Poitrimol v. France*, European Court of Human Rights Series A No 277 – A.

45 Rinkau, C- 57/80, ECR 1391, para. 12.

from its previous cases that the right to a fair trial and consequently the right of a fair defence is guaranteed in all proceedings no matter whether the offence was committed intentionally or unintentionally.[46]

Ultimately, the European Court of Justice concluded that in case the French judgment was to be enforced in Germany it would be contrary to Article 103 Grundgesetz, the German Constitution. Consequently, the enforcement would be contrary to Germany's public policy. Therefore, the German courts were allowed to refuse enforcement, thus indemnifying the defendant from paying damages to the plaintiff.

Effects of the Krombach Judgment

In line with the Krombach case comes a crucial lesson with regard to the interpretation of the Brussels Convention and its successor.

The Krombach decision reveals circumstances under which recourse to the public policy clause is possible and when it is not. Thus, it fills the value phrase with a more precise and comprehensible meaning.

Firstly, it was said that the clause could not be invoked solely on the ground that jurisdiction was based on a victim's nationality. A case following the Krombach judgment confirmed this major finding.[47]

Secondly, the judgment presents the grounds on which the provision can be raised successfully. Although the attempt to define a breach of public policy still sets out general terms by demanding a 'manifest breach of a rule of law regarded as essential'[48] in the enforcing state, it is more than a hollow value phrase. The reason for that lies in the fact that with the Krombach case the European Court of Justice incorporated the content of Article 6 of the European Convention on Human Rights into the interpretation of the departure ground in question. This step implies that the requirements of procedural fairness under the Brussels Convention are now congruent with those of the European Human Rights Convention.[49]

As a result of this incorporation, it can be observed that the court's decision enhances an increasingly European approach regarding the interpretation of the Brussels

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46 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 42.

47 *Maxicar v. Renault II*, C-38/98, ECR 2000, I-2973.

48 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 37.

49 Muir Watt, Horatia, 'Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions', (2001) 36 *Texas International Law Journal*, 539, 549.

Convention. Therefore, it leaves less room for the national judges to define the notions of public policy. This is why one legal scholar suggests that the judgment reflects a significant shift in which a European standpoint is taking over, and forcing the national values to retreat and giving way to European parameters.[50] How far this European approach of interpretation is beneficial and whether the Member States will adhere to the guidelines set out by the European Court of Justice remains to be seen.[51]

A disadvantage of imposing European values is that it undermines to some extent the sovereignty of the Member States. This is especially true with regard to the public policy term since it seemed to be the last bastion without interference from superior European authorities. Instead of considering exclusively their own national interests and values, the local judges now have to refer to the European ones. Those do not necessarily correspond with the national ones. In the worst case, they might even be contrary to them. However, it is also important to consider the European approach from a different perspective. One has to keep in mind that the European Court only set boundaries to the interpretation of public policy. Within those limits the national courts are still free to attribute a precise national meaning to the value phrase. Thus, despite the superior guidelines set out by the European Court of Justice the emphasis with relation to public policy is still placed on domestic public policy. Therefore, when deciding whether the enforcement of a foreign judgment would be contrary to the enforcing court's public policy, the courts have to consider the guidelines set out by the European Court. Nevertheless, as an ultimate safeguard all European jurisdictions may refuse the enforcement of the foreign judgment if it runs counter to the national (domestic) public policy[52]. However, the probability of European values being contrary to those of the Member States is not dangerously high. The reason being is that –as was mentioned above- the European Court seeks to protect fundamental rights of the Member States and its citizens. Therefore, the emphasis is put on constitutional rights. All Member States of the European Union want to ensure those rights to its citizens. Despite minor differences in the exact scope of those fundamental rights, the basic notions are very close.

Furthermore, there is only way to guarantee a uniform application of the public policy clause. This can be achieved when superior guidelines have to be taken into account in every national consideration concerning the content of public policy. This argument relates to another one, which can be put forward in favour of a European interpretation of public policy. That is that the ruling of Luxembourg has to be discussed in the glare of the Convention's objectives. Only when the Member States

50 Muir Watt, above n 49, 543.

51 Muir Watt, above n 49, 546, 552.

52 Behr, above n 1, 221.

apply the Convention uniformly the goal to facilitate to the greatest possible extent the free movement of judgments can be enhanced.

The decision has also conjured quite a debate concerning the competence of the European Court to impose European values on the interpretation. Prior to the decision, the majority view was that the European Court of Justice did not have competence to define the notions of public policy. This competence was rather exclusively allocated to the national courts.[53] This view was also expressed by a judgment of Germany's Federal Supreme Court. It had ruled that public policy was not a subject for the European Court of Justice to deal with. Therefore, the German court refused to allow a reference to be made on that subject.[54] In addition, two of the Advocate Generals of the European Court of Justice were convinced that defining the notions of public policy was a task solely for the national judges.[55] However, Luxembourg ignored these opinions. The court stated that a national definition of public policy would advance an excessively huge concept of the refusal ground. Since this is to operate in exceptional cases only an excessive use had to be prevented. That aim could only be obtained by making the Member States comply with some European values.[56] Otherwise, the clause would lose its exceptional character.

One of the beneficial aspects of the Krombach judgment lies in the fact that it contributed to the clarification of the relationship between Article 27 paragraph 1 and paragraph 2 of the Brussels Convention. The national courts assumed over a long period that there were no other cases than those immanent to Article 27 paragraph 2 of the Convention dealing with procedural fairness. Consequently, it was thought Article 27 paragraph 1 could only envisage those cases in which enforcement was refused for other reasons than for a violation of due process. The decision in question however reverses this supposition by explicitly extending paragraph 1 to procedural fairness –with the incorporation of Article 6 of the European Convention on Human Rights- instead of letting this clause operate only in cases where a breach of substantive public policy would occur.[57]

However, even after Krombach the potential residual role of the public policy clause has not been clarified yet. In specific, it remains to determine if recourse to Article 27 paragraph 1 is prohibited if the elements of another ground for refusal were not fully

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53 *Hoffmann v. Krieg*, C-145/86, ECR 1988, 645, para. 58; Kroppholler, Jan, 'Europäisches Zivilprozessrecht: Kommentar zum EuGVÜ und Lugano Übereinkommen', 6. Auflage, 1998, p. 343.

54 BGH 26.9.1979 BGHZ 167, 171.

55 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 24.

56 *Maxicar v. Renault II*, C-38/98, ECR 2000, I-2973, para. 28.

57 Muir Watt, above n 47, 550.

satisfied. The European Court of Justice dealt with another case in which the relationship between the public policy reservation and other departure grounds was at stake. In that decision the court held that recourse to public policy is excluded when the issue must be resolved on the basis of another, respectively a more specific provision in the Brussels Convention.[58] This view was confirmed in the case of *Hendrikman v. Magenta*.[59] However, the aforementioned cases did not consider the potential residual role of the departure ground of public policy. It remains unanswered if the 'mutual exclusivity' criterion as laid down in *Hoffmann v. Krieg* means that whenever a legal situation could be captured by another provision but its elements are not fully satisfied a recourse to public policy is precluded?[60] If this view was confirmed it would be easier to operate the public policy clause as an exceptional provision. Thus, the fear of an abusive use of the clause could be avoided.[61] Since the European Court itself had not decided on the residual role of public policy itself yet, one of the court's Advocate Generals expressed a tendency. According to his opinion even in cases where there is a specific rule this fact does not necessarily preclude a successful invoking of the public policy clause after the failure of the more specific provision.[62] Whether the court will follow this proposal has to be watched in future judgments.

In conclusion, the Krombach judgment has achieved the aim of defining pubic policy more precisely than it was done before. Thus, the uniformity in the application of the departure ground will increase. On the other hand, some questions – especially the potential residual role- still remain unanswered.

The Public Policy Clause and its Consistency with the Principle of the Free Movement of Judgments

One of the fundamental objectives governing the Brussels I Regulation is to simplify the formalities for the enforcement of foreign judgments. Precisely, the Brussels I Regulation aims at promoting the free movement of judgments within the

58 *Hoffmann v. Krieg* ,C-145/86, ECR 1988, 645, para. 21.

59 *Hendrikman v. Magenta,* C-78/95, ECR 1996, I-4943, para. 23.

60 Newton, above n 31, 400.

61 Ibid.

62 *Krombach v. Bamberski*, C–7/98, ECR 2000, I-1935, para. 27.

community.[63] The preamble of the Regulation indicates this by implementing Article 293 of the EEC.[64]

The aim underlying the principle of enhancing a free circulation of foreign judgments is to promote the 'legal protection of persons established in the European Community'. Thus, the judgment creditor will receive a fair and great chance that a judgment rendered to him in the initial forum shall be enforceable in another state in circumstances where this becomes necessary.

In order to guarantee a full implementation of the principle of the free movement of judgments the absence of two different types of hurdles is required. Firstly, there should not be any departure grounds from the general rule to enforce another state's judgment. Secondly, the Brussels I Regulation should not contain any procedural barriers. It can be inferred from these considerations that the principle of free movement of judgments can be split up into two sub-principles. The first one is the principle of full respect for judgments delivered in a member state. The second one is the principle of a swift and simple procedure for the enforcement of a foreign judgment.[65]

According to the first sub-principle, a judgment should have the same authority and effectiveness in the country where enforcement is sought as it has in the country of origin.[66] However, although this principle is a fundamental aim of the Brussels I Regulation, its full implementation is impossible. The reason for that lies in the Regulation itself. As was demonstrated above, it contains several grounds to deviate from the pro-enforcement rule.[67] The reason for providing those barriers lies in the following: the departure grounds are generated by principles and interests, which are embodied in the Regulation as much as the principle of the free circulation of judgments is. In other words, the Regulation contains more than one fundamental principle. With the accumulation of so many objectives, under certain circumstances a collision of these different principles is likely to occur.[68] Then it becomes necessary to find the right balance between those conflicting values, to try to reconcile them, and to allow maximal development for each of them.[69] However, giving effect to all of the

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63 *Unibank v. Christensen*, C-260/97, ECR 1999, I-3715.

64 Lane, Suriyakumari, 'Free Movement of Judgments within the EEC', (1986) 35 *International and Comparative Law Quarterly*, 629, 629.

65 Pontier, above n 4, p. 28.

66 *Hoffmann v. Krieg*, C 145/86, ECR 1988, 645, para. 10f..

67 Pontier, above n 4, p. 30.

68 Pontier, above n 4, p. 31.

69 *Solo Kleinmotoren v. Boch*, C 414/92, ECR 1994, I-2237, para. 20.

principles to the greatest extent is sometimes impossible. The reason is the mutual exclusivity of some of the principles. If the aims are mutually exclusive, then it is indispensable to give priority to one principle over another one. It is commonly accepted that there are values whose observance and protection are more important than upholding the free circulation of judgments. Hence, the Regulation's objective to promote to a greatest possible extent a free movement sometimes has to supersede to higher valued policies implied in other provisions. One of those priorities can be the adequate protection of the defendant or the adequate protection of superior national interests.[70]

At this stage the public policy exception comes into play. As was seen above, the provision aims at ensuring the protection of fundamental interests of the Contracting States' legal orders. This is considered to be so important that it was given priority and that is has found explicit expression in the Regulation.

However, although the Regulation attributes different weight to opposing principles this does not mean that one principle must always be totally neglected in the glare of another one. If it is possible, both aims should be upheld. This can be inferred from the Krombach judgment, which demands a narrow interpretation of the public policy clause.[71] On the one hand, the exception is given priority over the principle of a free circulation of foreign judgments. On the other hand, the public policy reservation is to operate in exceptional cases only.[72] However, this exceptional character of the clause does not imply that the refusal grounds should be interpreted in a way, which would make them fully redundant to the other principles. Therefore, construing them to an extent that would deprive them of their overall legal effect is unacceptable as well.[73]

The second sub-principle derived from the objective of the free movement of judgments means that a party seeking enforcement should not be hampered by procedural obstacles. Hence, the ideal situation to promote this principle would be to have an automatic recognition and enforcement process. Since this is not the case, the procedure has to be at least rapid and easy.[74] However, the Brussels I Regulation is no danger to ensure the implementation of this principle. As was set out in the beginning of this note, there are no great formal hurdles to overcome to enforce a foreign judgment.[75]

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70 Kaye, above n 17, p. 1437.

71 *SoloKleinmotoren v. Boch* C 414/92, ECR 1994, para. 20.

72 *Hoffmann v. Krieg,* C 145/ 86, ECR 1988, 645, para. 21.

73 Pontier, above n 4, p. 35 f.

74 Lane, above n 64, 639.

75 Lane, above n 64, 640.

In conclusion, the principle of the free movement of judgments and its sub-principles are firmly established in the Brussels I Regulation. Nevertheless, their nature is not absolute because the Regulation contains competitive or conflicting principles. Also, the Regulation provides provisions to deviate from it. Still, it has a major impact on the interpretation of the departure grounds, especially regarding the public policy exception.[76] Therefore, although the public policy clause does not to a full extent support the free circulation goal, this clause must be maintained for it ensures the protection of fundamental values. Here, as so often in law, it is essential to find the right balance between contravening interests. The guidelines suggested by the European Court for the interpretation of public policy are helpful for the formation of this balance.

Enforcement of Foreign Arbitral Awards Under the New York Convention

As was pointed out in the introduction, international trade has massively expanded during the last decades. Coinciding with this expansion was an increase in the number of international commercial disputes. The business world, being aware of the complications that still exist to obtain and enforce a foreign judgment, therefore turned to other grounds of conflict resolution. The most popular method in this respect is international commercial arbitration. It is believed, that by taking recourse to this dispute resolution mechanism it will be easier to enforce a foreign arbitral award in a second forum than it would be to enforce a foreign judgment in a forum different from the delivering forum.[77]

Therefore, it will be examined here whether this 'belief' is correct regarding the court's ability to refuse the enforcement of a foreign arbitral award under the public policy reservation of the New York Convention.

Owing to the comparative nature of this note, the author will point out the similarities and commonalities between the departure ground of public policy in the Brussels I Regulation and the New York Convention first and afterwards discuss the differences.

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[76] Pontier, above n 4, p. 44.

[77] Contini, Paolo, 'International Commercial Arbitration The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards', (1959) 8 *American Journal of Comparative Law*, 283, 283.

Commonalities and Similarities

Both, the Brussels I Regulation and the New York Convention contain departure grounds to refuse the enforcement of foreign judgments respectively awards. The refusal grounds are set out in Article V of the New York Convention. Under Article V (2) (b) the courts may deny enforcement of a foreign arbitral award if such would be contrary to the public policy of the enforcing country. The list of departure grounds under the New York Convention is exhaustive as well, meaning that the courts can only deny enforcement if the elements of one of the provisions are satisfied.[78] Also, either the defendant or the court ex officio may invoke the public policy reservation.[79] Another commonality is that under the New York Convention the departure ground is split up into the two categories of procedural and substantive public policy.[80] Furthermore, under both instruments the public policy clause has a dynamic character, which is subjected to sociological and economic changes. Just because it is embodied in a different Convention cannot change the term's nature of a value phrase.[81]

As much as the Brussels I Regulation forbids any review to the substance under the public policy clause, the New York Convention must not serve as an open door for a judicial review of the arbitral award either.[82]

A little bit more controversial is whether the public policy exception is to be interpreted narrowly as under the Brussels I Regulation? This question has been subject of a debate among different legal authorities. The problem results from the fact that the legislative history of the New Convention neither provides clear guidelines in favour, nor against a narrow construction of the public policy clause.[83] The precursors of the New York Convention contained the departure ground of public policy, too. However, the wording was not exactly the same. Rather than mentioning only public policy – as the New York Convention does - its precursors extended the clause. They

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78 Reisman, W. Michael, Craig, W. Laurence, Park, William, Paulsson, Jan, 'International Commercial Arbitration Cases, Materials and Notes on the Resolution of International Business Disputes, 1997, p. 1261.

79 Craig, W. Laurence, Park. William W., Paulsson, Jan, 'International Chamber of Commerce Arbitration', 3rd edition, 2000. p. 684.

80 Lew, Julian D M, Mistelis, Loukas A, Kröll, Stefan M, 'Comparative International Commercial Arbitration', 2003, p. 723.

81 Ibid.

82 Lowenfeld, above n 34, p. 352.

83 Berglin, Hakan, 'The Application in the United States Courts of the Public Policy Provision of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', (1985-1986) 4 *Dickinson Journal of International Law*, 167, 168.

added the terms contrary to 'principles of law' or violative of 'fundamental principles of the law'.[84]

Therefore, one opinion suggests a narrow interpretation of the provision. This hypothesis allegedly finds support in the pro-enforcement bias underlying the Convention.[85] Also, an expansive interpretation of the departure ground would oppose the Convention's basic effort to abolish the pre-existing barriers to the enforcement of foreign arbitral awards.[86]

Another authority, however, concludes exactly the opposite from the omission of the words cited above. According to that opinion, leaving those terms out is an indicator favouring a broad interpretation of the clause.[87]

To resolve this controversy, a look at the history of the Convention as a whole is instructive. Especially the general pro-enforcement bias points towards a narrow interpretation of public policy. If the courts interpreted the public policy provision broadly, the realisation of the Conventions' aims would be much more difficult. The judges could, according to their subjective preferences, classify a minor 'offence' as contrary to public policy. This would impede the enforcement of foreign arbitral awards instead of facilitating it. In addition to that, considerations of reciprocity advise the courts to handle the public policy reservation with great care.[88] Reciprocity in this context means that the decision of foreign courts should only be enforced if the foreign country was likely to enforce the judgments rendered by the second forum as well.[89] Achieving this reciprocity is more likely if the foreign countries will mutually rely on the other state's award. That is only possible with a narrow interpretation of the clause.

Hence, it is advisable to interpret the clause narrowly and reserve it for the gravest infringements only.

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84 Lowenfeld, above n 82.

85 Contini, above n 77, 304.

86 Cole, Richard A., 'The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards', (1985-1986) 1 *Ohio State Journal on Dispute Resolution*, 365, 366.

87 Quigley, Leonard V., 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards', (1960-1961) 70 *Yale Law Journal*, 1049, 1077f.

88 Lowenfeld, above n 34, p. 353.

89 Behr, above n 1, 221.

Differences

Despite the aforementioned commonalities also a few differences are observable with regard to the public policy clause under the Brussels I Regulation and the New York Convention.

Acceptance of the New York Convention

As a starting point it is worth mentioning that the New York Convention is one of the most widely accepted multinational conventions. Its basic thrust is to liberalise and facilitate to the greatest possible extent the procedures to enforce foreign arbitral awards. A large number of countries are parties to the Convention.[90] This fact makes the instrument highly satisfactory to award creditors seeking enforcement.[91] Although the Brussels I Regulation pursues the same objective, only the Member States of the European Union are bound by the Regulation. Therefore, the instrument is of great use when it comes to the enforcement of judgments within the Member States. If however, a judgment from a non-member state needs to be enforced, the Regulation will not operate, thus making the enforcement process more complicated. Therefore, one advantage of the New York Convention lies in its global application and acceptance.

Discretion

The most obvious distinctive feature can be inferred from the choice of words of the public policy provision. Whereas the Regulation does not give any discretion to the courts, the New York Convention allows the courts to exercise discretion. This is implied by using the words 'may refuse'. Thus, if a court chooses to enforce a foreign award although one of the departure grounds is established, this does not result in a violation of the treaty.[92] Providing a court with discretion enables it to be much more flexible in the process of decision-making. Instead of applying inflexible rules of law to a situation where the application of these rules might lead to an unfair result, the court can consider circumstances, which are not described in the provision in question. The consideration of those circumstances might be very important for the finding of a judgment that is individually just and fair. The discretion under the New

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90 Harnik, Hans, 'Recognition and Enforcement of Foreign Arbitral Awards', (1983) 31 *American Journal of Comparative Law*, 703, 703.

91 Lew, above n 80, p. 693 f.

92 Lowenfeld, above n 34, p. 362.

York Convention is therefore a great benefit in the enforcement process of foreign arbitral awards as opposed to the enforcement of foreign judgments under the Brussels I Regulation.

Domestic Versus International Public Policy

In the *Overseas v. Rakta*[93] case, the court had to face the question whether public policy under the New York Convention is equitable to or if it is reflected in domestic governmental policies. In other words, the court had to answer if public policy under the New York Convention has the same meaning as public policy in a national sense.[94]

The court concluded in its judgment that there is a difference between domestic and international public policy. The latter demands a narrow interpretation of the provision in question.[95] In contrast, when it comes to domestic law, the public policy elements may be construed broadly. The reason for a narrow construction is that a wide interpretation favouring a protection of national interests would run counter to the Convention's objectives.[96] One of the most important objectives is to facilitate the enforcement process of foreign arbitral awards. To stress that, the courts also pointed out that the defence should not be used to safeguard national interests but rather to focus on supranational values. Hence, considerations with an international character were thought to outweigh the benefits, which were intended by some national statutory provisions. A court decided so in the case of *Scherk v. Alberto Culver Co.*[97] Eventually, enforcement should only be denied if such would 'violate the forum state's most basic notions of morality and justice'[98]. This international standard was repetitively emphasised in the *Fotochrome Inc. v. Copol Co. Ltd*[99]case. However, although it was ruled in the *Overseas* case that a violation of domestic public policy will usually not establish the defence, under certain circumstances this general rule might be invalid. That could be the case when the violated national law is based upon

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93 *Overseas v. Rakta*, 508 F.2d 969, (2nd Circuit 1974)

94 Junker, Joel R.,'The Public Policy Exception to Recognition and Enforcement of Foreign Arbitral Awards', (1977) 7 *California Western International Law Journal*, 228, 239.

95 *Overseas v. Rakta*, 508 F.2d 969, 974, (2nd Circuit 1974).

96 *Overseas v. Rakta*, 508 F.2d, 969, 974, (2nd Circuit 1974).

97 *Scherk v. Alberto Culver,* 417 U.S. 506 (1974).

98 *Overseas v. Rakta*, 508 F.2d, 969, (2nd Circuit 1974).

99 *Fotochrome Inc. v. Copol Co. Ltd*, 517 F.2d, 512 (2nd Circuit 1975).

the aforementioned basic notions of morality and justice. Then, the public policy exception, as set out in the New York Convention, is likely to apply.[100]

Defining that enforcement of a foreign arbitral award is contrary to public policy if the basic notions of morality and justice are violated, was a short-term relief of dealing with the public policy clause. The reason for that is that this concept does not offer any specific guidance. In contrast, it is very vague and sets out a subjective standard which calls for interpretation by the national judges.[101] In particular, it remains unsure in which circumstances the public policy clause can be used effectively as a defence.[102]

Concluding from the previous passages, in most of the cases that had to be decided a conflict between the pro-enforcement bias of the Convention and the national public policies arose. However, the evolving case law on the application of the public policy clause has hardly presented a challenge on how far the courts are willing to go in terms of enforcing foreign arbitral awards. Thus, although quite a few cases dealt with the public policy clause, there is still a lack of certain guidelines as to when the clause will operate.[103]

The narrow interpretation of the public policy defence conjures up another problem, too. Originally, the provision's intention was to serve as a 'catchall' for those cases in which the fundamental notions of morality and justice have not yet been captured by a more specific departure ground.[104] Regarding this intention, one authority alleges that the United States' courts failed to comply with it. Rather than letting the public policy clause operate as a catch all provision, it is claimed that the narrow interpretation of the clause leads to its insignificance or even total meaninglessness. Thus, according to this opinion, there would hardly be a difference if the defence was non-existent under the New York Convention.[105] According to this opinion, the defence is an expression of ultimate national power. Apparently, however, the courts so far feared exercising this power, thus enforcing foreign arbitral awards in the vast number of cases. Also, the conceptual weaknesses of the provision will make it almost unpredictable for arbitrators, lawyers, the courts, and for the business world to anticipate the limits of fairness in international commercial arbitration.[106] It is therefore concluded that the narrow interpretation might result in a decreasing use of

100 Junker, above n 94, 241.

101 Cole, above n 86, 377.

102 Cole, above n 86, 365, 375.

103 Berglin, above n 83, 169.

104 Junker, above n 94, 245.

105 Ibid.

106 Ibid.

international commercial arbitration. Thus, attorneys might advise their clients to refer to the 'safety' of the national judiciary. This, however, is contrary to the intention to take the burden from the courts and to promote arbitration as a method of alternative dispute settlement.[107]

Defining Public Policy under the New York Convention

As was seen above, a precise definition of public policy under the New York Convention is still missing. That makes it impossible to predict if the clause will operate in an individual case. That in return is problematic in so far as the public policy clause is the most general departure ground and a party is likely to try invoking it when any specific provisions have failed.

Several legal writers have therefore used this unpleasant situation as an incentive to attempt defining the clause's meaning more precisely and avoid any uncertainty as to when it will operate.

One author intends to achieve certainty by endowing the clause with an objective standard. Thus, the national judges shall be prevented from applying their different subjective standards to the provision and in return guarantee a uniform application of the clause. The suggested standard sets out positive terms to describe when enforcement would be contrary to public policy. With the infringement of those terms, the courts can refuse the enforcement of the foreign arbitral award.[108] Precisely, the public policy reservation shall operate if the enforcement of the award would violate federal law.[109] Consequently, the striking feature of this definition is the violation of federal law. The scope of federal law should cover all congressional enactments, as well as rules and regulations emerging from those enactments. Case law, however, should not form a part of federal law.[110]

By emphasising a violation of federal law, the logical consequence must be that a breach of a state's law does not suffice to trigger the departure ground. However, this does not imply a detriment to the state law. The reason being is that the circumstances under which the state courts used to deny enforcement are expressed in the other

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107 Junker, above n 94, 246 f.

108 Barry, Robert A.J., 'Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards under the New York Convention: A Modest Proposal', (1978) 51 *Temple Law Review Quarterly*, 832, 843, 844.

109 Barry, above n 108, 845.

110 Barry, above n 108, 846 f.

grounds for refusal of the Convention.[111] Violation in the glare of this definition means that the action, which forms the basis of the award must establish a violation of public policy.[112]

Another opinion suggesting a more precise definition of public policy derives its idea from the definition under German law. The latter defines public policy rather broadly. Under German law an award would be contrary to public policy if the enforcement would offend the good morals or the main objectives, and also, if it would require a party to engage in an illegal action. The public policy clause in Germany is applied within the framework of certain circumstances described in the law. E.g., the German Code of Civil Procedure, Zivilprozessordnung, names certain situations under section 328 in which the enforcement of a foreign arbitral award would be contrary to public policy. This is a contrast to referring to the vague concept of morality and justice exclusively.

For those who might find a statutory definition undesirable, the author suggests another option to define public policy more specifically. He proposes that parliament should indicate which laws contain fundamental principles whose violation would be contrary to public policy.[113]

Yet another opinion proposes a clearer definition of public policy. The authority suggests that the clause should operate if the enforcement would violate the most basic notions of morality and justice of the second forum. Additionally, the courts should be allowed to deny enforcement if it would be detrimental to the interests of third parties or of the public.[114] The latter part of the definition relates to the idea that in some legal areas, rules are created to protect interests, which are beyond the fair resolution of a dispute between two parties. In these situations, public policy should be used to override an arbitration agreement because the arbitration will usually only consider the interests of the involved parties.[115]

All of the proposals refer to the national law. Therefore, these suggestions seem to counter run the standards of the courts. They had demanded to give public policy under the New York Convention a supranational meaning rather than focusing on a domestic standard. As soon as the definitions refer to a national standard, a global and uniform application of the Convention cannot be guaranteed. This is because every

111 Barry, above n 108, 848.

112 Ibid.

113 Junker, above n 94, 246ff.

114 Cole, above n 86, 383.

115 Cole, above n 86, 382.

country has its own federal law, thus its own meaning of public policy. Yet, in accordance with the proposals, certainty as to when the clause can be invoked should have priority over a uniform application. Therefore, with relation to the pro arbitration bias it is comprehensible to let the international standard supersede the more important factor of certainty.

Despite the potential disadvantage of abandoning an international standard, the first and the second proposal reveal significant benefits. Firstly, they provide specific guidelines as to when the public policy provision can be raised successfully. The reason for that is that the first definition only takes recourse to objective criteria. Thus, the circumstances under which the clause will operate do no longer depend on the subjective interpretation of the national judges.[116] This in return will increase the certainty when the clause can be invoked successfully.

The benefit of having a definition as under German law is a high predictability as to when the clause will work. This definition also confines the circumstances strictly enough in order to prevent the provision from becoming a loophole. Finally, it is important to mention that despite a broader interpretation of public policy under German law, arbitration flourishes in Germany. Thus, the broader interpretation is not detrimental to the use of arbitration.[117]

With relation to the third proposal, the following is relevant: it differs from the other proposals because it still adheres to the concept of basic notions of morality and justice. By referring to this standard, the factor of uncertainty remains. By adding the second part to the definition, precision is increased. Nevertheless, the judges still have to determine which public or third party interests are intended to be protected. This might be interpreted differently from judge to judge again. Hence, this definition does neither promote a uniform application, nor does it increase certainty. Consequently, the adaptation of this standard is unlikely to bring along a great change to the current problems with the departure ground in question.

Conclusion

The remarks above have revealed similarities as well as differences regarding the application of the public policy clause under the Brussels I Regulation and under the New York Convention.

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116 Barry, above n 108, 850.

117 Junker, above n 94, 249.

Concerning the choice of using international litigation or international arbitration the following is relevant: the fact that under the New York Convention the courts are endowed with discretion makes arbitration a more attractive dispute resolution mechanism. This discretion is another feature of flexibility in arbitration, which is lacking to a certain extent in international litigation. Therefore, with regard to this factor, the assumption that enforcement under the New York Convention is easier than under the Brussels I Regulation is correct. The assumption is also confirmed by the world-wide acceptance and application of the New York Convention as opposed to the Regulation.

The other conspicuous feature is the difference concerning the focus on domestic public policy under the Brussels I Regulation as opposed to international public policy under the New York Convention. With regard to this distinction, it is instructive to return to the competence of the European Court in terms of interpreting the Brussels I Regulation.

It was seen that the national courts may address the European Court of Justice when uncertainties with the application of the Regulation arise. Because of this power, the Court was able to impose a certain European standard as to the construction of the public policy clause. It sets out boundaries and the national courts are forced to adhere to these limitations. Within those limits however, the national courts are free to rule according to their domestic concept of public policy. Therefore, despite that there are certain superior guidelines within the European Union, the national courts still have a lot of authority and power. The guidelines help facilitating a uniform application of the clause under the different jurisdictions of the Member States.

Concerning the New York Convention, there is no superior organ the national courts can address in cases of uncertainty in the interpretation of the public policy clause. Rather than that, it only depends on the Contracting States and their view of what public policy should mean under the Convention. When an international standard is suggested without any precise guidance as to what this standard must look like, then it is very likely that all courts will interpret the clause differently and ultimately return to the national concepts anyway. Therefore, in order to achieve a uniform application it might be justified for the Contracting States of the New York Convention to seek a definition, which is more precise and to allow the states to refer to a national standard. However, the bar must be kept at quite a high level in order to prevent undermining the Conventions' objectives. That way, it can at least be said with certainty as to when the clause will operate. In addition, one should rely on the national courts' respect to handle the clause in exceptional circumstances only, thus promoting the objectives of the New York Convention.