

Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy failed in The Hague

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A. Introduction**

In the early Nineties the Hague Conference on International Private Law on initiative of the United States started negotiations on a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the "*Hague Convention*").¹ In October 1999 the Special Commission on duty presented a preliminary text,² which was drafted quite closely to the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the "*Brussels Convention*"). The latter was concluded between the then 6 Member States of the EEC in Brussels in 1968 and amended several times on occasion of the entry of new Member States. In 2000, after the Treaty of Amsterdam altered the legal basis for judicial co-operation in civil matters in

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¹ Schack, *Hundert Jahre Haager Konferenz für IPR. Ihre Bedeutung für die Vereinheitlichung des Internationalen Zivilverfahrensrechts*, RABELSZ 1993, 224; *ibid.*, *Perspektiven eines weltweiten Anerkennungs- und Vollstreckungsübereinkommens*, ZEuP 1993, 306.; BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGEMENTS*, 2003.

² Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999: www.hcch.net/e/conventions/draft36e.html; Preliminary Document No 11 - Report of the Special Commission, drawn up by Peter Nygh and Fausto Pocar, <http://www.hcch.net/doc/jdgmpl11.doc>.

Europe,³ it was transformed into an EC Regulation (the “Brussels I Regulation”).⁴

The 1999 draft of the Hague Convention was heavily criticized by the USA and other states for its European approach of a double convention, regulating not only the recognition and enforcement of judgments, but at the same time the extent of and the limits to jurisdiction to adjudicate in international cases.⁵ During a diplomatic conference in June 2001 a second draft was presented which contained alternative versions of several articles and thus resembled more the existing dissent than a draft convention would.⁶ Difficulties to reach a consensus remained, especially with regard to activity based jurisdiction, intellectual property, consumer rights and employee rights.⁷ In addition, the appropriateness of the whole draft was questioned in light of the problems posed by the de-territorialization of relevant conduct through the advent of the Internet.⁸ In April 2002 it was decided

³ For an overview of the activities aiming at an „European Area of Justice“ in civil matters see http://europa.eu.int/comm/justice_home/fsj/civil/recognition/fsj_civil_recognition_general_en.htm

⁴ Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 12/1 of 16 January 2001: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf; It is called „Brussels I Regulation“ since there exists as well a „Brussels II“-Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters.

⁵ Black, *Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention*, 38 OSGOODE HALL L.J. (2000) 237; Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Perspectives*, 6 ANN. SURV. INT'L & COMP. L. (2000) 1.

⁶ http://www.hcch.net/doc/jdgm2001draft_e.doc; see the report of the German participant to the negotiations Wagner, *Die Bemühungen der Haager Konferenz für Internationales Privatrecht um ein Übereinkommen über die gerichtliche Zuständigkeit und ausländische Entscheidungen in Zivil- und Handelssachen. Ein Sachstandsbericht nach dem 1. Teil der Diplomatischen Konferenz*, IPRax 2001, 533.

⁷ See „Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the conference“, submitted by the Permanent Bureau, Preliminary Document No 16 of February 2002: www.hcch.net/doc/gen_pd16e.doc

⁸ „The Impact of the Internet on the Judgments Project: Thoughts for the Future“, submitted by Avril D. Haines for the Permanent Bureau, Preliminary Document No 17 of February 2002: www.hcch.net/doc/gen_pd17e.doc

to continue negotiations on an informal level on the basis of a *nucleus approach*.⁹ The core consensus as identified by a working group, however, was not very broad. The experts involved came to the conclusion that the project should be limited to choice of court agreements. In March 2004 a draft was presented which sets out its aims as follows:

“The objective of the Convention is to make exclusive choice of court agreements as effective as possible in the context of international business. The hope is that the Convention will do for choice of court agreements what the New York Convention of 1958 has done for arbitration agreements.”¹⁰

In April 2004 the Special Commission of the Hague Conference adopted a Draft “*Convention on Exclusive Choice of Court Agreements*”, which according to its Art. 2 No. 1 a) is not applicable to choice of court agreements, to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party”.¹¹ The broader project of a global judgments convention thus seems to be abandoned, or at least to be postponed for an unlimited time period.

There are – of course – several reasons why the Hague Judgments project failed. Samuel Baumgartner has described an important one as the “*Justizkonflikt*” between the United States and Europe or, more specifically Germany.¹² Within the context of the general topic of this conference, that is (international) jurisdiction for human rights, in the remainder of this presentation I shall elaborate on the socio-cultural aspects of the impartiality of judgments and their enforcement on a global scale.

⁹ „Reflection paper to assist in the preparation of a convention on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters”, prepared by Andrea Schulz, First Secretary, Preliminary Document No 19 of August 2002: www.hcch.net/doc/jdgm_pd19e.doc

¹⁰ Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report drawn up by Masato Dogauchi and Trevor C. Hartley, Preliminary Document No 25 of March 2004: www.hcch.net/doc/jdgm_pd25e.pdf, Introduction, page 6.

¹¹ HCPIL Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, WORK. DOC. No 110 E, Revised (May 2004), www.hcch.net/doc/jdgm_wd110_e.pdf

¹² BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGEMENTS 95 (2003).

B. "Impartial Partiality": Peer Review as a Legacy of the Rule of Law

The very idea of law and justice is rooted in impartiality, i.e. the resolution of conflicts between two parties by judgment of an independent third party. The essential question then is: *what makes an impartial judge?* In the ancient law of acephalous societies as well as in today's national and international arbitration procedures, this question is to be decided by the parties to the conflict, who either appoint the judge *by consent* or each appoints a judge who then conjointly appoint a third person as chair of the arbitration panel.¹³ However, since the territorial nation state acquired a monopoly in the execution of force and in exchange promised its citizens a right to "access to justice" (i.e. the core content of the social contract), jurisdiction of state's courts over defendants had to be mandatory. So what makes a state's judge in a mandatory procedure impartial?

According to Harold Berman the origins of the "Western Legal Tradition" can be traced back to the Papal revolution, commonly referred to as the "Investiture Controversy", which led to the pluralistic system of divided authority, competing jurisdictions, and bounded sovereignty that later on inspired the ideas of the rule of law, the separation of powers, and an independent judicature.¹⁴ A basic concept of impartiality of law and its implementation in the legal system through a due process principle is contained in the Magna Charta of 1215. In a poem by Kipling it reads:

"... Your rights were won at Runnymede/
No freeman shall be fined or bound/
Or dispossessed of Freehold ground/
Except by lawful *judgement* found/
And passed upon him by his *peers*/
Forget not after all these years/
The Charter signed at Runnymede."¹⁵

This rule is regarded as the origin of the fundamental "right to trial by jury", which today is guaranteed in the Anglo-American legal systems, while it was abandoned for a purported irrationality of juries in late 19th century Germany, where today some relics of the jury principle can be found in the participation of lay-judges in criminal and commercial courts.

¹³ BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990); Benson, *The Evolution of Law*, in: THE ENCYCLOPEDIA OF PUBLIC CHOICE (ROWLEY/SCHNEIDER EDS. 2003).

¹⁴ BERMAN, LAW AND REVOLUTION (1983) (German edition 1991, p. 146, 468).

¹⁵ Quoted in Summers, *A Formal Theory of the Rule of Law*, RATIO JURIS 1993, 127.

The word “peer” refers to someone that is “equal in status”. While in 13th century England this only meant members of the nobility, which were awarded with rights in the Magna Charta, today “peer” is used more broadly as a concept of equality in terms of professional rank and skills (e.g. in “peer-review”) or age and attitude (e.g. in “peer-group”). In the context of adjudication today, however, the members of a jury are selected by random out of the local population. The fact that “peer” here means *any fellow citizen* is the result of the philosophy of enlightenment’s campaign for the principle that all men (and later on women as well) are free and equal. However, enlightenment’s concept of citizenship was anchored in a local community (e.g. Rousseau had the city republic of Geneva in mind when reflecting on the social contract). It took many generations in order to broaden the concept of citizenship from local and regional to a national identity.

This might not be true for centralized states like France, where regional identity was oppressed already under the rule of absolutism of the French kings. But national identity building was a big issue in states with a strong federalist tradition like Germany or the USA. In late 19th century Germany it was still very difficult for a Prussian to perceive a Bavarian court ruling as impartial, i.e. to accept judges from Munich as his unbiased peers. And in the United States the public policy exceptions to the full faith and credit clause are even today an important issue, especially where fundamental values and beliefs are concerned as it seems to be the case for example with same-sex marriages.

So where does this argument lead to? My point is that the very idea of an impartial court is *not only* rooted in the *neutrality* of the judges in terms of their non-affiliation with one of the parties. For having a “Man from Mars” or a “Justice Robot” as a judge does not seem to be a very attractive idea. Impartiality is as well rooted in the concept of being judged by a “peer”. The justification of “peer-review” lies in the recognition of the natural human constraints to the realization of the concept of “justice as universalization”, for example as inherent to Kant’s categorical imperative. As Mead argued in his social psychology, communication, understanding, and consent between individuals are based on *mutual role taking*, which is processed by means of an internalized reference to the concept of the so-called “generalized other”.¹⁶ The same is true for the justification of impartial, i.e. just norms, an activity which requires *universal role taking*, the preconditions of which are described by John Rawls as the “veil of ignorance”, and by Jürgen Habermas as the “discourse principle”.¹⁷ But as the “generalized other” is a

¹⁶ MEAD, MIND, SELF, AND SOCIETY (1934)

¹⁷ RAWLS, A THEORY OF JUSTICE (1971); HABERMAS, FAKTIZIÄT UND GELTUNG (1992), ENGL. TRANSLATION (WILLIAM REHG): BETWEEN FACTS AND NORMS (1996).

construct of the social process, and thus is embedded in local culture, the understanding of foreigners is as difficult an endeavor as the justification of universal norms. On this background the right to trial by jury can be understood as a procedural implementation of the right to be treated fair and impartial, for only the parties' peers are presumed to have the ability of taking the role of and thus understanding the parties to a conflict. I shall call this insight a concept of "partial impartiality" or "impartiality *by* partiality".

As noted, however, the question who could possibly be perceived as a "peer" to the parties is a question of socio-cultural identity. During the 18th, 19th and 20th centuries a slow and painstaking process of conversion took place from local and ethnic towards national identities. Where this socio-cultural process did not take place, the state is based on brut force, a fact that often results in civil wars once the Leviathan becomes weak, as it was the case in former Yugoslavia and as it currently appears to be the case in Iraq. Where the process of national identity building was successful, a comparable problem results from transnational conflicts across borders. Albeit the current trends of de-nationalization and globalization it is very difficult to built supra- or transnational identities. True cosmopolitan identities may be found in social systems like the economy, sports, arts, science, even religion, but not in law and politics, which are still mentally stuck in the "Westphalian system". Therefore, in international civil and commercial litigation national judges are suspected to vote the interests of their co-citizens, which is commonly referred to as a reason for parties to international commercial contracts to agree on the jurisdiction of a neutral state by means of an exclusive choice of court agreement, or to submit potential conflicts to binding arbitration, where neutral judges are chosen by consent.¹⁸

In the context of mandatory international civil litigation, most continental European legal systems have reacted to the problem of home-biased judges with the "*actor sequitor forum rei*"-rule, that is that a party in principle is subject to mandatory jurisdiction at its permanent domicile only, i.e. where judges can be perceived as being the defendants' peers. The resulting "*favor defensoris*" was legitimized by the idea that the claimant is perceived as a kind of aggressor who interferes with the peaceful *status quo ante* by raising a claim and asking the state in executing a judgment to transfer assets from the defendant to the claimant. This perception was, however, heavily criticized, for in many cases, e.g. deceptive or fraudulent business conduct or tort, it is the defendant who first of all interfered into the

¹⁸ See Mankowski, *Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse*, in: 118 VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN (OTT/SCHÄFER EDS. 2002).

preexistent distribution of property rights. This fact led to a lot of exceptions to the “*favor defensoris*”-principle in Europe as well as to the “activity based jurisdiction”-doctrine in the United States.¹⁹

C. Value-added norms and the enforcement of foreign judgments

However, most civilized nations do foresee the possibility of the recognition and enforcement of foreign judgments in civil and commercial matters in their autonomous national law, that is on a *voluntary basis* – at least from the point of view of public international law. Such recognition of foreign judgments is based on the “double fiction”²⁰ whereby

1. the substantive laws on which the judgment is based are more or less equivalent in civil and commercial matters, since the private laws of civilized nations are predominantly driven by the interests of private conflict parties, and thus are of a non-political character (no public interest involved), and
2. the civil procedure is functionally equivalent and judges are not biased in favor of their co-citizens, so that the results are fair and impartial as well with regard to foreigners.

Since these two are obvious fictions, the enforcement of foreign judgments is, however, subject to various qualifications, the most substantial of which, although practically not the most important, is the “*ordre public*”-test under which a foreign judgment is recognized and enforced only, if its contents do not interfere with the public policy and the fundamental values of the enforcing state.

The recognition and enforcement of foreign judgments is often denied where value-added norms like human rights are involved. Human rights, despite their purported universality, are value-added norms, since they contain very broad and abstract concepts, which in order to be applied to a single dispute have to be *fueled* by judges with local cultural and political values in the process of balancing and weighing conflicting interests. Free speech, for example, is as such a universal concept, but in applying it to real private law disputes, where for example a tenant wants to install a satellite television receiver on the roof without the consent of her landlord, the decisive contents of free speech and its limits with regard to other fundamental freedoms such as the landlords property rights are produced by the

¹⁹ See BUCHNER, KLÄGER- UND BEKLAGTENSCHUTZ IM RECHT DER INTERNATIONALEN ZUSTÄNDIGKEIT 48 (1998).

²⁰ See GEIMER, INTERNATIONALES ZIVILPROZESSRECHT, p. 16 notes 37, 38 (4th ed. 2001).

court. The same is true with regard to free speech and racism, hate speech, or pornography. And is even worse with anti-discrimination suits, where the decision which cases are alike and therefore should be treated alike is a highly controversial process which is influenced by local political and cultural values.

For example, let's take a case decided by a French judge in May 2000. Two French NGOs fighting against racism and anti-Semitism in a civil trial complained that US-based Yahoo! Inc. was allowing the sale of thousands of Nazi memorabilia through its online auction services. Since such sales in France are regarded as a criminal offence, the French court ruled that Yahoo! Inc. under a threat of a 100.000 FRF daily penalty shall take all appropriate measures in order to prevent French Internet surfers from accessing those sites. However, in November 2001 a US District Court issued a declaratory judgment stating that the First Amendment right to free speech precludes the French ruling from being enforced in the US.²¹

A lot of counter examples could be given as well, for example where German courts are reluctant to enforce US court-rulings. This is especially the case where German businesses are "haled" into US civil jury trials on a jurisdictional basis, which in the German perception is questionable, and where for example punitive damages rulings are issued, which from a German point of view do belong to a criminal rather than a civil procedure. At the end of the day, both the citizens of Europe and the USA seem to be quite comfortable with the idea that the mutual enforcement of judgments is possible in principle but subject to a public-policy test on a case-by-case basis.

D. The Brussels-Philosophy in the Hague?

The Brussels Convention and even more so the recent Brussels Regulation, however, follow a completely different philosophy, which in the context of the European economic law under the EC-Treaty is called the "Cassis-Philosophy" after a famous ruling of the European Court of Justice which states that within the EEC there is a general *presumption* that the laws and their administration in the Member States are *equivalent* with regard to public policies like the protec-

²¹ See Frydman/Rorive, *Regulating Internet Content through Intermediaries in Europe and the USA*, ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 2002, 41, 46; Michaels, *Territorial jurisdiction after territoriality*, in: GLOBALISATION AND JURISDICTION 105, 116 (Slot/Bulterman eds. 2004)., Karavas/Teubner, *The horizontal effect of Fundamental Rights on 'Private Parties' within autonomous Internet Law*, in: 4 German Law Journal No. 12 (1 December 2003), 1335-1358, available at: http://www.germanlawjournal.com/pdf/Vol04No12/PDF_Vol_04_No_12_1335-1358_European_Teubner_Karavas.pdf.

tion of health, consumers, the environment and the like.²² The whole European integration project was, under this philosophy, built on the *principle of mutual recognition* of the substantive standards and the administrative procedures of public oversight over private business conduct according to the *home-state principle*.²³

For the same reason there is also a presumption for legal standards and court proceedings in civil and commercial matters to be equivalent, so that judgments of one Member State's court have to be recognized and enforced in all other Member States without subjecting them to the traditional "public-policy"-test on an individual case by case basis in the enforcing Member State. Under the Brussels Regulation, a German citizen has no remedy in Germany against a court ruling from another Member State. Even if the defendant wants to raise the objection that the court had no jurisdiction under the Brussels Regulation he can only raise that objection at the court in Malta (for instance), but is precluded with this objection at his place of permanent residence.²⁴

The aim of the proposed Hague Judgments Convention was to institutionalize a comparable automatism in the recognition and enforcement of judgments on the basis of common standards for jurisdiction, but without a harmonization of the conflict of law rules or substantive private law, as it both is the case within Europe. If we consider that the Hague Convention was not meant to be a bilateral instrument between Europe and the USA, but rather a multilateral treaty enabling

²² ECJ, Decision of 20 February 1979 (C 120/78) „Cassis de Dijon”; and the Commission White Paper on the Single Market COM (1985) 310; see also Epiney in: KOMMENTAR ZU EUV UND EGV (C.Calliess/Ruffert eds., 2nd Ed. 2002), Art. 28 EGV (EC-Treaty) No. 20 et seq.

²³ Schwintowski, *Freier Warenverkehr im europäischen Binnenmarkt*, RABELSZ 38 (2000); Calliess, *Heimatstaatprinzip und Europa-Pass im europäischen Finanzmarktrecht: Wettbewerb der Finanzdienstleister oder der Finanzplätze?*, in: EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT (EWS) 432 (2000).

²⁴ On the Brussels I Regulation see, generally Junker, *Vom Brüsseler Übereinkommen zur Brüsseler Verordnung - Wandlungen des Internationalen Zivilprozessrechts*, in RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 2002, 569 ff; Gillies, *A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union*, 2001 (1) THE JOURNAL OF INFORMATION, LAW AND TECHNOLOGY (JILT); Reich/Gambogi/Carvalho, *Gerichtsstand bei internationalen Verbrauchervertragsstreitigkeiten im e-commerce. Die EG-Verordnung 44/2001 vom 22.12.2000 und der Haager Konventionsentwurf über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung ausländischer Entscheidungen in Zivil- und Handelssachen*, in: VERBRAUCHER UND RECHT 269 (2001).

the enforcement of judgments on a global scale, it has to be concluded that it was a serious mistake to draft the Hague Convention on the basis of the Brussels Convention. For on a global scale there is just not enough trust in order to apply the Brussels Convention's philosophy of a general presumption of equivalence of norms and procedure and thus to strictly follow the principle of mutual recognition.

At the end of the day, a Hague Convention drafted on the basis of the so-called Cassis-Philosophy could be challenged even as unconstitutional. A State in enforcing a judgment ordering, for example, payment of a certain amount of money or transfer of property is interfering with the fundamental rights of the defendant. Under certain circumstances, however, it might be unconstitutional if the defendant is subjected to enforcement of foreign judgments without having a remedy in front of his home-state courts. Under Art. 6 (1) of the European Convention on Human Rights, i.e. the right to be heard, a defendant might be referred to a hearing at the court in another Member State, but it might not suffice to have the possibility of a hearing and remedies in a very remote country in terms of distance as well as legal culture. For, forget not after all these years: No freeman shall be fined or bound/ Or dispossessed of Freehold ground/ Except by lawful judgment found/ And passed upon him by his peers ...