

‘JURISDICTIONAL PROTECTION’ AND ‘TRUST’ IN THE EXCLUSION OF ARBITRATION UNDER THE BRUSSELS RECAST REGULATION

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Contact: enguerrand.marique@student.uclouvain.be

Dissertation written by Enguerrand Marique
Under the supervision of Pr. J-F. van Drooghenbroeck

1. Introduction

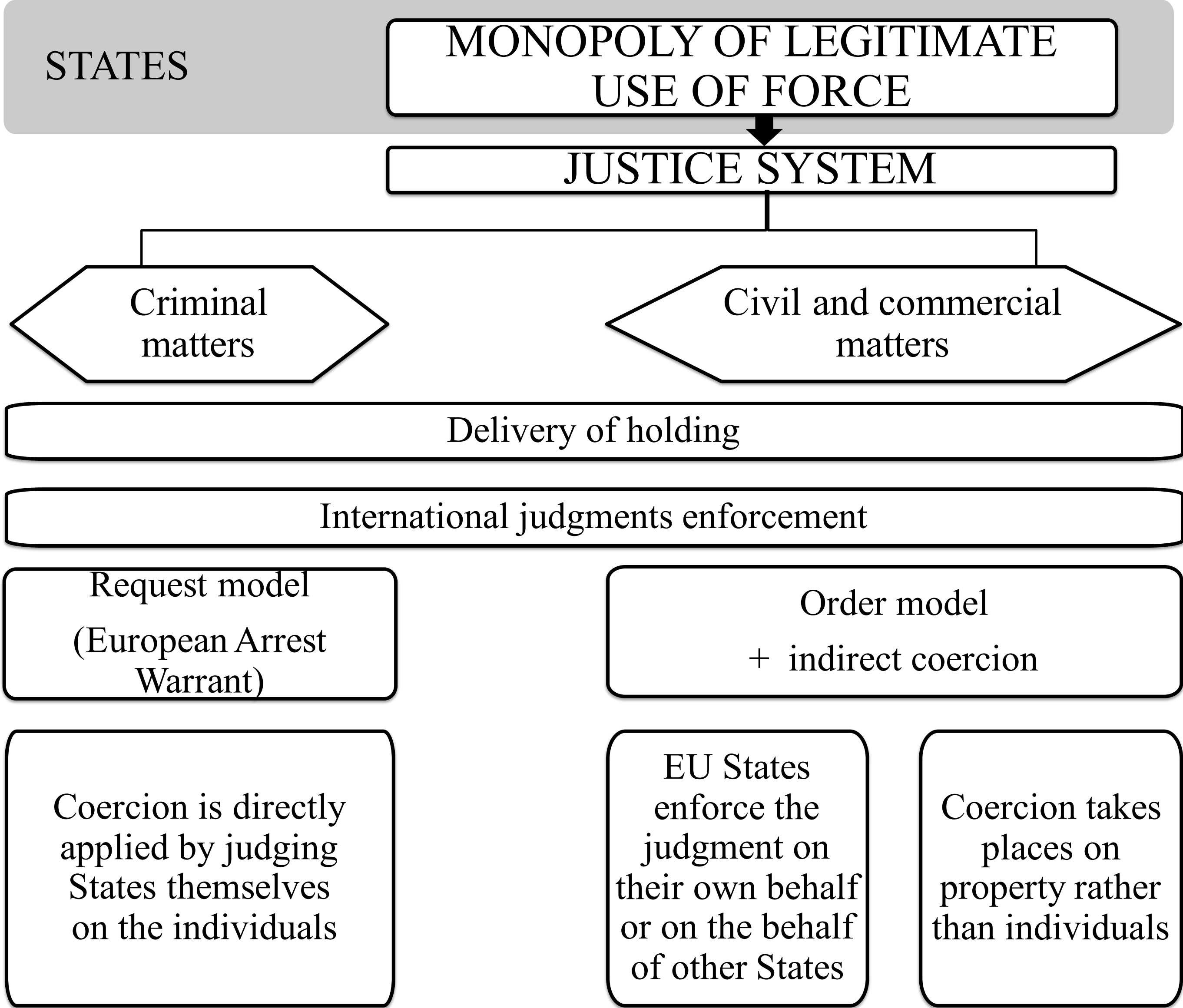
- ✓ Coexistence of instruments regulating international enforcement of arbitral awards (1958 New York Convention) and judgments (Brussels Regulations).
- ✓ These instruments allegedly solve all the issues at the interface between arbitration and private international law within the EU.
- ✓ Research question 1: how to cope with cross-jurisdictional parallel proceedings in civil and commercial matters? This problem is indeed not addressed by EU law nor by International law.
- ✓ Research question 2: how to reconcile (positive and negative) conflicts between EU law and international law?

2. Literature review

- ✓ Very polarized positions
- ✓ Lack of consensus on international *lis alibi pendens* rules.
- ✓ Lack of consensus on the scope of the *res iudicata* effect given to decisions.
- ✓ Mutual trust is a cornerstone principle of the EU legal order when it comes to circulation of decisions;
 - Object: Trust between MS that fundamental rights are protected equally.
 - Limits: Trust is limited by the effective respect of Human Rights.
 - Scope: Human Rights.

3. Coercion in the European Judicial Area

How does coercion intervenes in the state justice?



- ✓ Within the EU, there is only one area of coercion in civil and commercial matters. Indeed the abolition of the exequatur created a space where Member States coerce in the name of each other, and use thus coercion powers which is not theirs.
- ✓ According to Weber, political entities having coercion power amounts to States. Thus, the EU is *de facto* a (Federal) State.
- ✓ This is not blind recognition but trust as a ‘constitutionalism’.

5. Trust and collaboration

- ✓ If EU is a federal state, New York Convention does not apply anymore.
- ✓ Indeed, the CNY only applies to ‘foreign proceedings’.
- ✓ In case of conflicts between an arbitral award and a judgment within the EU, EU law does not bend against International law. However, international law remains the most important legal order.

4A. Trust and arbitral tribunals

- ✓ Should arbitral tribunal be trusted? Criteria of trust have been defined in criminal cooperation. It is based on the juridictional protections offered to the individuals prosecuted.

TRUST	MS IN ARB?	ARB IN MS?
SAME PROTECTION EVERYWHERE?	No enforcement of what is contrary to public policy	<i>Eco Swiss</i> : referral will be followed up by Courts
EU LAW EFFECTIVE?	Arbitrators have the duty to deliver enforceable awards. EU public policy will be at least applicable. For the rest, regional arbitration regulation is possible.	Enforcement rules are clear under the NYC1958
FUNDAMENTAL RIGHTS UPHELD?	a) ECHR and EU Charter rights are part of public policy, including the right to a fair trial. b) Same standards are upheld here.	

- ✓ This shows that an asymeric trust *might* exist. If so, article 31(3) of the Brussels Recast regulation would provide a viable *lis alibi pendens* rule.

4B. An alternative to trust in arbitral tribunals?

- ✓ Weller considers regulation is an alternative to trust.
- ✓ How to regulate arbitration?
- ✓ Awards are delivered by arbitrators but not enforced. There is therefore a competition between arbitrators and judges in cross-jurisdictional proceedings.
- ✓ Competition law could then ensure that States do not abuse their normative power to unduly favour their own jurisdiction to the expense of consent and freedom of contracts in parallel cross-jurisdictional proceedings.
- ✓ Regulation would go hand in hand with (partial) liberalization of decision delivery in civil and commercial matters.

6. Conclusions

- ✓ Systemic and axiological interpretations in accordance with legislator’s intent. Semantic interpretation less satisfactory, but better than what existed in the past.
- ✓ *Inter-legality* approach. It gives a more concrete answer to international commercial law conflicts than transnational law or globally governance theory. NYC remains for non-EU conflicts.

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