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Conference proceedings from the 29th Journée de droit international privé of 23 June 2017

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Recognition and Enforcement of Decisions

Andrea Bonomi*

Recognition and Enforcement of U.S. Civil Judgments in Europe: Old Problems and Recent Trends

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1. Introductory Remarks

The question of recognition and enforcement of U.S. judgments in Europe is a very important one when measuring the impact of U.S. civil litigation on European businesses.

Certainly, exposure to proceedings in the U.S. is often per se a matter of great concern for foreign defendants, irrespective of the subsequent recognition and enforcement of the judgment abroad. Indeed, European businesses often have assets in the U.S. on which a U.S. judgment may be enforced. Enforcement can easily be obtained not only in the U.S. state where the judgment was rendered, but also with regard to assets situated in all other sister states: domestic judgments enjoy "full faith and credit" across the U.S. under Article IV, of the U.S. Constitution, which imposes their recognition and enforcement, subject only to limited exceptions.[1] Even when enforcement of a U.S. judgment can only take

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[1] Art. IV, section 1, U.S. Constitution: "Full Faith and Credit shall be given in each State to the [...] judicial Proceedings of every other State. And the Congress may by general

place abroad, a foreign business cannot simply assume that recognition and enforcement will be denied; it will therefore often choose to defend on the merits, thus facing the high costs and the inconveniences that are related with proceedings in the U.S.

Nevertheless, recognition and enforcement of judgments abroad remain crucial aspects of litigation. It is essential not only for monetary awards, but can also be very important for other kinds of decisions, such as those providing injunctive or declaratory relief. In the field of IP litigation, for instance, an injunction issued against a foreign counterfeiter is useless if it cannot be enforced in the defendant's jurisdiction. Also, the recognition of a declaratory judgment may be the only way to bar duplicative litigation abroad.

While U.S. states are generally considered to be quite hospitable to foreign judgments, the "circulation" of U.S. judgments in Europe has traditionally been perceived as difficult. There are two main grounds for this.

First, it is well known that the EU provisions on recognition and enforcement, based on mutual recognition and mutual trust, are inapplicable to third country-judgments.[2] As a result, there is no common approach to the recognition of U.S. judgments across Europe: each country will apply its own recognition rules. The suggestion of unifying these rules has only recently surfaced in the doctrinal debate,[3] but for the time being the EU institutions clearly privilege a multilateral approach, consisting of negotiating a global convention under the auspices of the Hague Conference.[4]

At first sight, this has parallels with the situation in the U.S.: based on the "Erie doctrine",[5] recognition and enforcement of foreign judgments is also regarded in the U.S. as a state law matter,[6] while the attempts to adopt federal legislation on

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." On this, see: HAY, Law of the United States, N 215 *et seq.*; HAY/BORCHERS/SYMEONIDES, Conflict of Laws, N 24.12 *et seq*. "Full faith and credit" does not preclude an inquiry into the jurisdiction of the first court, subject however to res judicata: *id.*, N 24.14.

2 See Article 36 of the Brussels Ia Regulation and Article 32 of the Lugano Convention.

3 See: FALLON/KRUGER, Spatial Scope; CARBONE, Recognition, p. 299-309; BONOMI, Third States, at 190 *et seq*. See also the proposal on "Extension of the 'Brussels I' Regulation to judgments given in a State which is not a Member of the European Union", drafted by the European Group of Private International Law and available at <http://www.gedip-egpil.eu/documents/gedip-documents-20poe.htm>.

4 On the Hague Judgment Project, see BONOMI, Courage, p. 1 *et seq.*

5 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938): see HAY, Law of the United States, §§ 113 and 235 *et seq*. On the impact of this seminal case in the area of judgments recognition see HAY/BORCHERS/SYMEONIDES, Conflict of Laws, N 24.35.

6 See BRAND, Recognition, p. 1.

that issue have been quite timid.[7] However, the situation in Europe is different on at least two points. On one hand, contrary to what has been held in certain U.S. cases,[8] court decisions on recognition of a foreign judgment rendered in each individual state do not, in Europe, enjoy "full faith and credit". Therefore, the issue of recognition must be re-litigated afresh in each jurisdiction. On the other hand, while the recognition rules applicable in most U.S. sister states share the same basic features because they are based on the same common law background (the comity doctrine as distilled by the U.S. Supreme Court in the *Hilton v Guyot* case[9]) and, at least for certain judgments, on two uniform law acts,[10] the recognition systems across Europe sometimes diverge fundamentally, albeit benefiting from a certain harmonizing effect of the EU legislation.

While the absence of uniformity affects the recognition of judgments rendered in all foreign jurisdictions, specific problems exist with respect to U.S. judgments – and this is the second obstacle. The U.S. litigation system presents very original traits which are sometimes perceived as surprising – not to say disturbing – from a European perspective. Some of these U.S. peculiarities have disappeared in recent times (such as the so-called "doing business-jurisdiction"[11]), but others are still there (such as "tag jurisdiction", "private" service of process, jury trial, the "American rule" on costs, contingent fees agreements, pre-trial discovery, class actions, punitive damages, etc.). While some of these features are widely recognized as increasing the attractiveness of U.S. courts for foreign plaintiffs,[12] they can also represent potential hurdles to the circulation of U.S. judgments abroad.

However, as I will try to show in this paper, the two shores of the Atlantic have come closer in recent years, so that U.S. judgments might fare better in the future.

7 See the 2005 ALI Proposed Federal Statute on the Recognition and Enforcement of Foreign Judgments, on which BRAND, Recognition, at 29.

8 See *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros.*, 2014 PA Super 179, 108 A.3d 36 (Pa. 2015). *Contra*: *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Ba*nk, 98 A.3d 998, 1006–08 (D.C. 2014). On the issue, see BRAND, Recognition, at 2; SILBERMAN/SIMOWITZ, Recognition, at 356.

9 *Hilton v. Guyot*, 159 U.S. 113 (1895).

10 The 1962 Uniform Foreign Money-Judgments Recognition Act and the 2005 Uniform Foreign-Country Money Judgments Recognition Act: see BRAND, Recognition, at 7 *et seq*.

11 See *infra*, section 3.1.

12 How couldn't we quote the dictum of Lord Denning in the case *Smith Kline v. Bloch* (C.A. 1983): «As a moth drawn to the light so is a litigant drawn by the United States».

2. General Hurdles to Recognition of Foreign Judgments

Among the obstacles that recognition of third-country judgments may face in Europe, some are of a general nature, *i.e.*, they are not related to peculiar features of the U.S. litigation system. I will briefly discuss these before turning to more specific challenges which U.S. judgments may present.

The most obvious and radical obstacle to the circulation of judgments arises when the state addressed simply refuses recognition and enforcement of foreign decisions unless it is based on a treaty with the country of origin. This is still the case in certain Nordic countries, such as Denmark, Finland, Iceland, and to a certain extent Norway and Sweden.[13] In the absence of treaties with the U.S. on the recognition and enforcement of judgments, U.S. decisions simply cannot be recognized in these countries. Of course, even in these jurisdictions, a foreign judgment might have some limited effects; in particular, it can be used as evidence supporting the claim in the framework of fresh proceedings initiated in the country concerned. However, this is quite different from recognition.

Serious obstacles to recognition and enforcement can also result from restrictive views of the admissible recognition basis. While in principle jurisdictional filters should be there to guarantee basic due process requirements (this is the traditional understanding in the U.S.[14] and in many other systems), some European countries use them to protect their citizens or residents from the dangers related to exposure to foreign proceedings. Thus, in the past, French courts interpreted Article 15 of the French Civil Code as establishing exclusive jurisdiction over French nationals, thereby preventing recognition of judgments rendered abroad against a French defendant. Luckily, this overly protective interpretation has been dropped in a 2006 case.[15] In Switzerland, foreign judgments handed down in contract and tort law disputes against a defendant domiciled in Switzerland are only eligible for recognition and enforcement when the foreign court's jurisdiction had been expressly or tacitly accepted, or in other limited

[13] BAUMGARTNER, Obstacles, at 970; WALTER/BAUMGARTNER, General Report, p. 9-10, 17-18; see also the national country reports in GARB/LEW, Enforcement. On Sweden, see also BOGDAN, Sweden, N 311-312. In Norway, foreign judgments can only be recognized – in the absence of a treaty – when the parties have agreed in writing on the jurisdiction of the foreign court.

[14] BRAND, Recognition, at 18. See also Restatement (Third) on Foreign Relations Law (1987), § 482, comments c.

[15] The *Prieur* case: Cour de cassation, 1e ch. Civ., 23 May 2006, Bull. civ. I, N 857; see also CUNIBERTI, Liberalization, at 935.

circumstances; this restriction does not apply when the defendant was domiciled in a third country.[16]

Rules of this kind bar the recognition and enforcement of all foreign judgments. Although they are not specifically related to the U.S., they represent major obstacles to the circulation of U.S. judgments in Europe. Contracting states of a global convention on judgments, such as the one currently being negotiated in The Hague, would certainly have to give up such national law restrictions, thus bringing substantial progress from the U.S. perspective.

Among the obstacles that are not specific to U.S. judgments, one could also mention some "technical" difficulties that typically arise in the recognition context due to disparities among the national procedural law systems. A typical example is the definition of the "finality" of a judgment, a requirement common to most national recognition systems. Due to the rich variety of post-trial motions and appeals allowed in the U.S. system, it is not always easy for a foreign court to determine when a U.S. judgment can be regarded as final.[17] These kind of problems also arises with respect to foreign judgments rendered in countries other than the U.S.

3. Specific Obstacles to the Circulation of U.S. Judgments

As already mentioned, civil procedure in the U.S. – both at the federal and state level – presents a number of very peculiar traits that make it quite different from its European equivalents. Some of these features – although surprising for European lawyers – are not per se obstacles to the circulation of judgments.

Accordingly, contrary to some isolated opinions,[18] it is widely accepted that the use of jury trial in civil proceedings – a right granted by the Seventh Amendment of the U.S. Constitution[19] – does not prevent the recognition of a judgment.[20] Also, the fact that American state courts judges are often elected by the people[21] cannot

16 See Articles 25, 26 and 149 of the Swiss Private International Law Act of 1987.

17 See DÖRIG, Finality, at 271 *et seq*.

18 SCHÜTZE, Prozessführung, at 157 *et seq*.

19 Under the VI[th] Amendment to the U.S. Constitution, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

20 See, in Germany, the decision of the Oberlandesgericht Saarbrücken, NJW 1988, at 3100, and HERMANN, Anerkennung, at 208. On jury trial see HAY, The Law of the United States, N 198-199.

21 See HAY, The Law of the United States, N 117A; SCHÜTZE, Prozessführung, at 158.

be regarded as casting legitimate doubts as to their impartiality. The adversarial nature of proceedings is obviously unproblematic as well.

Although different from the solutions prevailing in Europe, the "American rule" on costs and contingent fees agreements[22] cannot hinder the recognition and enforcement of a judgment on the merits.[23] In normal circumstances, they also do not bar the recognition and enforcement of a decisions on costs, unless the amounts granted to the lawyers are grossly excessive.[24]

Finally, recognition is generally not hindered by the fact that the judgment was based on the extraterritorial application of U.S. law, in particular, on one of those federal statutes which are still regarded as extraterritorial after the significant policy adjustments resulting from the more recent case law of the U.S. Supreme Court[25] (such as the Clayton Act or the Foreign Corrupt Practices Act). Indeed, in most European states, recognition cannot be refused on the ground that the foreign court applied its own law, even if the result would have been different before the courts of the state in which recognition is sought. The only limit is public policy.

On a number of other issues, however, specific features of the U.S. litigation do represent potential hurdles to the circulation of U.S. judgments. These can be divided into four different groups: a) problems related to the jurisdiction of the court of origin; b) alleged breaches of state sovereignty resulting from service of process or taking of evidence abroad; c) enforcement of punitive damages awards; and d) specific questions related to the recognition of class action judgments or settlements.

3.1. Lack of Jurisdiction of the Court of Origin

In most national systems, the jurisdiction of the court of origin (also called in Europe "indirect" jurisdiction) is a requirement for the recognition of a foreign judgment. This has parallels to the U.S. approach, where lack of personal jurisdiction is also regarded as a ground for refusal, with respect not only to foreign

[22] See HAY, The Law of the United States, N 154-155.

[23] As decided in Germany by the BVerfG, 14 June 2007, NJW 2007, 3709. See also DÖRIG, Anerkennung, at 449. *Contra*: SCHÜTZE, Prozessführung, at 160 *et seq*.

[24] See HEß, Anerkennung, at 379 *et seq*. In Switzerland, see the decision of the Federal Tribunal, 11 July 2005, 5P.128/2005, N 2.3, and BUCHER, Commentaire, Art. 27 N 15.

[25] I refer to the «new» presumption against extraterritoriality, as developed by the Supreme Court in its recent case law: *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013); *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016). See, in this book, the contributions of William DODGE and Matthias LEHMANN.

judgments[26] but also to sister states' judgments under the Full Faith and Credit clause.

Jurisdictional filters are structured differently in different European countries, but three general methods are frequently used. Under the most traditional one, the recognition bases simply "mirror" the rules governing the personal jurisdiction of the courts of the state addressed (rules on "direct" jurisdiction). In other words, these rules are applied symmetrically in order to ensure that the foreign court's jurisdiction was in line with the notions of the state where recognition is sought.[27] In other countries, the foreign court is regarded as having jurisdiction (and thus recognition is granted) whenever the dispute presented a "significant connection" with the country of origin.[28] This method resembles, at least in its approach, the "minimum contact" test used by the U.S. Supreme Court for both direct and indirect jurisdiction. It normally results in a more generous recognition of foreign decisions than that of the "mirror image" approach, because foreign jurisdictional bases are sometimes regarded as sufficient for the purpose of recognition even though they do not correspond to those used in the state where recognition is sought. Finally, in some countries, national recognition rules contain a "laundry list" of enumerated jurisdictional grounds, similar to those that are included in international treaties on recognition or enforcement.[29] Depending on the specific content of these rules, this solution can be more or less generous than the "mirror image" approach – but is normally less liberal than the test based on sufficient connection.

Irrespective of the methodology adopted in the state addressed, the recognition of a judgment will be refused whenever the jurisdictional reach of the court of origin is regarded as too broad in the case at hand. With respect to U.S. judgements, this was clearly the case in the past, when they were rendered on the basis of "doing business-jurisdiction", which was generally perceived in Europe as exorbitant.[30] In

[26] BRAND, Recognition, at 17 *et seq*.

[27] This method is used, *inter alia*, in Germany (Article 328(1)(1) of the Code of Civil Procedure) and Italy (Article 64(a) of the 1995 PIL Act).

[28] This approach has been followed by the French courts since the *Simitch* case: Cass. civ. 6.2.1985, *Simitch*, RCDIP 1985, p. 369. It is also used in Belgium (Article 14 of the 2004 PIL Code) and Spain, since a decision of the Tribunal Supremo of 24 December 1996.

[29] As mentioned before, this method is used in Switzerland in order to protect defendants domiciled in this country from the recognition of foreign judgments: see *supra*, n. 16.

[30] For this reason, the "doing business-jurisdiction" had been included in the "black list" of prohibited jurisdictional grounds of Article 18(2) of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission of the Hague Conference on 30 October 1999 (Prel. Doc. No 11 of August 2000).

the aftermath of the *Goodyear* and *Daimler* cases,[31] this specific problem does not exist anymore: the new paradigm for general jurisdiction requiring that the defendant was "at home" in the forum state very closely resembles the European approach based on the defendant's domicile.[32] A U.S. judgment handed down on this basis is certainly entitled to recognition in most European states.

However, lack of jurisdiction can still operate as a ground for denial in several other scenarios. On one hand, "transient" or "tag" jurisdiction (based on process being served to the defendant within the boundaries of the forum state[33]) is clearly perceived as an exorbitant ground in all civil law jurisdictions across Europe.[34] On the other hand, the U.S. test for specific jurisdiction (based on "minimum contacts", "purposeful availment", and "reasonableness") can still lead to outcomes that are exorbitant from a European perspective. This will often be the case in contractual disputes, where many European countries are willing to recognize judgments handed down at the place of performance of a contractual obligation, but are more reluctant when the foreign court jurisdiction was based on some other kind of "purposeful contact" (*e.g.*, the fact that the defendant "reached out" to the counterparty or carried on negotiations in the forum state).[35] Recognition can sometimes be refused for lack of jurisdiction even in tort cases. In this area, U.S. courts are often more "timid" than their European counterparts (typically, when they refuse to take jurisdiction based on the effects of a wrongful act in the forum state),[36] but they are also capable of extending their reach based on

[31] *Goodyear Tires v. Brown*, 131 S. Ct. 2846 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). See, in this book, the contribution by Linda SILBERMAN.

[32] Under the Brussels Ia Regulation, general jurisdiction can only be asserted at the defendant's domicile (Article 4), which – for corporations and other legal persons – is deemed to be situated either at the registered seat, or at the central administration, or at the principal place of business (Article 63(1)).

[33] This jurisdictional ground has been held compatible with due process by the Supreme Court in the *Burnham* case: *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604 (1990).

[34] For Switzerland, see DÖRIG, Anerkennung, at 283 *et seq.*; for Germany, see HERRMANN, Anerkennung, at 152. It is interesting to note that even in the U.S., under both the 1962 and 2005 Uniform Recognition Acts (see *supra* n. 10), recognition of a sister state judgment may be refused when «tag jurisdiction» resulted in a «seriously inconvenient forum» (1962 Act, section 6(b)(6), 2005 Act, section 4(c)(6)). See BRAND, Recognition, at 8.

[35] For Switzerland, see DÖRIG, Anerkennung, at 285. Based on the decision of the U.S. Supreme Court in the *Burger King* case, the existence of minimum contacts and purposeful availment must be determined, in contractual scenarios, by evaluating a plurality of factors, in particular "parties negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing": *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

[36] In product liability cases, see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *J. McIntyre*

surprisingly weak connections (such as the use of a U.S. bank account or simply of U.S. clearing channels for U.S. Dollar transfers in otherwise "f-cubed" cases).[37]

3.2. Alleged Breaches of State Sovereignty Related to Service of Process or Taking of Evidence Abroad

On account of its adversarial approach, the U.S. litigation system relies heavily on the activity of the parties and their attorneys. Thus, in federal courts and in many U.S. states, service of process is not reserved to courts officials but also can be performed by private process servers.[38] Service by mail is also allowed, including when process must be served to an out-of-state defendant.[39] In most European jurisdictions, however, where service of process is normally a task of the court or of court-related officials, private service is not allowed, and many states oppose service by mail, in particular in international situations.[40]

Very significant differences also exist with respect to the way of gathering evidence. The U.S. system is based on extensive disclosure duties and on very wide-ranging discovery tools offered to the parties during the pre-trial stage.[41] Most discovery devices (such as interrogatories, depositions, requests for documents production and land inspections etc.) are directly available to the parties without judicial intervention.[42] The role of the judge is mostly subsidiary: he or she can be asked to intervene when one of the parties does not comply with its disclosure or discovery obligations,[43] goes too far with its discovery requests,[44] or when evidence is to be gathered from a non-party.[45] Once again, the approach is

Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011). See also in this book, the contributions of Sam BAUMGARTNER and Linda SILBERMAN.

37 See *Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161 (2d Cir. 2013); *Strauss v. Credit Lyonnais*, 175 F. Supp. 3d 3 (E.D.N.Y. 2016); *Weiss v. Nat'l Westminster Bank PLC*, 176 F. Supp. 3d 264 (E.D.N.Y. 2016). On these cases see, in this book, the comments by Linda SILBERMAN. See also, in the different but related context of U.S. sanctions law, the contribution by Susan EMMENEGGER.

38 Under Rule 4(b)(2) of the Federal Rules of Civil Procedure (FRCP), «[a]ny person who is at least 18 years old and not a party may serve a summons and complaint». Private process servers may be subject to licensing requirements.

39 Under Rule 4(f)(2)(C) FRCP, service to an individual abroad can be made «unless prohibited by the foreign country's law [...] by using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt», subject to «international agreed means».

40 Thus, several European countries (although not all of them) have objected to service by postal channels as allowed by Article 10(a) of the 1965 Hague Convention.

41 See in this book the contribution by Karen TOPAZ DRUCKMAN.

42 See Rules 26 to 36 FRCP.

43 See Rule 37(a) FRCP («order compelling disclosure or discovery»).

44 See Rule 26(c) FRCP («protective orders»).

45 See e.g. Rule 34(c) FRCP («subpoena»).

very different in civil law jurisdictions, where evidence is normally gathered by the judge or under court order.

These diverging philosophies lead to tensions in cross-border situations. Civil law countries tend to consider that both service of documents and taking of evidence, as expressions of judicial power, require some kind of consent by the territorial sovereign. It follows that they can only take place in a foreign country in accordance with official channels, such as through letters rogatory or other devices of international civil cooperation. In their relationship with the United States, at least some of these countries therefore insist on the mandatory application of the Hague Conventions of 1965 and 1970.[46] Since the U.S. approach is more flexible, this can lead to conflicts and create obstacles to the circulation of judgments.

With respect to service, U.S. courts have recognized the mandatory character of the 1965 Hague Convention.[47] Although Article 10 of that Convention only allows service by mail if the state addressed does not object it – as recently reaffirmed by the U.S. Supreme Court,[48] this channel is sometimes used in practice even in the relationship to State that reject it.[49] Moreover, since the *Schlunk* case,[50] U.S. courts consider that the U.S. subsidiary of a foreign company can validly be served process , because this is a case of domestic service not subject to the Hague Convention.

Defective service may lead to a denial of recognition of the U.S. judgment in certain European countries. Thus, in several recent decisions,[51] the Swiss Federal Tribunal has taken a very severe stance, reaffirming that service of process must be

[46] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

[47] *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694. See already *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, fn. 16, where the U.S. Supreme Court opposed the permissive language of the Hague Evidence Convention to the mandatory language in the preamble to the Hague Service Convention.

[48] In *Watersplash, Inc. v. Menon*, 581 U.S. ___ (2017), the U.S. Supreme Court held that the Hague Service Convention does not prohibit service by mail – a question that had received opposite answers in different circuits: *Bankston v. Toyota Motor Corp.*, 889 F.2d 172; *Brockmeyer v. May*, 383 F.3d 798; see ZEKOLL/COLLINS/RUTHERGLEN, Transnational Civil Litigation, at 325 *et seq*. However, the Court also reaffirmed that "this does not mean that the Convention affirmatively authorizes service by mail", and that "service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail, and second, service by mail is authorized under the otherwise-applicable law."

[49] See, for instance, the Swiss case ATF 142 III 180.

[50] *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694 (1988).

[51] ATF 135 III 623, at 626 *et seq*., points 2 and 3; ATF 142 III 180, at 186 and 190 et seq.; TF 4 February 2008, 5A_544/2007, point 3.2. See already DÖRIG, Anerkennung, at 397 *et seq*.

performed in conformity with the international instruments, and that Switzerland is not prepared to recognize a foreign judgment when process was served by mail.

Other countries may follow the same approach, but this is not necessarily so. Not all Contracting States of the 1965 Hague Convention have made, as Switzerland has, a reservation against service by mail.[52] It is also worth noting that, although not applicable in the case of proceedings in the U.S., the EU Service Regulation expressly allows mail service.[53]

Even when service does not comply with the standard of the state addressed, this does not necessarily lead to a denial of recognition. Indeed, the courts of several states seem to be influenced by the more lenient approach of the Brussels Ia Regulation, based on which even formally irregular service does not preclude recognition when the defendant was able to arrange for his/her defense or when he/she appeared before the foreign court.[54]

With respect to the taking of evidence, the gap between U.S. and Europe seems at first glance even larger. U.S. procedural rules allow discovery devices even when the evidence is located abroad (*e.g.*, deposition of a foreign witness). This approach was approved in the well-known *Aérospatiale* case,[55] in which the U.S. Supreme Court, despite the reactions by some European countries, held that the 1970 Hague Convention is not mandatory and does not take priority over national law tools.

Although pre-trial discovery should not be regarded as incompatible per se with the public policy of European countries, sovereignty concerns could be raised, at least in theory, when discovery channels were used in lieu of the Hague Convention to obtain evidence situated in the country where recognition is sought.[56] However, once again, it is not certain that this would necessarily lead to a refusal of recognition. In particular, when the defendant's right to be heard was otherwise fully respected in the foreign proceedings, it is doubtful that the public policy defense would really be triggered by considerations of sovereignty.

[52] Besides Switzerland, following European countries have made a reservation against Article 10(a) of the Hague Service Convention: Bulgaria, Croatia, Czech Republic, Germany, Hungary, Lithuania, Norway, Poland and Slovakia. However, other European countries did not object against service by mail: Belgium, Denmark, Estonia, France, Italy, Netherlands, Portugal, Slovenia, Spain, Sweden, and the United Kingdom.

[53] Article 14 of the Regulation (EC) No 1393/2007.

[54] See Article 45(1)(b) of the Brussels Ia Regulation and Article 34(2) of the Lugano Convention.

[55] *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

[56] For Switzerland, see DÖRIG, Anerkennung, at 428 *et seq*. For Germany, see HESS, Anerkennung, at 379.

With respect to the relationship between national tools and the Hague Convention, it is also interesting to note that in two recent decisions, the ECJ has held that the EU Evidence Regulation No. 1206/2001 is not exclusive and does not prevent the court of a Member State from using national procedural tools to gather evidence located on the territory of another Member State.[57] That being so, it is difficult to understand why the analogous interpretation of the 1970 Hague Convention by the U.S. courts should run counter to the public policy of an EU Member State.[58]

According to some commentators, public policy would prevent the recognition of a judgment in circumstances where the evidence had been gathered through what some European countries would perceive as inacceptable "fishing expeditions".[59] However, what is meant by "fishing expeditions" is not clear and the threshold can be different from one country to another. It is interesting in this respect to compare the different definitions of an unacceptable pre-trial discovery given by the individual Contracting States for the purpose of Article 23 of the 1970 Hague Convention.[60] One should also consider that real "fishing expeditions" are less likely to happen, at least in federal court cases, after the restrictive re-reading of the pleading standards by the U.S. Supreme Court.[61]

Finally, an interesting question is whether excessive discovery requests (in particular in the form of e-discovery) might infringe upon the strict European data protection regulations.[62] While this cannot be discounted, one has to consider that even in some European countries, data protection considerations generally give

[57] ECJ, 6 September 2012, in the case C-170/11, *Lippens;* ECJ, 21 February 2013, in the case C-332/11, *Pro Rail*.

[58] See also KNÖFEL, Electronic Discovery, at 404.

[59] For Switzerland, see DÖRIG, Anerkennung, at 431 *et seq.*; for Germany: SCHÜTZE, Prozessführung, at 159 *et seq.*; HEß, Anerkennung, at 379. However, a public policy breach can only be appreciated on a case-by-case basis: see HERRMANN, Anerkennung, at 197 *et seq*.

[60] Under Article 23 of the Hague Evidence Convention, "[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries". Among the countries that have made such declaration, some have used a very broad language, which can potentially rule out any kind of pre-trial discovery (e.g. Germany), while others only exclude specific kind of discovery requests (see the Swiss declaration, referring for instance to requests that have "no direct and necessary link with the proceedings in question").

[61] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). According to this case law, a well-pleaded complaint must be supported by sufficient factual allegations; therefore, it is now more difficult for the plaintiff to make use of discovery devices for «fishing» purposes. See also ESCHENFELDER, Verwertbarkeit, at 445 *et seq*.

[62] HESS, Anerkennung, at 379.

way in circumstances where information needs to be provided as evidence in judicial proceedings.[63]

3.3. Punitive Damages Awards

The circulation of punitive damages awards outside of the U.S. has always proved problematic. In many European and non-European jurisdictions, compensation is perceived as the main (if not exclusive) goal of tort liability.[64] Punitive damages, as a sort of criminal penalty imposed through the mechanism of civil proceedings, are often considered as blurring the line between civil law and criminal law and thus infringing on the state monopoly over criminal sanctions. Being paid to the victim, they also run counter to the prohibition on the victim's enrichment. This traditional approach is reflected in some statutory provisions[65] and, in particular, in the hostile decisions rendered since the 1990s by the Supreme Courts of certain European and non-European countries, such as Germany,[66] Greece,[67] Italy,[68] and Japan,[69] where the recognition of punitive damages awards was rejected as incompatible with public policy.[70] The 2005 Choice of Court Convention also includes quite a restrictive provision on this issue.[71]

However, some national courts demonstrated, already at that time, more openness. Thus, in one of the few Swiss decisions, the Court of Appeal of Basle agreed to recognize a U.S. punitive damages award – admittedly, quite modest in its amount – on the ground that Swiss civil law also recognises certain rules with a punitive function (*e.g.*, penalty clauses) and that civil liability should prevent the enrichment of the offender.[72]

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63 For Germany, see KNÖFEL, Electronic Discovery, at 405.

64 See KOZIOL, Punitive Damages, p. 741 *et seq.*

65 See for instance Article 40(3) of the German Introductory Act to the Civil Code (EGBGB), and Articles 135(2) and 137(2) of the Swiss Private International Law Act.

66 BGH, 4 June 1992, 118, BGHZ 312. See the comments by HERRMANN, Anerkennung, at 261 *et seq.*

67 Areios Pagos, 17/1999, 461-64.

68 Corte di cassazione, 19 January 2007, N 1183/2007.

69 See TATEISHI, Japanese Case Law, at 71 *et seq.*; GOTANDA, Charting Developments, at 10.

70 It is no surprise that an American author wrote, even in 2010, that «the chances of getting a foreign court to recognize a substantive punitive judgment rendered by a U.S. court are virtually nil»: BORCHERS, Punitive Damages, at 540.

71 Article 11 of the 2005 Hague Choice of Court Convention. By contrast, Article 33 of the 1999 Hague Preliminary Draft Convention (see *supra*, n. 29) was more open to the recognition of punitive damages awards (see also *infra*, n. 85).

72 Basle Court of Appeal, BJM 1991, at 31. See comments by BERNET/ULMER, Recognition, at 272. See also DASSER, Punitive Damages, p. 101-111. The Swiss Federal Tribunal never decided the question (the language in ATF 122 III 463, 467,

Over the course of the last decade, this more open approach has progressively gained ground across Europe.[73] This development has been helped, on one hand, by the distinct efforts made in the U.S., both by the Supreme Court and by several state legislatures, to curb excessive punitive damages awards. After establishing a conceptual framework in the *BMW* decision,[74] the U.S. Supreme Court went on in the *State Farm* case to set some concrete (although still flexible) caps for punitive damages awards in order to better ensure compatibility with substantive due process. [75] Over the years, many U.S. states have imposed statutory limits on punitive awards.[76] This trend undoubtedly increases the acceptance of punitive damages overseas.

On the other hand, awareness has grown in Europe about the usefulness of (some kind of) punitive damages. Thus, while revising the mechanisms of "private enforcement" of anti-trust law, the Commission seriously flirted with the idea of introducing a European equivalent of treble damages.[77] Notwithstanding that this suggestion has finally been shelved,[78] the seeds of doubt were sowed into European legal minds. The same idea has surfaced in some national law reform

where the Court states that recognition might be contrary to public policy, is just an *obiter dictum*).

73 See GOTANDA, Charting Developments, at 14 *et seq*.

74 *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

75 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), where the Supreme Court held that «few awards exceeding a single-digit ratio between punitive and compensatory damages [...] will satisfy due process». Consider also *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), where the Court decided that, in maritime cases governed by federal common law, a ratio of 1:1 between punitive and compensatory damages should be the upper limit.

76 For an overview see *Exxon Shipping*, 554 U.S. 471, at 493.

77 See the Green Paper: Damages Actions for Breach of EC Treaty Antitrust Rules, of 19 December 2005, COM(2005) 672 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=en>. According to this document, «doubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements».

78 Punitive damages are not provided for in the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349 of 5 December 2014. See also point 31 of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201 of 26 July 2013, p. 60, pursuant to which «punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited».

projects, such as the "projet Catala" for the revision of the French Civil Code[79] or a 2016 draft text for the revision of the French law on civil liability.[80]

When a legislative concept is being considered with a view to reforming the domestic legal system, it is difficult to reject it as being wholly inconsistent with public policy. Thus, a new approach towards punitive damages has also emerged in private international law. The Rome II Regulation[81] – instead of rejecting all kinds of punitive damages, as was advocated by some – makes clear in its recital 32 that exemplary or punitive damages may be regarded as incompatible with public policy, but only when they are "of an excessive nature […] depending on the circumstances of the case". This language clearly shows that the emphasis has shifted from an ideological rejection of punitive damages as such towards a legitimate concern as to possibly excessive amounts awarded.

If the decision by a European court to award non-excessive punitive damages based on the applicable foreign law is not *per se* incompatible with public policy, the same must be true, *a fortiori*, for the recognition of a foreign judgment. Indeed, public policy is traditionally applied more cautiously when it works as a bar to the circulation of judgments than when it limits the application of a foreign law.

Various national court decisions have recently adopted this new paradigm. After the Spanish Tribunal Supremo took the lead in this new trend in 2001,[82] similar conclusions were reached by the German Constitutional Court in 2007,[83] the French *Cour de cassation* in 2010,[84] and by the joint chambers of the Italian *Corte di cassazione* in 2017.[85]

The common elements of this new wave of decisions are, on one hand, the acceptance that punitive damages are not *a priori* incompatible with public policy and, on the other, the refusal of excessive awards.

The first point clearly reflects the general trend towards interpreting the public policy exception in a very restrictive way. Since only very fundamental principles of the forum can be relevant, there is a strong tendency to equate such principles

79 Article 1371.

80 Article 1266(1) of the preliminary draft of 29 April 2016, which grants the courts the power to order an "amende civile".

81 Regulation EC No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40.

82 Tribunal Supremo, 13 November 2001, Exequátur N 2039/1999. See CARRASCOSA GONZÁLEZ, Daños punitivos.

83 BVerfG, 24 January 2007, JZ 2007, at 1046.

84 Cour de cassation, 1 December 2010, N 09-13.303. See comments by LICARI, Compatibilité, at 423, and GAUDEMET-TALLON, Conformité, at 93. This decision was later confirmed by Cour de cassation 7 November 2012, N 11-23871.

85 Corte di cassazione, Sezioni Unite, 5 July 2017, N 16601.

with human rights such as those protected by the ECHR, the Charter of the European Union, and by national constitutions. The principle of the compensatory function of civil liability, even though enshrined in domestic civil law, is not sufficiently strong to hinder the recognition of foreign judgments.

But there is more. The national decisions mentioned above also rest, in a more or less explicit way, on the awareness that civil law countries admit some form of civil law punishment, such as penalty clauses, *astreintes*, and sometimes even real punitive damages in some specific areas (*e.g.*, intellectual property). Even more interestingly, they are sometimes also based on the recognition that, even in civil law systems, tort law does not (or should not?) have a merely compensatory but also a dissuasive function, which can often only be achieved if compensatory damages are combined with some kind of penalty.[86]

Of course, this change of attitude does not mean that most U.S. punitive damages awards will now be able to circulate in the European countries concerned. As a matter of fact, all the mentioned decisions still exclude the enforcement of excessive awards. This seems to echo the U.S. Supreme Court rejection of "grossly excessive" awards. Also, the criteria to judge the excessive nature of the award are at least partially similar: it is clear, in particular, that the degree of reprehensibility of the offender's conduct plays a key role.[87] However, it is also evident that the threshold is different. In countries where punitive damages are virtually nonexistent, the single-digit cap set by the Supreme Court in its *Campbell* decision is much too high. And even the lower caps allowed by certain federal statutes ("treble damages") or by the law of several U.S. states (often 3 to 5 times the actual damages) will be regarded in most cases as excessive. In particular, the quite limited amount of compensatory damages that can be awarded under the *lex fori* of the state addressed will often constitute the main paradigm, with the obvious conclusion that many U.S. awards will continue to be unenforceable.

One should keep in mind, however, that even though a punitive damages award is rejected as excessive, this should not lead to a refusal to recognize the entire judgment. Most recognition systems allow for partial recognition of those parts of the judgments that do not raise issues of public policy. This means that nothing prevents the recognition of the declaratory part of the judgment (typically, the part ruling on the liability issue) as well as the recognition and enforcement of the part awarding compensatory damages, even if these are higher than those that could have been collected in the forum.[88] This also includes the amounts that have

[86] Very explicit on this is the Italian Supreme Court, see *supra*, n. 82.

[87] «[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct»: *BMW v. Gore*, 517 U.S., at 575.

[88] This had already been recognized by the German Federal Court in its 1992 decision (see *supra*, n. 64).

been awarded to compensate non-financial loss, such as pain and suffering, as well as the amounts awarded to cover legal costs and expenses relating to the proceedings.[89]

The recognition and enforcement of punitive damages awards could also be promoted if the court addressed could opt for an intermediate solution between full recognition and denial, consisting of a reduction in the size of the award.[90] However, such a possibility might be precluded, at least in some European jurisdictions, by the prohibition of *révision au fond*.

3.4. Class Actions Judgments and Settlements

Class actions are certainly one of the most efficient procedural tools developed in the U.S. to facilitate claims against corporate defendants. While long regarded as a U.S. peculiarity, in recent times they have become a source of inspiration on the Eastern side of the Atlantic. With the blessing of the EU authorities,[91] several European countries have adopted various models of collective redress.[92]

While the gap between Europe and the U.S. is thus shrinking, U.S. class actions still feature some unique traits, which are often invoked to hinder the circulation of the ensuing judgments or settlements.

Among the arguments against recognition and enforcement, some are raised with the purpose of shielding the class action defendant while others are intended to preserve the position of (certain) absent class-members from the effects of a judgment or settlement in which they did not participate.

Within the first category, we mainly find objections to recognition that are not specific to class actions, although they may well be deeper-seated, due to the magnitude of these kind of proceedings. Thus, concerns are often voiced with regard to the huge amounts of damages that are commonly awarded in class actions proceedings. However, as far as real victims are concerned, collective redress is not supposed to lead, in term of compensatory damages, to very different results than a bulk of individual claims. The fact that many of these claims would most probably not have been brought in the absence of class actions proceedings can certainly not be a serious ground for denial. As for punitive damages, while it is true that they can be particularly vast in class action judgments, they do not give rise to specific issues in this context. Of course, excessive awards will not be

[89] This possibility is expressly provided by Article 11(2) of the 2005 Hague Choice of Court Convention.

[90] Such a possibility was provided by Article 33(1)(a) of the 1999 Hague Draft (see *supra*, n. 29), "[w]here the debtor [...] satisfies the court addressed that [..] grossly excessive damages have been awarded." See also BUCHER, Commentaire, Art. 27 N 15.

[91] Commission Recommendation of 11 June 2013 (see *supra*, n. 76).

[92] See in this book the contribution by Eva LEIN, p. 137.

recognized in Europe, but this should not hinder the partial recognition of compensatory awards.[93] Moreover, the U.S. case law and practice seem to indicate that the ratio between punitive and compensatory damages is generally lower in class actions cases than in other kind of proceedings.[94]

Not entirely convincing either are the objections against the use of statistical methods for evaluating the damage. [95] European courts also employ these methods when needed, although probably in a less systematic and uninhibited way. Of course recognition and enforcement will be denied if the court addressed finds that the amount of damages awarded is out of proportion to the gravity of the offense: compensatory damages determined with the use of statistics might then be perceived as a sort of disguised punitive damages, and thus rejected.

Enforcement of class action settlements is sometimes resisted with the argument that defendants were subject to enormous economic pressure and were thus "forced" to enter into an unfair settlement agreement.[96] Although *prima facie* appealing, this argument is also clearly exaggerated: U.S. courts are not so plaintiff-friendly as they are sometimes depicted, and the requests for class action certification are often rejected. Therefore, the heavy burden on a class action defendant only exists if and when the courts consider that the claims are sufficiently substantiated.[97]

The second category of objections specifically touches upon the peculiar procedural traits of class actions. Such actions are brought on behalf of a great number of class members, who may have no interest in pursuing their claims individually, or who are even totally unaware that they have a claim. These "absent class members" are represented by the class representative and are finally bound by the judgment or the settlement, with the consequence that they are precluded from filing a separate claim. In Europe, this preclusive effect of class action judgments or settlements is sometimes regarded as being at odds with some crucial principles of procedural law, belonging to "procedural public order", such as the right to be heard, the freedom to decide whether to bring or not to bring a claim, and the right to be properly represented in court.[98] These principles are not at stake where recognition and enforcement are sought against the defendant. Normally, the defendant is informed of the class action proceedings, he is properly represented, and his right to be heard is thus protected. From this perspective, recognition and enforcement of the judgment or settlement is not an issue,

93 See *supra*, 3.3.
94 See BAUMGARTNER, Anerkennung, at 120.
95 According to ROMY, Class Actions, at 788, this does not trigger public policy. See also BUCHER, Commentaire, Art. 27 N 15.
96 See HESS, Anerkennung, at 379.
97 See also BAUMGARTNER, Anerkennung, at 117.
98 See HESS, Anerkennung, at 378 *et seq*.

provided that all other requirements are fulfilled. This is true even when the party seeking recognition and/or enforcement is an absent class member. The question is more complex when the class action judgment or settlement is invoked against a class member, in particular when the purpose is to prevent him/her from seeking a fresh decision against the defendant. Even then, recognition is not problematic if it is invoked against the class representative, *i.e.*, the party who actually brought the claim on behalf of the class, or against those class members who positively decided to "opt in". They are all real parties to the proceedings and thus cannot escape the effects of the judgment.

The question is more problematic with respect to those class members who remained absent. Seen from a European perspective, it seems that no preclusive effect can arise for absent class members in a "mandatory class action".[99] In such a case, absent class members not only do not decide whether to bring the claim, but they are not even allowed to "opt out". In most European countries, they cannot be regarded as parties to the proceedings and, therefore, they are not bound by the ensuing decision.[100]

Recognition should also be excluded with respect to absent class members of a "voluntary class action"[101] when they did not receive proper notice. Since they also had no real possibility to opt out, they cannot be regarded as having implicitly accepted to be a party to the proceedings. This is true *a fortiori* for future victims, who did not receive notice because they could not yet be identified.[102]

What about absent class members who have received notice but did not react? Were they domiciled in the U.S., a European court would probably have no difficulty in accepting that they are bound by the judgment. Since the preclusive effect is provided for under the law of the country of those parties' domicile, there is no reason why it should not be recognized in Europe, provided that the judgment meets all other requirements. In European countries, public policy is certainly not opposed to this.[103] In such situations, the meaning and requirements for a "proper notice" should be determined in accordance with U.S. procedural rules.[104]

[99] Such as those provided for under Rule 23(b)(1) and Ruke 23(b)(2) of the Federal Rules of Civil Procedure.

[100] HESS, Anerkennung, at 379. Some Swiss commentators consider that even mandatory class action judgments can be recognized and enforced, so long as the amount at stake would not allow a plaintiff to sue individually: FAVALLI/MATTHEWS, Recognition, at 628 *et seq.*, 636.

[101] Such as those provided under Rule 23(b)(c) of the Federal Rules of Civil Procedure.

[102] See ROMY, Class Actions, at 796.

[103] For Switzerland, see ROMY, Class Actions, at 794. For Germany, see GOTTWALD, § 328 ZPO N 125.

[104] ROMY, Class Actions, at 794.

The recognition of the preclusive effect is more debatable with respect to those absent class members who were domiciled in Europe or in another foreign country.[105] Various factors might be relevant in this respect. The first one is the kind of notice they were provided with. It seems that recognition can only be admitted when these parties actually received individual notice of the proceedings, instructing them in a clear and unmistakable way about their right to opt out. A notice in newspapers or media would most likely be insufficient. By contrast, information sent by mail could be regarded as sufficient.[106] A second relevant element is whether the class representative provided adequate representation.[107] This is also a crucial condition for class action certification in the U.S. However, the standards might be different, in particular with respect to the risk of conflict of interests.[108] A third element is knowing whether an equivalent "opt-out" class action mechanism also exists in the requested state or in the country of domicile of the party concerned. If this is the case, public policy will probably not hinder recognition, provided that proper notice and adequate representation were guaranteed. However, even in the absence of a procedural equivalent in one of the states concerned, recognition is not necessarily excluded.[109] One has to consider that, with the diffusion of collective redress proceedings across Europe, judgments and settlements issued from "opt out" proceedings will begin to circulate under the Brussels I Regulation and Lugano Convention where the public policy threshold is very high. Indirectly, this will also facilitate the acceptance of class action judgments and settlements stemming from the U.S.

4. What's next?

While the general trend is towards more openness, the circulation of U.S. judgments in Europe still faces serious obstacles. Will this change in the future if and when a Hague Judgment Convention is adopted?

We do not intend to discuss the chances of success of the Judgment Project here. Following the last meeting of the Special Commission in November 2017, several questions still remain open, in particular with respect to intellectual property litigation. A new meeting of the Special Commission is scheduled for May 2018 in

[105] According to some German commentators, recognition in Germany should be denied with respect to absent class members who are domiciled in Germany: see GOTTWALD, § 328 ZPO N 125. *Contra* STADLER, at 561; HERRMANN, Anerkennung, at 171 *et seq.*

[106] Some commentators require a notice per registered mail: see LEMONTEY/MICHON, Class actions, N 78.

[107] ROMY, Class Actions, at 798.

[108] See BAUMGARTNER, Anerkennung, at 116, and FAVALLI/MATTHEWS, Recognition, at 636.

[109] In Switzerland, where no proper class action proceedings are available so far, some commentators consider that recognition is possible if proper notice was given and adequate representation guaranteed: FAVALLI/MATTHEWS, Recognition, at 631 *et seq.*

order to prepare the path for the Diplomatic Conference to be held, possibly, in 2019. If a convention is signed, the long road towards ratification still remains. In Europe, the process might be quite straightforward, in particular because the Union would have the competence to ratify this treaty with effects for all Member States. After Brexit, the United Kingdom might also be interested, in particular if it appears that other common law jurisdictions could follow suit. By contrast, the outcome is much more difficult to predict in the U.S., as the precedent of the 2005 Choice of Court Convention clearly shows, partly because of the laborious coordination of federal and state competences and partly because the present political trend is not very conducive to international cooperation.

Without indulging in divination, let us try to imagine what the impact of a Hague Judgment Convention would be if it were to enter into force. Looking at the preliminary draft that is currently being negotiated,[110] the first impression is that – while bringing clear progress in the relationship with certain European countries – such a convention will not fundamentally alter the lot of U.S. judgments across Europe.

Of course, the future convention would establish a basis for the circulation of judgments in those countries that currently refuse to recognize foreign decisions in the absence of a relevant treaty.[111] Also, it will get rid of parochial rules such as those protecting the citizens or the persons domiciled in the requested State.[112]

However, a lack of jurisdiction of the rendering court will probably continue to be an obstacle to the circulation of a number of U.S. judgments. As a matter of fact, the grounds of recognition currently listed in Article 5 of the preliminary draft are not much broader than those existing already in the majority of European states.[113] Thus, specific jurisdiction over contractual disputes is only granted to the court of the place of performance of the contractual obligation,[114] which excludes other possibly significant contacts with the State of origin even when they have purposefully been created by the defendant.[115] As for tort disputes, the reference to the place of the "act or omission directly causing" the harm[116] not only excludes the recognition of judgments rendered at the place of the event, but also of those rendered at the place of acts lacking a proximate link to the event.[117] Unsurprisingly, "tag jurisdiction" is also absent from the permissible basis.

[110] November 2017 Draft Convention, available on the website of the Hague Conference at <https://assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf>.
[111] See *supra*, 2.
[112] *Ibid*.
[113] See BONOMI, Courage, p. 12 *et seq*.
[114] Article 5(g) of the draft (see *supra* n. 107).
[115] Such as reaching out or carrying on negotiation in the forum, see *supra*, n. 34.
[116] Article 5(j) of the draft (see *supra* n. 107).
[117] Such as the use of the U.S. clearing channels, see *supra* n. 36.

With respect to the other current obstacles to the circulation of U.S. judgments, the future convention will probably not bring substantial changes. Thus, the sovereignty concerns arising out of defective service are expressly mentioned as a possible ground of refusal under Article 7(1)(a)(ii) of the draft. Contracting States are also allowed to refuse punitive damages awards even if they are not excessive:[118] in so doing, the draft reaffirms the traditional hostility to punitive damages without integrating the more recent trends. Also, no possibility of mitigation is provided for, contrary to the 1999 preliminary draft.[119] Finally, pre-trial discovery and class actions are not specifically mentioned, but nothing will prevent the Contracting States from resorting to the public policy exception[120] to reject certain effects of such procedural devices.

Although, in this respect, the draft may seem disappointing, one should not lose sight of the fact that the very existence of treaty-based obligations to recognize and enforce will have an impact on judicial attitudes towards foreign decisions. The trend towards a more open reception to foreign judgments that we have observed throughout this paper will certainly be enhanced within a mandatory cooperation framework.

[118] Article 10 of the draft (see *supra* n. 107).
[119] See *supra*, n. 86.
[120] Article 7(1)(c) of the draft (see *supra* n. 107).

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