14. New challenges in the context of recognition and enforcement of judgments

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1. INTRODUCTION

When scholars around the world are asked to describe what private international law is about, a great majority naturally answer that the recognition and enforcement of foreign decisions are at the heart of this subject.

This is unsurprising. If private international law is aimed at the coordination of national legal systems and the creation of bridges across state boundaries, in order to develop a uniform legal environment for the harmonious treatment of transnational legal relations, then recognition of foreign judgments is certainly an essential ingredient of this. The same is true if one prefers to consider private international law as an aspect of international relations among sovereign states: recognition and enforcement have always been a central element of state cooperation in the area of private law, through both bilateral and multilateral treaties.

In light of this, it is amazing to see how far we remain from reaching a satisfactory common threshold across the different national legal systems.

The crucial importance of the recognition and enforcement of foreign decisions has long been acknowledged in numerous countries around the world. In the United States, the door was thrown open by the US Supreme Court in the nineteenth century in the seminal *Hilton v Guyot* case. Drawing on the principle of international comity, it was said in this case that:

> where there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.[1]

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[1] *Hilton v Guyot*, 159 US 113, at 202–203 (1895).

Since then, the US recognition system has been regarded, with good reason, as one of the most generous from a comparative perspective.[2]

In Europe, the 1968 Brussels Convention and its progeny have established an even more liberal system of mutual recognition, albeit limited to decisions handed down in other EU Member States and in the Contracting States of the Lugano Convention.[3] Several European states have also taken, in their national laws, a very liberal stance towards recognition and enforcement,[4] although this is often founded on principles other than comity. The preferred rationale is that where a case has been litigated before a foreign court with proper jurisdiction; where the parties have 'had their day in court' and a fair opportunity to be heard; where proceedings have not been tainted by fraud or corruption; and where the judgment does not conflict with a local judgment or with an overriding policy of the requested State – in such cases, recognition flows as a corollary from the *res judicata* principle and is due as a matter of procedural justice. Indeed, under these circumstances, the parties should not be exposed to the risk of two irreconcilable, self-denying judgments or of conflicting duties. What matters here are not foreign countries' interests, but rather the crucial interests and legitimate expectations of the parties.

By contrast, a number of countries are still very restrictive in this regard. In several jurisdictions, recognition and enforcement of foreign judgments are simply excluded in the absence of a treaty base.[5] In others, reciprocity is still a requirement[6] and is sometimes interpreted quite restrictively, although interesting developments are taking place in some important jurisdictions.[7] Even other systems, which at first sight are quite open, nevertheless maintain some restrictive recognition requirements which may represent serious hurdles for the acceptance of foreign decisions.[8]

The overall picture is quite surprising when one considers how easy it has become in most countries to obtain recognition and enforcement of an arbitral award under the 1958 New York Convention.

It is difficult to explain, in general terms, the grounds for such restrictions. One obvious reason is the absence of a global instrument similar to the New York Convention:[9] as a consequence, recognition and enforcement are often still matters of national law, subject to the EU instruments and some multilateral treaties in specific areas.

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[2] Ronald A. Brand, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, FEDERAL JUDICIAL CENTER INTERNATIONAL LITIGATION GUIDE (2012), *available at* www.fjc.gov/sites/default/files/2012/BrandEnforce.pdf, at 2.

[3] *See infra* at section 2.

[4] This is, for instance, the case in Belgium, France, Germany, Italy, Spain and Switzerland.

[5] This is still the case in most Nordic countries, such as Denmark, Finland, Iceland and, to a certain extent, Norway and Sweden.

[6] This is the case, for instance, in Austria, China, Germany, Japan, South Korea, Moldavia, Russia and Turkey.

[7] For recent developments in China, *see* Qiseng He and Yahan Wang, *Resolving the Dilemma of Judgment Reciprocity – From a Sino-Japanese Model to a Sino-Singaporean Model*, 19 YPIL 83 (2017/2018).

[8] *See infra* at section 3.

[9] On the Hague Judgments Project, *see infra* at section 4.

If one looks at national recognition systems, the reasons for the existing hurdles are not always clearly spelled out. Of course, local traditions play a role; however, if these were the only grounds, they would be quite easily overcome through law reform or case law. Parochialism and misplaced sovereignty considerations may also be relevant in a number of jurisdictions. However, it is submitted that behind the scenes, one of the biggest reasons for state reluctance to recognize and/or enforce a foreign judgment – albeit one seldom openly confessed – is a lack of trust in the legal and/or judicial systems of (certain) foreign countries. Where trust exists or can be enhanced through specific measures (as is the case within regional organizations such as the European Union), recognition is far more easily accepted. In the absence of trust, the acceptance of foreign decisions proves problematic.

The purpose of this chapter is to discuss what could be done in the near future to improve the existing picture, first focusing on the European and national recognition systems, and then trying to anticipate what could facilitate a future Hague convention on judgments. At these different levels, I will initially tackle the issue of (lack of) trust and consider whether and how this is (or should be) addressed – this first step being the precondition to breaking down existing barriers. I will then consider other possible improvements to recognition systems and, in particular, how to enhance their openness.

2. THE EUROPEAN SYSTEM

2.1 Mutual Recognition and Mutual Trust

Within the European Union, the mutual recognition of judicial decisions represents a crucial element for the establishment of an area of liberty, security and justice. This principle has been included in the European Treaties since the Amsterdam Treaty and is now enshrined in Articles 67 and 81 of the Treaty on the Functioning of the European Union.

Based on these provisions, the liberal recognition and enforcement system originally conceived under the 1968 Brussels Convention for dealing with judgments in civil and commercial matters has progressively been extended, through several EU regulations, to civil judgments rendered in other areas of law – notably insolvency, divorce, personal separation and annulment of marriages, child protection, maintenance, successions, matrimonial property and the financial effects of registered partnerships.[10]

As announced in the preamble to most of these regulations,[11] as well as in some important rulings of the European Court of Justice (ECJ), mutual recognition rests

[10] These areas are governed by specific EU regulations: Council Regulation (EC) No 2201/2003 of 27 November 2003 (Brussels IIa); Council Regulation (EU) No 4/2009 of 18 December 2008 (Maintenance Regulation); Regulation (EU) No 650/2012 of 4 July 2012 of the European Parliament and the Council (Succession Regulation); Council Regulation (EU) No 2016/1103 of 24 June 2016 (Matrimonial Property Regulation); Council Regulation (EU) No 2016/1104 of 24 June 2016 (Registered Partnerships Regulation).

[11] *See, for example*, recital 26 of EU Regulation No 1215/2012 of the European Parliament and the Council of 12 December 2012 (Brussels Ia Regulation).

on mutual trust between Member States. Akin to the principle of full faith and credit, mutual trust is a very powerful tool. The ECJ has largely relied on it to interpret cooperation measures not only in the area of civil justice, but also in those of criminal justice and migration law. In its recent case law, mutual trust has been elevated to an unwritten constitutional principle of EU law.[12]

2.2 Possible Improvements to the European Recognition System

2.2.1 No need to further reduce the grounds for denial

Mutual trust among the EU Member States allows for recognition requirements and grounds for denial to be reduced to a strict minimum. This is true under all of the existing EU regulations.

Besides substantive and procedural public policy grounds (which include the basic due process requirements as enshrined by the European Charter and by the European Convention on Human Rights), recognition can be denied only when service of process was defective and when the judgment is irreconcilable with another judgment rendered in the country addressed or in a third state (provided that it is recognized in the state addressed). The list is very short and should not be further reduced.

In particular, it is not desirable, in my opinion, that the defence based on substantive public policy be abolished, as was suggested by the Commission in the Recast Proposal.[13] While mutual trust creates a presumption that the Member State of origin respects fundamental values, in particular the human rights as enshrined in the European Charter, the requested Member State must nevertheless be able to verify this point in exceptional cases.[14] Thus, the public policy exception strikes the necessary balance between openness and protection.[15] Trust is certainly good, but control is (sometimes) better.

Indeed, mutual trust is not always entirely justified and sometimes goes too far. The risk of excessive, unwarranted openness arises when Member States are not provided with express safeguard mechanisms – in particular, when they are not allowed to make use of the public policy exception. In this regard, there is still room for improvement of the European system.

2.2.2 Reinforcing the 'double convention' paradigm

Subject to some limited exceptions (exclusive jurisdiction; rules protecting the weaker party), all existing regulations prevent the requested Member State from refusing

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[12] The clearest expression of this trend is ECJ Opinion No 2/13 of 18 December 2014 on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454, §§ 168, 191, 194 and 258.

[13] COM (2010)748/3, at 5. The safeguards built into Articles 43, 45 and 46 of that proposal operated only in case of irreconcilable judgments or violation of due process requirements.

[14] *See* ECJ Opinion No 2/13 of 18 December 2014, *supra* note 12, § 192.

[15] In the US, the Supreme Court has rejected the idea of a general public policy defence against sister state judgments: *Baker et al v General Motors Corp.*, 522 US 222 (1998). However, in certain instances, public policy might still work as a restriction to full faith and credit.

recognition on the grounds of a lack of indirect jurisdiction of the rendering court.[16] This mechanism rests on the 'double convention' paradigm, which is an important ingredient of mutual trust. Since the courts in the rendering state are presumed to have correctly applied the uniform European jurisdictional rules, a further second check at the stage of recognition is regarded as redundant. Even public policy cannot be used to that effect.

This model goes even further than what applies in purely domestic cases in the US, where a judgment rendered by a sister state court lacking personal jurisdiction is not entitled to full faith and credit.[17]

As several observers have pointed out, this mechanism is flawed, due to the different scope of application of the European rules on jurisdiction on the one hand, and on the recognition of judgments on the other. While the latter benefit all judgments rendered in a Member State (obviously provided that the material scope is respected), several uniform jurisdictional rules of the Brussels I Regulation apply only when the defendant is domiciled in a Member State.[18] As a consequence of this, a judgment against a defendant domiciled in a third state must be recognized without examining the question of jurisdiction of the court of origin, even if it was rendered on the basis of national (and possibly too far-reaching) jurisdictional grounds. As mentioned, even public policy cannot be a defence in such cases.

This 'asymmetry' has been corrected in the most recent regulations on family and succession law, in which the uniform European jurisdictional rules are now indistinctly applicable to all defendants, irrespective of their domicile. However, this step remains to be taken in the area of civil and commercial matters covered by the Brussels Ia Regulation and the Lugano Convention. The Commission proposal to include in the Brussels Ia Regulation (Recast) jurisdictional rules of universal application[19] failed, because the European Parliament preferred to give priority to negotiations with third countries, in particular under the auspices of the Hague Conference.[20]

Since the judgments convention that is currently being negotiated in The Hague does not include uniform rules on direct jurisdiction,[21] the European institution will again

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[16] *See* now Arts 45(1)(e) and (2) of the Brussels Ia Regulation, *supra* note 11. The other above-mentioned EU regulations simply rule out the jurisdictional review without any exception.

[17] RESTATEMENT (SECOND) ON CONFLICT OF LAWS §§ 104–105 (1969); William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD L REV 412 (1994), at 424 *et seq*. However, this limitation to full faith and credit applies only when the issue of personal jurisdiction had not been litigated in the state of origin.

[18] See Articles 5 and 6 of the Brussels I Regulation.

[19] *See* the Commission proposal for a revision of the Brussels I Regulation (Recast Proposal) (COM (2010)748/3), notably Articles 4(2), 25 and 26.

[20] *See* the European Parliament Resolutions of September 2010, §§ 15–18, and of 23 November 2010, § 35. In this sense already Hess, Pfeiffer and Schlosser, REPORT ON THE APPLICATION OF THE BRUSSELS I REGULATION IN THE MEMBER STATES (THE HEIDELBERG REPORT), Study JLS/C4/2005/3, No 157. *See also* Alexander Layton, *The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness*, in Lein (ed), THE BRUSSELS I REVIEW PROCEDURE UNCOVERED, London 2012, pp 75–81.

[21] The future convention, if adopted, will be a 'simple' convention, where jurisdiction will be dealt with only as a recognition basis: *see infra* at section 4.1.

have to address this issue in a 'unilateral' way. In doing so, the European lawmakers will not need to stick to the existing jurisdictional grounds: additional bases can be made available for claims against third-country defendants,[22] provided that they reflect a genuine and substantial link between the dispute and the forum.

2.2.3 Extending *de iure* enforcement?

Subject to limited conditions and grounds for denial, the European rules provide that judgments are recognized *de iure*, without any specific procedure being required.[23] However, the Brussels Convention, most existing regulations and the Lugano Convention provide that enforcement is still subject to a declaration of enforceability, which can be obtained through a streamlined procedure. While the Brussels Ia Regulation (Recast) has abolished even these intermediate exequatur proceedings, the party resisting enforcement is still granted the right to invoke grounds for denial – including public policy[24] – by initiating a specific procedure in the Member State addressed.[25]

By contrast, the public policy defence has been ruled out in some other regulations, which adopted the new paradigm of 'automatic' enforcement. This is the case of judgments on uncontested claims that are certified as European enforcement orders,[26] certain judgments concerning rights of access or requiring the return of a child under the Brussels IIa Regulation[27] and some maintenance orders under the Maintenance Regulation.[28] In these cases, no grounds for denial can be invoked against the enforcement of a Member State's decision. As mentioned above, this development goes very far and has sometimes led to objectionable results, in particular with respect to child return orders.[29]

To better guarantee the protection of human rights, Member States should be allowed to object to the enforcement of other Member States' decisions even where the

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[22] Most of the abovementioned regulations (see note 10) include rules of 'subsidiary' jurisdiction, which are applicable only when the courts cannot rely on the primarily available grounds (eg, see art 10 of the Succession Regulation). For possible options *see* Articles 25 and 26 of the Recast Proposal (COM (2010)748/3) and the discussion in Andrea Bonomi, *European Private International Law and Third States*, 30 IPRax (2017), at 187 *et seq*.

[23] *See* Art 36 of the Brussels Ia Regulation, *supra* note 11. Similar provisions are included in all other EU regulations mentioned above.

[24] Notwithstanding the Commission proposal to abolish it: *see supra*, note 13.

[25] Arts 46 *et seq* of Brussels Ia Regulation, *supra* note 11.

[26] Art 5 of EC Regulation No 805/2004 of the European Parliament and the Council of 21 April 2004.

[27] Arts 41 to 45 of the Brussels IIa Regulation, *supra* note 10.

[28] Under Art 17 of EU Regulation No 4/2009 (Maintenance Regulation), the exequatur proceedings have been abolished only for maintenance decisions rendered in the EU Member States that are bound by the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations.

[29] The mechanism provided for by Articles 11(8), 40 and 42 of the Brussels IIa Regulation, by virtue of which a return order overrides a judgment of non-return pursuant to Article 13 of the 1980 Child Abduction Convention, has been widely criticized. Amendments have been proposed by the Commission in its 2016 Revision Proposal (COM(2016) 411/2).

applicable EU instrument does not expressly provide for a public policy exception.[30] In any case, an extension of *de iure* enforcement to new areas of law should be envisaged only with great caution.

2.2.4 European rules on recognition of third-country judgments?

The very open European system of recognition and enforcement benefits only judgments rendered in other EU Member States and in those European Free Trade Association States that have ratified the Lugano Convention;[31] judgments rendered in third states are still subject to national recognition systems. The introduction of uniform European recognition rules for third-country judgments has been addressed, although for the time being only in academic circles.[32] While the interaction of unilateral European rules with a future Hague convention on judgments might prove problematic, this could be a desirable development to enhance the overall consistency of the system.[33]

3. THE NATIONAL RECOGNITION SYSTEMS

National recognition systems continuously evolve and the general trend, at least in recent decades, has been towards more open and liberal recognition of foreign decisions.

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[30] This is in line with some recent decisions of the ECJ which – in areas other than the recognition of civil judgments (refugee law and European arrest warrant) – have accepted that mutual trust should, in exceptional circumstances, be subject to some limits in order to guarantee the effective protection of fundamental rights: ECJ, 21 December 2011, Joined Cases C-411/10 and C-4923/10, *N.S.*, ECR I 13905 ; ECJ, 5 April 2016, Joined Cases C-404/15 and 659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198; ECJ, 16 February 2017, C-578/16 PPU, *C.K.*, ECLI:EU:C:2017:127. The same concern is also reflected in the ruling of the ECtHR, 23 May 2016, No 17502/17, *Avotiņš v. Latvia*.

[31] Iceland, Norway and Switzerland. Note that the 2007 Lugano Convention – which replaced the 1988 Lugano Convention – is still based on the 2001 Brussels I Regulation and differs from the 2012 Brussels Ia Regulation (Recast) in a number of ways; in particular, execution of a foreign judgment is still subject to a declaration of enforceability.

[32] The European Group of Private International Law thoroughly analysed the question of uniform rules for third-country judgments in its Copenhagen and Brussels meetings and came up with a detailed draft proposal, *available at* www.gedip-egpil.eu/documents/gedip-documents-20poe.htm. *See also* Sergio M. Carbone, *What about the Recognition of Third States' Foreign Judgments?*, in Pocar, Viarengo, Villata (eds), RECASTING BRUSSELS I, Milan 2012, pp 299–309; Marc Fallon and Thalia Kruger, *The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality?*, YPIL (2012/2013), at 22 *et seq*.

[33] *See* the discussion in Bonomi, *supra* note 22, at 190 *et seq*. On the desirability in the US of federal law rules on recognition and enforcement of foreign judgments, see the chapter by Ronald Brand in this book.

This tendency has been particularly strong in Europe, under the influence of the Brussels and Lugano instruments.[34] In other regions of the world, this evolution seems to be taking more time and the results have been less spectacular.

The opportunity to improve a national recognition system depends on where it presently stands. In a number of countries, the simple admission of the possibility to recognize foreign judgments in the absence of a bilateral or multilateral treaty would represent, *per se*, a very significant step forward. In others, progress depends on the adjustment of the conditions for recognition and grounds for denial. In the following sections, I will discuss the main areas of potential development.

3.1 Specific Safeguards against Lack of Trust

While the European approach is based on the premise of mutual trust, allowing the requirements for recognition and enforcement to be reduced to a minimum, trust does not necessarily exist in relationships with third countries. This probably explains the very restrictive stance that certain states, including some European states, have adopted in their national systems with respect to the recognition and enforcement of foreign decisions.

Lack of trust is sometimes justified. In several countries, the rule of law is not fully respected and the courts may lack independence or corrupt practices may be widespread. The best way to address this issue would obviously be to improve the situation in the country of origin; but while some tools might be available to this effect within regional communities, such as the European Union, in most cases the requested state has no influence at all on the foreign legal or judicial system. Therefore, the only way is to refuse recognition and enforcement of judgments originating from the foreign state concerned. To do this, the law of recognition should provide specific grounds for denial, explicitly tailored to address the issue of lack of trust. These kinds of safeguards exist in certain recognition systems, but are absent from others.

In the US, the *Hilton v Guyot* opinion highlighted that recognition of foreign decisions should be allowed only if the foreign judgment was rendered:

> under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of foreign countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting.[35]

In the wake of that decision, the 1962 Uniform Act on Recognition and Enforcement of Foreign Money Judgments provided that a foreign judgment is not conclusive (and thus not entitled to recognition and enforcement) if it 'was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law'.[36] A similar mandatory ground for denial was also included, with

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[34] *See* Andrea Bonomi, *50 ans de Convention de Bruxelles: «ce n'est qu'un début, continuons le combat» !*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ (2018) (forthcoming).

[35] *Hilton v Guyot*, 159 US 113, at 205 (1895).

[36] Section 4(a)(1).

the same terminology, in the 2005 Uniform Act.[37] Also, the American Law Institute (ALI) proposed federal statute provides for a mandatory ground of denial when the judgment had been rendered by a 'system (whether national or local) that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness'.[38]

Although the practice shows that these grounds for denial are seldom used by courts,[39] which certainly is a good thing,[40] they constitute important safeguards. While they provide courts with a useful tool against recognition and enforcement of decisions originating from 'untrustworthy' systems, they also make it possible to cut down the other grounds for denial to what is strictly needed to protect fundamental values.

By contrast, in other national recognition systems, notably in Europe, no specific tools are provided to cope with the lack of trust in foreign judicial and legal systems. The only ground of denial that can be invoked for this purpose is (procedural or substantive) public policy. However, it is commonly held that public policy works only *in concreto*, which means that it requires a positive showing of flaws affecting the specific decision to be recognized. Thus, if the concern is, for example, judicial corruption, the party opposing recognition cannot simply allege, using statistics or official reports, that judges in the country of origin are often corrupt. Public policy does not allow for this kind of generalization. Recognition will be denied only if positive evidence is given that the judges who rendered the foreign decision were in fact bribed. Since this kind of evidence is very difficult to secure, the foreign decision will often have to be recognized despite suspicions of judicial corruption.[41]

To avoid this, other barriers are sometimes set up. As mentioned, some national legislatures simply exclude recognition and enforcement of foreign decisions; however, this is overkill, because a recognition ban affects all foreign decisions, even those handed down in entirely 'trustworthy' foreign legal systems.

Sometimes other, more 'traditional' grounds for denial, such as jurisdictional filters or reciprocity, are also used (or misused) to address the lack of trust in foreign legal and/or judicial systems. This way, unnecessary rigidity is added to the system, with the consequence that recognition and enforcement are sometimes unduly restricted.

Thus, the purpose of jurisdictional filters is to counter the overreach of foreign courts. They are not, however, intended to cope with a lack of trust in a foreign legal or judicial system; indeed, the reach of a foreign court's jurisdiction has nothing to do

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[37] Section 4(b)(1).

[38] Section 5(a) of the ALI Proposed Statute: *see* ALI, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006). On section 5(a), *see* S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REVIEW OF LITIGATION (2014), *available at* http://ssrn.com/abstract=2313855, pp 57 *et seq*.

[39] Brand, *supra* note 2, at 13 *et seq*; Strong, *supra* note 38, at 24.

[40] Indeed, the kind of evidence required is not easy to obtain and courts are not at ease in evaluating the flaws of foreign judicial systems.

[41] The ALI Proposed Federal Statute, *supra* note 38, also addresses this concern by providing for a mandatory ground for refusal where the foreign judgment was rendered 'in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question' (section 5(a)).

with the legal and procedural guarantees offered in the state of origin. This notwithstanding, restrictive recognition bases are sometimes (mis)used to protect local defendants from risks relating to exposure to foreign proceedings. Thus, in the past, the French courts have held that they had exclusive jurisdiction in cases where proceedings were opened against French citizens; this was clearly also intended to protect French citizens from untrustworthy foreign courts.[42] Switzerland, which otherwise features a quite modern and open recognition system, refuses recognition of foreign decisions rendered in certain areas of law where the defendant is domiciled in Switzerland;[43] criticism of this parochial rule is often met with the argument that Swiss residents should not be exposed too easily to the risks of foreign litigation. The (often unconfessed) justification for such restrictive rules is mistrust of foreign legal or judicial systems.

The same is true with regard to reciprocity. Its main purpose is to induce foreign countries to open up their systems to recognition and enforcement of decisions. Again, this has nothing to do with the level of trust in the legal and/or judicial system of the state of origin of the judgment.[44] Nevertheless, it is true that countries that do not fully respect the rule of law are often also less open to the recognition of foreign decisions: thus, reciprocity is sometimes used (or misused) as a barrier against judgments originating from untrustworthy systems.

It might seem odd that, while advocating greater openness in recognition and enforcement of foreign decisions, I suggest including a new ground of denial in countries that presently ignore it. The rationale behind this proposal is that, by adding specific safeguards to cope with the lack of trust in certain countries' legal and/or judicial systems, some countries that are presently hostile to recognition and enforcement might be convinced to open up their systems. Also, in those countries that already feature a 'modern' recognition system, the existing recognition requirements could be adapted to their specific purpose, which is normally to protect basic due process concerns or other fundamental values of the state addressed.

3.2 Possible Improvements in National Recognition Systems

3.2.1 Jurisdictional filters

Contrary to the EU instruments, most national recognition systems make use of jurisdictional filters. As mentioned, their main purpose is to protect parties against jurisdictional overreach of the foreign courts and thus better defend their due process rights. Three different methods are most frequently used in practice.

Under the most traditional one, the admissible recognition bases (rules on indirect jurisdiction) simply mirror the rules governing the personal jurisdiction of the courts of the state addressed (rules on direct jurisdiction). In other words, such rules are applied

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[42] The French *Cour de cassation* changed its practice in the *Preur* case: Cass. 1e ch. Civ, 23 May 2006, Bull civ I, N 857; *see also* Gilles Cuniberti, *The Liberalization of the French Law of Foreign Judgments*, 56 INT'L & COMP LQ 931(2007).

[43] *See* Art 149 of the Swiss Private International Law Act of 1987.

[44] *See already* Paul Lagarde, *La reciprocité en droit international privé*, 154 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1 (1977), at 146.

symmetrically in order to ensure that the foreign court's jurisdiction was in line with the notions of the state where recognition is sought.[45]

In other countries, the foreign court is regarded as having jurisdiction whenever the dispute presents a 'significant connection' with the country of origin, provided that the local courts did not claim exclusive jurisdiction.[46] This method normally results in a more generous recognition of foreign decisions than 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 to establish jurisdiction of the courts 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. 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.[47]

Among these approaches, the second is the most liberal and the more consistent with the actual goal of jurisdictional filters. If these are intended to counter jurisdictional overreach, recognition should be possible whenever the jurisdiction of the foreign court was based on a substantial link between the dispute and the forum. The adoption of this method would favour the recognition of foreign decisions in many national systems, without affecting the due process guarantees.

3.2.2 Reciprocity

Although clearly in retreat, reciprocity is still required under several national recognition systems. In Western Europe, while it was renounced in a majority of countries, it is still required in some national systems.[48] In the US, the reciprocity requirement established by the Supreme Court in *Hilton v Guyot* was maintained only in a minority of states;[49] however, a heated debate on its desirability was reopened by its inclusion in the 2006 ALI draft for a federal statute.[50] Reciprocity is also still a condition in several other countries around the world, such as China and Russia.

Where it is still required, formal reciprocity tends to be replaced by substantial reciprocity; notwithstanding the absence of a treaty, proof that decisions rendered in the requested state are *de facto* recognized in the state of origin is regarded as sufficient. In

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[45] 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).

[46] This approach has been followed by the French courts since the *Simitch* case: Cass civ 6 February 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.

[47] As mentioned, this method is used in Switzerland in order to protect defendants domiciled in that country from the recognition of foreign judgments: see *supra*, note 43.

[48] *See supra* note 6.

[49] According to Brand, *supra* note 2, at 11, six states have made reciprocity a discretional ground for recognition (Florida, Idaho, Maine, North Carolina, Ohio and Texas), while only two have made it a mandatory ground (Georgia and Massachusetts). Both Uniform Acts have specifically excluded the reciprocity requirement.

[50] ALI Proposed Federal Statute, *supra* note 38, section 7(a). On this, *see* Strong, *supra* note 38; John F. Coyle, *Rethinking Judgments Reciprocity*, 92 NCL Rev 1109 (2014), at 1112 *et seq*.

some countries, courts simply require proof that the conditions for recognition and enforcement of decisions in the country of origin are not substantially different from those in the state addressed.[51] 'Abstract' reciprocity is also increasingly accepted; if this is the case, the abstract possibility of recognition in the state of origin of a decision stemming from the requested state is regarded as sufficient, even in the absence of concrete precedents.[52]

However, states should arguably go further and give up reciprocity. On the one hand, the practical costs and unfairness of the reciprocity requirement have often been denounced.[53] Indeed, it is not easy for the party seeking recognition of a foreign decision to convince the courts of the requested state that those of the state of origin grant reciprocity. Moreover, when this condition is not realized (or simply cannot be proved), it is simply not fair for a party that has obtained a legitimate judgment abroad that recognition is denied so that the case must be relitigated in the requested state.

On the other hand, the only alleged benefit of reciprocity is very doubtful. As mentioned, this requirement is supposed to induce foreign countries to recognize and enforce judgments originating from the requested state. However, according to a commonly held opinion, recently confirmed in the US by more empirical studies, the likelihood that reciprocity requirements actually generate the expected result is quite remote.[54] And if the effectiveness of reciprocity is doubtful when required by a big and important country such as the US, it is even more so when required by a small country. The European experience seems to suggest the opposite: the liberal system set up by the 1968 Brussels Convention and by the later EU instruments encouraged emulation by Member States and ultimately did much more for the diffusion of open national recognition systems than the reciprocity regimes that were previously in place in some of those countries.

3.2.3 Public policy

In all recognition systems, the public policy of the state addressed is a ground for refusal. While its definition is always tricky, it is obvious that it now plays, in the most open countries, a very limited role. Its main function is undoubtedly to guarantee the protection of fundamental rights, in both their substantive and procedural dimensions. If in the past it was recognized that public policy also protects other general principles of the law, this approach seems to be in retreat.

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[51] This is the case in Germany: *Bundesgerichtshof*, 9 July 1969, BGHZ 52,251; *Bundesgerichtshof*, 16 March 1970, BGHZ 53, 332. Similar developments took place in Japan and South Korea: *see* Yasuhiro Okuda, *Recognition and Enforcement of Foreign Judgments in Japan*, 15 YPIL 411 (2014/2015), at 417, and Kwang Hyun Suk, *Recognition and Enforcement of Foreign Decisions in the Republic of Korea*, 15 YPIL 421 (2013/2014), at 433.

[52] For recent Chinese developments in this direction, *see* He and Wang, *supra* note 7, at 83, as well as the chapter by Ronald Brand in this book.

[53] See Arthur Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 LA L Rev 465 (1956); Lagarde, *supra* note 44, at 146.

[54] As an American scholar puts it, 'there is simply no obvious mechanism by which this requirement seems likely to generate the changes necessary for these benefits to be realized'. Coyle, *supra* note 50, at 1166.

As an example, I will mention the recent decisions of the Supreme Courts of three European states on the issue of recognition of punitive damages awards.

In several European and non-European jurisdictions, punitive damages used to be considered incompatible with some traditional principles of civil law, the most important being the compensatory (as opposed to punitive) function of tort liability. This traditional understanding is still reflected in the hostile decisions rendered since the 1990s by the Supreme Courts of certain European and non-European countries, such as Germany,[55] Greece,[56] Italy[57] and Japan,[58] which refused the recognition of punitive damages awards as incompatible with public policy.[59] However, over the course of the last two decades, a more open approach has progressively gained ground across Europe.[60] Indeed, the Supreme Courts of some European states have recently stated that punitive damages awards are not *a priori* incompatible with public policy, provided that they are not excessive. After the Spanish *Tribunal Supremo* issued such a decision in 2001,[61] similar conclusions were reached by the German Constitutional Court in 2007,[62] the French *Cour de cassation* in 2010[63] and the joint chambers of the Italian *Corte di cassazione* in 2017.[64]

While in practice many punitive damages awards will still be denied recognition, the new paradigm comes closer to the case law of the US Supreme Court, under which only grossly excessive awards are contrary to substantive due process.[65] This seems to indicate that for European courts, the violation of a general principle of law does not justify *per se* a denial of recognition unless a fundamental right is at stake.

Other hints in the same direction may be seen in the decisions of several European Supreme Courts concerning forced heirship rights. In civil law countries, such rights are a pillar of the law of succession and can therefore be regarded as the expression of an important general principle of civil law. However, forced heirship rights are normally not regarded as fundamental rights and this also holds true under the

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[55] BGH, 4 June 1992, 118, BGHZ 312. See the comments by Herrmann, Anerkennung, at 261 *et seq*.

[56] Areios Pagos, 17/1999, 461–64.

[57] *Corte di cassazione*, 19 January 2007, N 1183/2007.

[58] Supreme Court, 11 July 1997. *See* Okuda, *supra* note 51, at 416.

[59] 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': Patrick Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA L REV 529 (2010), at 540.

[60] *See* John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, WORKING PAPER SERIES, Villanova University Charles Widger School of Law, *available at* http://digitalcommons.law.villanova.edu/wps/art65, at 14 *et seq*.

[61] *Tribunal Supremo*, 13 November 2001.

[62] BVerfG, 24 January 2007.

[63] *Cour de cassation*, 1 December 2010, No 09-13303. See comments by Licari, *Compatibilité*, at 423, and Hélène Gaudemet-Tallon, *De la conformité des dommages-intérêts à l'ordre public*, *REVUE CRITIQUE DROIT INTERNATIONAL PRIVÉ* 93 (2011). This decision was later confirmed by *Cour de cassation*, 7 November 2012, N 11-23871.

[64] *Corte di cassazione*, *Sezioni Unite*, 5 July 2017, N 16601.

[65] *BMW of North America, Inc. v Gore*, 517 US 559 (1996); *State Farm Mut. Auto. Ins. Co. v Campbell*, 538 US 408 (2003).

European Convention on Human Rights. It is therefore unsurprising that the highest courts of at least four European states have ruled that the application of a foreign law not granting forced heirship rights to the children of the deceased is, *per se*, not contrary to public policy.[66] In its recent decisions on this issue, the French *Cour de cassation* allowed an exception only in cases where the disinherited heir was left in a state of need or precarity – that is, when fundamental rights were at stake. Although these rulings concerned the application of a foreign law, there is little doubt that the outcome would be the same if forced heirship rights had been denied by a foreign judgment.

The tendency to equate public policy to human rights is similar to the move observed in international arbitration, whereby awards can be set aside or denied enforcement only on the ground of a violation of transnational public policy. This trend should be approved of.

However, it also raises some questions. For example, it is unclear whether public policy may still be used to protect crucial political, economic or social interests of the state addressed – in other words, to ensure the observance of overriding mandatory rules or '*lois de police*'.[67] This is still clearly the case in several jurisdictions around the world. The European Union itself seems to adopt this approach in order to ensure the observance of its own crucial policies: thus, important decisions of the ECJ require Member States to make use of the public policy exception to set aside arbitral awards that do not comply with crucial European policies, such as antitrust or consumer protection legislation.[68] On the other hand, the most liberal jurisdictions tend to restrict this control to gross violations only.[69] At first sight, this trend seems consistent with the equation of public policy to human rights. However, as a result, fundamental policies of a state might be in jeopardy when disputes arising from transnational transactions are deferred to foreign courts (or arbitrators). Therefore, the requested state should arguably be able to use public policy to ensure that its essential interests are respected. While this may lead to recognition of a specific foreign decision being denied, the

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[66] The Swiss Federal Tribunal in the *Hirsch v Cohen* case, ATF 102 II 136 (1976); the Spanish *Tribunal Supremo* in the *Lowenthal* decision, of 15 November 1996; the Italian *Corte di cassazione* in a ruling of 24 June 1996, No 5832; and the *French Cour de cassation* in two rulings of 27 September 2017, Nos 16-13151 and 16-17198.

[67] Luca Radicati di Brozolo, *Mondialisation, juridiction, arbitrage: vers des règles d'application semi-immédiate?*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (2003), at 21 *et seq*; Dominique Bureau and Horatia Muir Watt, *L'impérativité désactivée? (à propos de Cass. civ. 1ère, 22 octobre 2008)*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 1 (2009), at 22.

[68] ECJ, 1 June 1999, C-126/97, *Eco Swiss China Time v Benetton International*, ECLI: EU:C:1999:269; ECJ, 26 October 2006, C- 168/05, *Mostaza Claro v Centro Móvil Milenium*, ECLI:EU:C:2006:675.

[69] *Cour d'appel Paris*, 18 November 2004, Thalès, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 104 (2006), with a note by Sylvain Bollée; *Cour de cassation*, 4 June 2008 No 27-08, *SNF v Cytec*, 97 REV ARBITRAGE 1 (2008), with a note by Ibrahim Fadlallah. According to these French cases, an arbitral award can be set aside only if the violation of public policy was 'blatant, effective and concrete'. The Swiss Federal Tribunal has gone even further, ruling that a violation of antitrust law can never lead to the setting aside of an award on public policy grounds: ATF 132 III 389, Tensacciai (2006).

effect on recognition in general should be positive. The awareness that crucial interests of the requested state can be preserved by a refusal of recognition helps to build a relatively open recognition system.

The trend towards a restrictive application of public policy also raises another intriguing question. As illustrated by some of the decisions we have mentioned, public policy is triggered only when the damages award in the foreign judgment reaches a certain threshold. Thus, an award of punitive damages will be denied enforcement only when it is grossly excessive. Similarly, a derogation from forced heirship rights becomes intolerable only when an heir is put in a state of need or precarity. What then are the consequences? According to the traditional approach, recognition will be denied. Therefore, the party wishing to have a decision in the state addressed must initiate fresh proceedings in that state.

However, this 'all or nothing' approach is disappointing. A less draconian sanction should be envisaged: the court of the state addressed should be allowed to 'correct' the foreign judgment in order to make it compatible with the public policy of the forum. This solution would be more consistent not only with the interests of the party that is seeking recognition, but also with the general principle of procedural efficacy. Thus, if a punitive damages award is considered excessive in the requested state, the court should be able to allow enforcement for a more limited amount, in order to make it compatible with the standards of the forum.[70] *Mutatis mutandis*, if the foreign decision is based on a will that puts one of the heirs in a state of need or precarity, the requested court should be able to 'correct' it by allocating sufficient financial provision to that heir.

This possibility to 'correct' the foreign judgment might be regarded as incompatible with the prohibition of review as to the merits – one of the pillars of the law of recognition. However, this position would be too dogmatic. The prohibition of review is an important tool which favours the recognition of foreign decisions, while preventing a case from being relitigated in the country addressed. However, where public policy would lead to a denial of recognition, a limited possibility for the requested court to correct the foreign judgment might be a good way to avoid fresh proceedings.

4. THE HAGUE JUDGMENT PROJECT

4.1 Perspectives of Adoption and Ratification

The best way to improve the recognition of judgments worldwide would obviously be through a multilateral and global convention, open to ratification by potentially all countries, as is the case with the New York Convention in the field of arbitration.

A global convention would represent clear progress with regard to the recognition and enforcement of judgments in the many jurisdictions that have restrictive rules or practices. The establishment of a treaty base for recognition and enforcement would

[70] This should be distinguished from partial recognition and enforcement, as it is already allowed under many national recognition systems for those parts of the foreign judgments that are severable from the punitive damages award.

help some countries to overcome their reluctance to accept foreign decisions. Definitions of recognition and enforcement, as well as of their effects, would help to create a common understanding. Moreover, a uniform list of recognition bases and, in particular, of a limited number of grounds for denial would promote openness.

This are the goals of the Hague Judgments Project, which is now coming closer to a positive conclusion. After the refusal of the 1999 and 2001 drafts[71] and the adoption of the 2005 Choice of Court Convention,[72] the project of a global convention on recognition and enforcement has been reactivated. Following the suggestions of an Expert Group and a Working Group, a Special Commission has produced a draft convention (hereinafter, 'the 2018 draft'),[73] which will provide the basis for a Diplomatic Conference due to be convened in 2019. Mindful of previous setbacks, the Special Commission opted for a 'simple convention', in which judicial jurisdiction is only regulated as a condition for recognition and enforcement. Indeed, the model of a 'double convention' – although very successful in the European context – has proved to be unworkable on a global scale. Several issues remain controversial, but they concern quite specific points and it is unlikely that they will jeopardize the project as a whole.

If a convention is adopted, it remains to be seen whether it will be ratified by a significant number of countries. Everybody is aware of the traditional obstacles to the ratification of treaties: in the area of private international law, in particular, several Hague Conventions have failed to live up to expectations.

In this respect, the Choice of Court Convention is not a promising precedent. So far, it has been ratified only by the EU, Mexico, Montenegro and Singapore. Although potentially interested, the US has not yet ratified, due to coordination problems between the US and the individual sister states[74] in an area – that of choice of court agreements – which, although significantly influenced by important Supreme Court rulings, is still largely governed by state law. Now, despite its roots in the *Hilton v Guyot* case, recognition of foreign decisions is also – following the *Erie* doctrine – a matter of state law.[75] Issues of federalism therefore risk hindering ratification of a future judgments convention. Moreover, the position of the present federal administration will certainly not help.

The situation in Europe is different. The EU is competent to ratify a future judgments convention and could do so quite swiftly, as it did with the Choice of Court Convention. However, after the disappointing experience witnessed with the 2005 instrument, the EU institutions might act more cautiously. This is also because

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[71] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 (Prel Doc No 11 of August 2000). The 2001 Interim Text, on which no consensus was reached at the Diplomatic Conference, is included in the Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001.

[72] Hague Convention of 30 June 2005 on Choice of Court Agreements, *available at* www.hcch.net/en/instruments/conventions/full-text/?cid=98.

[73] 2018 Draft Convention, *available at* https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf (the website of The Hague Conference).

[74] Brand, *supra* note 2, at 28.

[75] Brand, *supra* note 2, at 4; Strong, *supra* note 38, at 11 *et seq*.

recognition and enforcement of foreign decisions raise serious sovereignty and reciprocity concerns, and are therefore politically a much more sensitive issue than recognition of the effects of exclusive choice of court agreements.

If the US and the EU do not quickly ratify a future convention, other important countries might theoretically take the lead. Brazil and other South American countries, as well as China, are very active in the negotiations and appear to have a genuine interest in such an instrument. The same may be true of countries such as Australia, Canada and Japan. However, these states do not have a very strong history of ratification of the Hague Conventions.

4.2 No Specific Tools to Address the 'Lack of Trust' Issue

Lack of trust in the legal and/or judicial systems of other (future) Contracting States is one of the major obstacles to ratification of a future convention. Therefore, it is rather disappointing that the 2018 draft provides no specific safeguards to address this issue.

In particular, contrary to the US uniform acts, it does not include a specific ground for denial based on the 'systemic' lack of due process in the country of origin of the decision. Also, Contracting States are not allowed to declare in advance that they will not recognize decisions handed down in a country whose judicial system lacks independence or is subject to corruption. Moreover, the current draft does not provide for any restrictions as to the 'openness' of the future convention. Thus, it does not provide for a 'veto' approach, allowing a Contracting State to object to accession by another state, or for an 'opt-in' or 'opt-out' approach, based on which the convention would enter into force between a Contracting State and an acceding State only if the former declared acceptance or raised no objection.[76] The 2018 draft does not even contain a 'bilateralization' provision – that is, it does not allow acceding states to declare that they will apply it only in their relationships with certain other specifically named countries.[77]

Of course, none of these options offers a panacea. However, if such issues are not addressed in the final text, the only possible barriers against judgments rendered in 'untrustworthy' countries will be the traditional grounds for denial – in particular, due process and public policy; as previously argued, these grounds are insufficient to cope with systemic flaws in the foreign legal system. Of course, it is understandable that the draft does not provide for these kinds of mechanisms. Indeed, it is difficult to openly voice such concerns within an international conference of sovereign and equal states

[76] On the possible restrictions to the 'openness' of the future convention see § 243 of Prel Doc No 2 of April 2016, drawn up by the Permanent Bureau, *available at* www.hcch.net/en/projects/legislative-projects/judgments/special-commission1. Note, however, as this same document highlights, that traditionally, Hague Conventions 'have always been open to the signature of at least all Members of the Conference at the time of the relevant Diplomatic Session'. This implies that restrictions, if any, can apply only to non-Members of the Conference.

[77] See, for instance, the mechanism based on a bilateral 'supplementary agreement' provided for under Articles 21 *et seq* of the 1971 Hague Judgments Convention. Of course, such a complicated mechanism could also represent an obstacle to ratifications.

such as the Hague Conference. Nevertheless, for several countries, the absence of any safeguards of this kind will represent a serious hindrance to ratification of the future instrument.

4.3 Other Weaknesses of the Current Draft Convention

While the current draft does not include sufficient safeguards against 'untrustworthy' countries (or perhaps because of this), it is unnecessarily restrictive on other issues.

Critics of the project would point out that important areas might be excluded from the scope of the future instrument. This is most likely to be the case with regard to defamation and threats to privacy (Articles 2(1)(k) and (l) of the 2018 draft), although the exact scope of the carve-out is still controversial.[78] Judgments in the area of IP litigation might also end up being excluded, with the only exception being contractual disputes arising from licensing and other similar agreements.[79] Interim measures will also fall outside the material scope of the future instrument.

While these excluded fields are disappointing, they will not diminish *per se* the importance of a convention that is meant to deal with the whole area of civil and commercial matters. Indeed, both contractual and tort disputes will be covered, as well as disputes relating to company law and financial transactions. Nevertheless, the current draft suffers from other weaknesses which, in my opinion, are more serious.

4.3.1 Limited bases for recognition

This is the case, in particular, with respect to the bases for recognition. Following the traditional approach adopted in most bilateral and multilateral recognition treaties, the draft includes a 'laundry list' of enumerated recognition bases (Articles 5 and 6 of the 2018 draft). Besides some unproblematic and widely recognized jurisdictional grounds – such as habitual residence, the place of business or branch of the person against whom recognition is sought (Articles 5(1)(a), (b) and (d)), the defendant's express or tacit submission (Articles 5(1)(e) and (f)), and derivative jurisdiction for counterclaims (Article 5(1)(l)) – other criteria for indirect jurisdiction are conceived quite restrictively in comparison to several national recognition systems.

Of course, it is perfectly consistent with the purpose of jurisdictional filters that 'exorbitant' grounds – such as doing business, tag jurisdiction and the plaintiff's domicile or nationality – are not included in the list.

However, what is less understandable is why the specific recognition basis for judgments in contracts – provided for in current Article 5(g) of the 2018 draft – is the place of performance of the obligation in question. This excludes all judgments based on other significant contacts, such as the place of pre-contractual negotiation, the domicile of a consumer in a country that was 'targeted' by the other party and even the

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[78] *See* Prel Doc No 8 of November 2017, *available at* https://assets.hcch.net/docs/ff125c57-c85a-467d-ab5e-8acc3a50e2eb.pdf. *See also* C. Mariottini, *The Exclusion of Defamation and Privacy from the Scope of The Hague Draft Convention on Judgment*, 19 YPIL 475 (2017/2018).

[79] The inclusion of judgments on IP disputes is one of issues that are still very controversial. For an overview of the possible options, see the Background Document of May 2018, *available at* https://assets.hcch.net/docs/0c2a7a4d-17ed-43b1-9b98-6bdb452f28a7.pdf.

place of performance of the characteristic obligation (where this is different from the obligation in question). In addition, recognition of a judgment originating in the place of performance is made subject to the condition that 'a purposeful and substantial connection' existed between the defendant's activities and the state of origin. This attempt to combine the jurisdictional standards applied in Europe (place of performance) and in the US (purposeful availment) results in cumulative requirements which are ultimately less generous than those applied in the national recognition systems of these same states that inspired them.

Also, for most judgments in tort, the only specific jurisdictional ground is the place of the wrongful act or omission (Article 5(j) of the 2018 draft); this excludes in blanket terms judgments handed down at the place of the event, even where they actually rest on a 'purposeful and sufficient connection'. This also results in more restrictive conditions than those provided for in the US and in several European states.

4.3.2 Other grounds for denial

Concerning the other grounds for denials, the list in the 2018 draft (Article 7) largely corresponds to what can be found in the most liberal national recognition systems: it includes substantive and procedural public policy, insufficient notice, inconsistency with another judgment, *lis pendens* in the requested state and fraud. Subject to some distinctions, this list also corresponds to the European instruments. In this respect, the future convention will probably constitute some progress when compared to the law of the more restrictive countries. However, even here, the draft is somewhat disappointing in at least two respects.

On one hand, the definition of 'insufficient notice' is quite broad: this ground for denial covers not only cases where the defendant did not receive service of process 'in sufficient time and in such a way' as to enable it to defend itself (as is also provided in the Brussels Regulation), but also cases where notice was given in a way that is 'incompatible with the fundamental principles of the requested State concerning service of process'. Based on this provision, which is modelled on Article 9(c) of the 2005 Choice of Court Convention, a Contracting State will be allowed to adopt a formalistic approach and to deny recognition and enforcement on the sole ground that an irregular channel was used for service, even though the defendant was able to arrange for its defence or appeared before the foreign court. This creates the potential for abuse.

On the other hand, while the draft obviously does not define public policy, leaving that task instead to the courts of the requested state, it implicitly endorses a relatively broad understanding of that notion by taking a quite restrictive stance on the specific issue of punitive damages.

According to Article 10, 'recognition and enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for the actual loss or harm suffered'. This provision is obviously based on the traditional hostility to punitive damages, but fails to reflect the most recent evolution in Europe. A more progressive rule would limit the refusal to punitive or exemplary damages awards that are 'of an excessive nature'.[80]

[80] *See* Recital 32 of the Rome II Regulation.

Also, contrary to the rule which was included in the 1999 draft convention,[81] the current draft – while clearly imposing partial recognition limited to the award of 'actual' damages – does not openly allow the court addressed to opt for an intermediate solution between full recognition and denial of the punitive damages award – namely, a reduction in the size of the award. This looks like a missed opportunity to favour recognition by adapting the *modus operandi* of public policy.[82]

4.3.3 Possible impact of a future convention on national recognition systems

Article 16 of the 2018 draft expressly provides that the future convention will 'not prevent the recognition and enforcement of a judgment under national law'.

This reflects a classic approach followed by several international instruments for the recognition and enforcement of foreign judgments: since the goal of such instruments is to facilitate the transnational circulation of decisions, they normally do not prevent the application of national rules whenever these better serve that objective. A similar provision is included in Article 7 of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards.

In view of this, one can expect that national recognition systems will continue to evolve independently from the global convention. However, since the future convention will probably be somewhat restrictive in several respects, one cannot completely rule out the risk that its ratification might discourage reform on the national level and produce a sort of 'chilling effect'. Indeed, since recognition and enforcement of judgments from Contracting States will be subject to the (quite restrictive) rules of the Hague Convention, why should Contracting States develop more liberal national recognition rules?

One might argue that the 1958 New York Convention has not prevented some Contracting States from applying more generous recognition and enforcement requirements, as is permitted under Article 7 of that instrument. However, such developments have taken place in only a limited number of countries. Furthermore, this trend is partly due to the wish of lawmakers and courts to show that their systems are particularly arbitration friendly – something which is expected to increase their attractiveness as locations for international arbitration. This factor, however, does not play a role in relation to state judgments.

5. CONCLUSION

A comparative analysis reveals very significant differences across national systems in terms of the degree of openness towards the recognition and enforcement of foreign

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[81] According to Article 33(1)(a) of the 1999 Draft:

> [w]here the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, *recognition may be limited to a lesser amount*. [emphasis added].

[82] See above, under III(B)(3).

judgments. It is submitted that lack of trust in the legal and/or judicial systems of foreign countries is one of the main reasons for the existing obstacles.

Within the European Union, where mutual trust is a basic ingredient of mutual recognition, the grounds for denial are reduced to a strict minimum. Potential for improvement exists only with respect to the elimination of some inconsistencies. Moreover, it is important to preserve some safeguards, based on the public policy exception.

Under national recognition systems, the issue of lack of trust should be addressed through specific grounds for denial – such as 'systemic lack of due process' – which are better suited to that purpose than the traditional public policy defence. The availability of such tools can lead states to open up their systems and make better use of other recognition requirements, in conformity with their specific purpose.

The same is true, *mutatis mutandis*, of a future Hague judgments convention. While the current draft still fails to convincingly address the lack of trust issue, it sets up recognition requirements that – in some respects – are overly restrictive and might therefore have an undesired chilling effect on the future development of national recognition systems.

Post scriptum – The Hague Judgments Convention was adopted on 2 June 2019 by the Twenty-Second Diplomatic Session of the Hague Conference on Private International Law.[83] This is a very important step forward, and it might potentially bring radical changes in the panorama I tried to describe. However, since the final text largely corresponds to the 2018 draft I referred to in my paper, some of the concerns I raised are still present. In particular, the list of the excluded matters has grown even longer, since it extends now, *inter alia*, to defamation, privacy, IP rights, and at least some anti-trust disputes (Article 2). Moreover, it can even be extended by a Contracting State through unilateral declarations (Articles 18 and 19). Also, the possible bases for recognition (Articles 5 and 6) – although varied – are conceived in a rather restrictive way, which does not completely rule out the risk of a 'chilling effect' I alluded to. As a novelty, the text now specifically addresses the issue of 'lack of trust' by including a notification mechanism, allowing a Contracting State to exclude the application of the Convention in the relationship with one or more other Contracting States (Article 29): it remains to be seen whether this sort of 'opt out' provision will be sufficient in practice to mitigate the concern that the unrestricted openness of the Convention (Article 24) might raise in some potentially interested states.

[83] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Cvil and Commercial Matters. The final text is *available at* https://www.hcch.net/en/instruments/conventions/full-text/?cid=137. For a first overview see Andrea Bonomi and Cristina Mariottini, *A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention*, 20 YPIL 537 (2018/2019).