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Founding Editors
Petar Šarčević † and Paul Volken

Editors
Andrea Bonomi and Gian Paolo Romano

PUBLISHED IN ASSOCIATION WITH
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YEARBOOK OF PRIVATE INTERNATIONAL LAW

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VOLUME XV – 2013 / 2014

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LAUSANNE, SWITZERLAND

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FOREWORD

It is a pleasure and privilege to write a few lines to introduce the new volume of the *Yearbook.* No less that the previous ones, this valuable collection intends to offer a comprehensive insight into the contemporary trends of private international law, in terms of both theoretical thinking and practical achievements.

The volume begins with two papers from prominent scholars on freedom of movement of public documents and recognition of civil status records, both of them triggered by the EU initiative on "less bureaucracy for citizens", to quote the 2010 *Green Paper.* Along the same lines, the subsequent contribution advocates "one name throughout Europe", i.e. the extension of the principle of mutual recognition to family names and ventures to make a legislative proposal which is ultimately designed to implement the teachings of the *Garcia Avello* and *Grunkin Paul* rulings by the Court of Luxembourg. The *Harroudy v France* decision – which is examined next – confirms that, according to the Court of Strasbourg, the conflict of law rules are not immune from review under the principles of non-discrimination and human rights test. If the opportunities for intervention of the ECHR are vast and to some extent unexplored, this is arguably even more so for another international court, the International Court of Justice. One paper reviews the relevant case law and reveals how complex and multi-layered the relationships between public and private international law may be. To be sure, immunity from jurisdiction and enforcement attracted already much attention, but the *Swissair/Sabena* proceedings, although discontinued, disclose a potential for conflicts which has gone quite unnoticed so far by showing that breaches of a multilateral treaty on private international law may well generate disputes between States on how best to settle disputes between individuals or private companies.

A whole section is devoted to Brussels I-*bis* Regulation – as it should be, since the date of entry into force of the "recast" (10 January 2015) is approaching fast. One contribution deals with the mild opening offered by the new *lis alibi pendens* regime to third-country related disputes, a second with the innovations affecting choice of court agreements – extended scope of the relevant provision, uniform substantive rules governing validity as well as the much awaited rule on *lis pendens* on validity issues –, a third addresses the abolition of *exequatur* and highlights the improvements that this will bring about for both the judgment-creditor and the judgment debtor, including a clear basis for ordering interim relief. Three authors look beyond Brussels I-*bis* and advance some ideas for a "Brussels I-*ter*" by pleading for an exemption of human rights cases from the jurisdictional scheme and proposing a cautious extension of such scheme to disputes which still escape it, notably because they involve non-EU domiciliaries on the defendant side.

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A dozen national reports on recognition and enforcement of foreign judgments outside the EU – from Turkey to Australia, from Russian Federation to Egypt, from South Korea to Commonwealth Africa, from Canada to Japan –, an overview of the new codification in Albania and two essays on internal conflict of laws and the challenges posed by cross-border coordination in insolvency matters complete this valuable collection.

Our deepest thanks go to all our contributors who helped us celebrate so conveniently the fifteenth anniversary of the *Yearbook*.

Andrea Bonomi Gian Paolo Romano

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ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Clunet	Journal de droit international
ECR	European Court Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
id.	idem
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
OJ	Official Journal
PIL	Private International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law
Rev. crit. dr. int. pr.	Revue critique de droit international privé
REDI	Revista española de derecho internacional
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
RIW	Recht internationaler Wirtschaft
RSDIE	Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht

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DOCTRINE

THE MOVEMENT OF CIVIL-STATUS RECORDS IN EUROPE, AND THE EUROPEAN COMMISSION'S PROPOSAL OF 24 APRIL 2013[*]

Paul LAGARDE[**]

I. Introduction
II. Legalisation
III. Translation
IV. Electronic Transmission
V. Keeping Records Up to Date

I. Introduction

1. Until recently, the European Union took much more interest in the movement of court judgments than in that of public documents. Since the Brussels Convention of 27 September 1968, right up to the EU Succession Regulation of 4 July 2012, the main regulations on European private international law have contained detailed clauses on the recognition and enforcement of court rulings issued in another member state. This is not to say that public documents are excluded from these regulations.[1] Although the brief article or chapter places them in the same category as judgments for enforcement purposes,[2] the scope of the clauses in question is

[*] Translated from French by Ian CURRY-SUMNER to whom the author expresses his thanks.

[**] Professor Emeritus of University Panthéon Sorbonne (Paris I) and member of the Institute of International Law. Although the author was secretary-general of the International Commission on Civil Status (ICCS) between 2000 and 2008, the views expressed in this paper are his only.

[1] See the recent publication by H. DUINTJER TEBBENS, Vers une libre circulation des actes authentiques dans l'Union européenne. Réflexions à propos d'un arrêt du Tribunal supremo d'Espagne du 19 juin 2012, in *Liber Amicorum Alegría Borrás*, Madrid 2013, p. 309.

[2] Brussels I-*bis*, Article 58; Brussels II-*bis*, Article 46, on the recognition (in a disputed fashion), the comparison of authentic instruments with decisions; Maintenance obligations, Article 48 (same point); Successions, Articles 59 and 60, which makes a fitting

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restricted to the substantive scope covered by the regulation of which they form part. In other words, beyond this field, there are no guarantees for the free movement of documents issued by a public authority for the purpose of proving certain circumstances of which it has made a record. In the case of private individuals moving from one country to another, the documents in question consist mainly of civil-status records, although they also include certificates of nationality and criminal records. In the case of legal entities, companies in particular, the main documents involved are articles of association, issued at the time of their admission by a public authority.

The European Commission is aware of the existence of these problems. Back in 2006, it already asked a firm of consultants to carry out a study of member states' legislation on civil status, the practical difficulties encountered in this respect by citizens wishing to exercise their right of free movement and the potential solutions to the problems. The resultant report was published in 2008. On 1 July 1990, the European Parliament organised a major conference in Brussels on the subject of "dismantling the obstacles encountered by EU citizens in their daily lives in cross-border situations", during which a number of speakers touched upon the issue of the movement of civil-status records.

2. Shortly after this conference, the European Commission published (on 14 December 2010) a green paper[3] entitled "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records". The green paper begins by raising a series of fairly technical questions relating to the free movement of public documents between member states, with the aim of enabling citizens to reduce the administrative formalities, and cost, of providing proof of their civil status. Another group of questions relate to the recognition of the circumstances recorded in a civil-status document. For example, does the production in one member state of a marriage certificate recording a marriage celebrated in another member state entail – and, if so, under what conditions – the recognition of the validity of the marriage in the member state in which the certificate is produced?

The green paper was right to raise these two series of questions. Clearly, it is in the interests of all those who regularly travel to and reside in the territory of another member state for their civil identity to be recognised, *i.e.* in a legal sense, as being that formalised in the relevant civil-status records. In the European Union, this requirement is in fact the automatic result of EU citizens' right of free movement within member states' territories, as laid down in Article 21 TFEU (ex Article 18 TEC). The recognition of a person's civil identity means two things: the first is that the person in question must be easily able to furnish proof of his or her civil status. The second aspect involves the recognition of the circumstances recorded in the documents in question. In short, *instrumentum* and *negotium.*

There was a huge response to the green paper. While there was basically broad agreement on the need to facilitate the movement of civil-status records,

distinction between "acceptance" and "enforceability", and gives a precise definition of the former.

[3] European Commission proposal of 24 April 2013 (COM(2010) 747 final).

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there were wide differences of opinion on the recognition of the circumstances recorded in them. A number of respondents took the traditional view and were prepared to accept the validity of a legal situation only if it was in accordance with the applicable law, as determined by the choice of law rule applied by the recognising forum.[4] These respondents therefore proposed, as a precondition for recognition, unifying the choice of law rules in the member states. Aware of the new trends emerging in the contemporary doctrine on international law, other commentators advocated the blanket recognition of these circumstances, barring the existence of specific grounds for not recognising them, as defined on a case-by-case basis in accordance with the Hague Convention of 14 March 1978 on the celebration and recognition of the validity of marriages, or of ICCS Convention No. 32 of 5 September 2007 on the recognition of registered partnerships. With certain variations, these grounds concern the protection of the international public policy of the recognising state and the need for there to be a link between the circumstance in question and the state of origin.

3. In accordance with what is common practice these days, the European Commission followed up the green paper and the responses to it by presenting a proposal for a regulation "on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012".[5] The proposal is based on Article 21(2) TFEU rather than on Article 81, as is logical enough given that its provisions are intended to permit the free movement of EU citizens. The applicable procedure is the ordinary legislative procedure. If the proposal had been based on Article 81, it would have needed to follow the special legislative procedure described in paragraph 3 of the article on measures concerning family law. This would have required the Council to act unanimously after consulting the European Parliament.

The proposal is restricted to the first series of questions raised in the green paper. Article 2 describes the scope of the proposed regulation as follows:

> "1. This Regulation applies to the acceptance of public documents which have to be presented to the authorities of another Member State.
>
> 2. This Regulation does not apply to the recognition of the content of public documents issued by the authorities of other Member States."

Neither the explanatory memorandum nor the preamble give any supporting arguments for this restriction, which may be due to the lack of agreement on the recognition of circumstances pertaining to a person's civil status.

Both elements included in the concept of the "acceptance of public documents", which is the field covered by the regulation, need some clarification. Commencing with the issue of acceptance, this term appears to have been used for

[4] See in particular M. BUSCHBAUM, La reconnaissance de situations juridiques fondées sur les actes d'état civil? Réflexions critiques sur l'abandon de la méthode résultant des règles de conflit de lois, *D.* 2011, p. 1094.

[5] COM(2013) 228 final.

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the first time in Article 59 of the Succession Regulation, where it supersedes the term previously used, *i.e.* "recognition".[6] The former term is more restricted than "recognition", and refers solely to the instrument's evidentiary value and authenticity, and more specifically to the powers of the authority establishing the authentic instrument to the exclusion of its content. The second element is the term "public documents". Article 3 (1) of the proposal gives a broad definition of the term, which is "documents issued by authorities of a member state and having formal evidentiary value", after which it lists the areas covered by these documents. Although civil-status records are not formally cited as falling under this definition, the drafters of the regulation clearly had these in mind when referring to documents relating to birth, death, name, marriage and registered partnership, parenthood, adoption, citizenship and nationality. The list also includes residence, real estate, legal status and representation of a company or other undertaking, intellectual property rights and the absence of a criminal record. The list is somewhat mixed, and the latter aspects would appear to have been added at a later stage, given that the Commission was interested basically in civil-status records, which were the sole focus of the green paper.

4. For more than 50 years now, the International Commission on Civil Status (ICCS) has devoted itself to the movement of civil-status records. Based in Strasbourg, this small, independent intergovernmental organisation has only limited financial and legal resources at its disposal with which it tries to tackle this two-fold concern by reducing the barriers to mutual recognition. To this end, it has drawn up many conventions, which the member states – with a few exceptions – have unfortunately been very slow to ratify. The European Commission's proposal is informed by the ICCSs work and at the very least one derives a great deal of inspiration from it.[7]

The work performed by the ICCS has helped to highlight the problems presented by the movement of civil-status records and to test potential solutions. The European Commission's proposal should be seen as following in the wake of this work. Let's take a simple example. A citizen of member state A (also born in state A) settles in member state B, where he wishes to get married. In order to do so, he must prove his civil status by producing a number of documents, which we assume were issued in state A. The same problem arises if he wishes to enrol his children, who were born in state A, in a school in state B, or if he wishes to practise a profession, register with a welfare agency or else to prove he has a family tie with a citizen of member state B or a person habitually resident in B, for the purpose of claiming nationality or applying for a residence permit. It's not enough simply to decide that all civil-status records drawn up in a foreign country are equally authentic in another country.[8] What is also required is a guarantee that the document furnished is indeed authentic and that the competent authority receiving a foreign document is capable of recognising its status, *i.e.* as a certificate of birth, marriage, death, irrespective of the language in which it is

[6] See Article 34 of the Commission's proposal for a regulation on succession.

[7] Without however quoting its sources, even in the explanatory memorandum!

[8] See Article 47 of the French civil code.

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written and the way in which its is presented. The receiving authority also needs to know for sure that the instrument submitted by the applicant is up to date at the time when it is submitted. All these various issues, and the European Commission's responses to them, are discussed below.

II. Legalisation

5. The competent authority to which an instrument is submitted needs to be sure that it is not a forgery. This is a huge problem that for a long time was thought best tackled by means of "legalisation", which the proposal defines as "the formal procedure for certifying the authenticity of a public office holder's signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears" (Article 3(3)). This definition is taken from the Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents, and stating that this formality is to be completed by the diplomatic or consular agents of the country in which the document has to be produced (Article 2).

Although numerous international conventions dispense with the need for legislation, very few of them have actually been ratified. Indeed, only five countries have ratified the Brussels Convention of 25 May 1987 abolishing the legalisation of documents in member states of the European Community.[9] While several ICCS conventions exempt civil-status records from legislation where their transmission is regulated in the conventions in question, they have received an average of ten ratifications. This may be a better track record, but is still not good enough. The Hague Convention of 5 October 1961, which replaced legalisation by an apostille issued by the competent authority of the state from which the document emanates, proved a great success: 107 contracting states had signed up to the Convention by June 2014, including all EU member states. The convention helps to facilitate the movement of public documents, as the apostille, which is placed on the document itself, is generally issued at the same time as the document itself (Article 4).[10] Where this is not the case, private individuals domiciled in a given country are required to apply to the authorities in the document's country of origin in order to obtain an apostille.

Member states apparently wish to retain the legalisation requirement, without having to sign up other international conventions. In France, this requirement was traditionally based on an old government decree on the navy, issued by Minister of Finance Colbert in 1681. In spite of the fact that this decree was formally repealed in 2006 (by decree 2006-460 of 21 April 2006), the Court of Appeal reaffirmed the obligatory nature of legalisation, adducing international

[9] See in this connection M. REVILLARD, La légalisation des actes publics, *Rev. crit. dr. int. pr.* 1992, p. 552.

[10] On the adaptation of this convention to new technology, see C. BERNASCONI, The Electronic Apostille Program (e-APP): Bringing the Apostille Convention into the Electronic Era, in *Liber Amicorum Alegría Borrás*, Madrid 2013, p. 199.

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custom as the grounds for this.[11] However, it is legitimate to ask whether it is worth insisting on this formality in relations between EU member states. The fact is that it slows down the movement of these documents and also does not allow genuine civil-status records to be distinguished from fakes obtained by bribing local officials. The European Commission was sensitive to these arguments and, "in order to promote the free movement of citizens and companies or other undertakings in the Union" (point 7 of the preamble), the proposed regulation exempts public documents "from all forms of legalisation and similar formality" (Article 4), as is precisely the aim of the apostille.

6. At the same time, it is important to retain the presence of a filter that can prevent fraud and intercept forgeries. The proposal therefore states that:

> "Where the authorities of a Member State in which a public document or its certified copy is presented have reasonable doubt as to their authenticity, which cannot be otherwise resolved, they may submit a request for information to the relevant authorities of the Member State where these documents were issued (Article 7 (1))."

This doubt may relate to certain aspects that legalisation was designed to guarantee, *i.e.* the authenticity of the signature, the capacity in which the person signing the document has acted, and the identity of the seal or stamp (Article 7 (2)). Evidence must be provided for "reasonable doubt" in order to prevent a reversion to legalisation. The proposal states that "those grounds shall be directly related to the circumstances of the case and shall not rely on general considerations" (Article 7(3)).

The proposal creates a form of administrative cooperation in order to dispel such doubt. An authority harbouring doubts about a document's authenticity has two options: either it can directly approach the Internal Market Information System (IMI) or it can get in touch with the central authorities of its member state. Every member state is required to designate one central authority whose job it is to provide assistance in relation to requests for information (Articles 9 and 10). The IMI, established by Regulation No. 1024/2012 of 25 October 2012, is a network enabling an authority in a member state to contact the corresponding authority in another member state and to ask it for information, for example on the authenticity of a public document originating from the latter member state. The proposed regulation extends the competence of the IMI network to encompass information relating to documents covered by the future regulation (Article 17).

[11] First Civil Division, 4 June 2009, two judgments, Nos 08-13541 and 08-10962, *Rev. crit. dr. int. pr.* 2009, p. 500, note by P. LAGARDE; *D.* 2009, p. 2004, note by P. CHEVALIER; *addendum* E. CORNUT, La légalisation des actes publics étrangers, *JCP* 2009, p. 40.

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III. Translation

7. Translation problems are more difficult to resolve, given the existence of 24 official languages in the European Union. The addressee authority must be able to read the document produced by the individual in question. The common-law solution is a "sworn" or certified translation, resulting in both delay and additional cost to the individual concerned.

The proposed regulation mitigates this requirement by obliging the authorities in the member states to accept, in circumstances where there is no reasonable doubt, non-certified translations of public documents issued by the authorities of other member states (Article 6). As described above in relation to the genuineness of the document produced, the authority to whom the translation of the document is presented may have reasonable doubt as to the correctness or quality of the translation, in which case, even though it may insist on a certified translation, it is bound to accept a certified translation produced in another member state (Article 6).

8. The best solution is to dispense entirely with the need for translation. To this end, the proposal follows in the footsteps of the ICCS, which has drafted a series of conventions on the issue of civil-status records for use in foreign countries, the aim being to guarantee that a certificate issued in one state may be used in another state and its status recognised, *i.e.* as a certificate of birth, marriage or death, irrespective of the language in which it is written and the way in which it is presented. In order to produce this result without having to engage a translator, the ICCS suggested standardising birth, marriage and death certificates by using identical forms that were easily recognisable by the authorities in the contracting states. The most relevant ICCS convention in this respect is Convention No. 16 of 8 September 1976 on the issue of multilingual extracts from civil-status records, which has been ratified by 22 states including 15 EU member states.[12] Any interested party is entitled to ask for an extract to be prepared in accordance with the form appended to the convention. The front of these forms contain a list of numbered statements. Either on the reverse or as a separate annex, they contain translations of these statements in the member states' languages. This enables the addressee to easily understand an extract that has been prepared in another contracting state in accordance with this model. Multilingual extracts have the same value as equivalent public documents issued in the state from which they emanate (Article 8).

9. The European Commission could have asked the Council to urge all those member states that have not yet ratified this convention to do so. Instead, it decided to operate independently, and replicate the ICCS Convention. According to Article 12(10) of the proposed regulation,

> "Union multilingual standard forms shall be made available by the authorities of a Member State to citizens and companies or other

[12] Switzerland is also a signatory state to this convention.

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> undertakings as an alternative to equivalent public documents existing in that Member State."

The Commission is quite shamelessly proposing the use of forms copy-pasted from the ICCS convention. The specific element added by the proposal is that the forms should also be used for registered partnerships and for the legal status and representation of a company or other undertaking (Article 11).

For its part, the ICCS has just adopted a new convention[13] intended to replace Convention no. 16. Similar to the preceding one, it extends its scope to registered partnerships and the acknowledgment of a child and is adaptable to changes in national laws – notably the recognition of homosexual couples and the adoption of children by these couples –, which involved the modification of forms and the creation of new categories. In order to respect States that still refuse to recognize homosexual couples, it provides for the possibility of reservations on these points. It is unfortunate that the Commission is not in a partnership with the ICCS, because the convention is of equal interest to Switzerland and the six other states that are not members of the EU.

This actually poses a more serious problem, which is how the ICCS can survive as an international organisation in the medium term. Although it safeguards the application of existing conventions, Article 18 of the proposal states that the future regulation will take precedence over them in relations between the member states. This means that Convention No. 16 will have only a residual value in relations with non-EU member states and will therefore be more-or-less emasculated. And Convention No. 34 appears to be doomed in advance for the same reason. Obviously, this does not come as good news for the ICCS, which is left wondering what is the point of continuing its work on this matter if the revised version has already been sidelined as not applying to relations between EU member states.

IV. Electronic Transmission

10. The standardisation of multilingual extracts, coupled with their simplicity, has the advantage of allowing for them to be transmitted by electronic means. In today's world, people need to be able to access civil-status information recorded in a foreign country and to do so at very short notice, provided that certain guarantees are provided. Here too, technological advances have led the ICCS, on the instigation of the Italian section, to draw up a Convention on international communication by electronic means (Convention No. 30 of 17 September 2001) of data the exchange or issue of which is provided for in ICCS Conventions. The

[13] Convention n° 34 on the issue of multilingual and coded extracts from civil status records and multilingual and coded civil-status certificates, signed in Strasbourg on 14 March 2014.

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proposed regulation also provides, in Article 14, for the development of electronic versions of multilingual standard forms.

Things are not quite as simple as they appear, though. There are problems surrounding the terms used in various civil-status records, which are not the same in every country. There is also the matter of the rules on the protection of personal data, in Italy for example, where extracts may not be issued if they contain references to parenthood. As a further point, in order for there to be any point in using electronic means of communication, the computer systems used throughout the EU should be compatible with each other, so that documents can be read by all parties without any spelling errors being introduced and without any of the diacritics used in the original being altered. The issue of diacritical marks is particularly sensitive. Where an individual's name is blemished when he or she passes a national frontier, on the grounds that computer keyboards (or typewriters in the old days) cannot handle the diacritic marks in question, this is often experienced as undermining his or her identity. Although the problem hit the headlines in relation to the transliteration of a Greek name in the Roman alphabet (the *Konstantidinis* case),[14] it arises very day in relation to the diacritical marks used in the same alphabet, *e.g.* the Spanish tilde, the Polish barred letter "l", the Slavic circle placed above the letter "s", the French circumflex, etc. These difficulties lie at the core of the research projects currently being undertaken on the interoperability of computer systems.

11. The ICCS has courageously decided to move down this pathway to tomorrow's world. In paving the way, Convention No. 30 of 17 September 2001 on international communication by electronic means sets out a legal framework for the electronic exchange of civil-status data. The Convention states that "transmission of data must be effected in such a way as to ensure the integrity and authenticity of the contents and the security and confidentiality of the communication". It adds that "the Contracting States shall attribute to data transmitted electronically in conformity with the conditions set out in the preceding Article the same value in law as they do to data transmitted in a material form".

Going a step further, the ICCS has created and developed a technical platform, *i.e.* an electronic communication system that provides all the guarantees required under Convention No. 30. A new Convention (No. 33) on the use of the ICCS platform for the international communication of civil-status data by electronic means was signed in Rome on 19 September 2012. It sets out the legal conditions applying to the use of this computerised tool by the contracting states.

12. The European Commission's proposal does not address these difficulties, and restricts itself to stating that "the Commission shall develop electronic versions of Union multilingual standard forms or other formats suitable for electronic exchanges" (Article 14). What is now to become of the ICCS platform, the development of which has already cost a fortune? It is hard to believe that the EU is

[14] ECJ, 30 March 1993, case C-168/91, *Konstantidinis*, *ECR* [1993] I-1191, see in particular M. Fallon, Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne, *Recueil des Cours* vol. 253 (1995), p. 11 *et seq*., 86; L. Gannagé, Le droit international privé à l'épreuve de la hiérarchie des normes, *Rev. crit. dr. int. pr.* 2001, p. 1 *et seq*., 18.

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planning to develop its own technical system, to be used alongside that designed by the ICCS. Some form of collaboration with the ICCS is clearly needed.

V. Keeping Records Up to Date

13. Another type of problem caused by the diversity of systems relates to the issue of *maintaining civil-status records up to date*, particularly though not exclusively as regards civil-status events that take place in a foreign country.

Let's take the example of an individual born in one member state, who is recognised by his father in a second member state, marries in a third member state, gets divorced in a fourth member state, remarries in a fifth member state, dies in a sixth member state, etc. At each of these points, an instrument will be drawn up to record the event in question. However, every time preparations are made for a fresh event, marriage for example, the interested party must be able to prove the totality of his civil status. Here too, the problem lies in the diversity of the national systems. In the French system, all civil-status events pertaining to a particular individual are listed in the margin of his or her birth certificate, *i.e.* parental recognition, marriage, divorce, remarriage, any decisions or judgments relating to his or her nationality, death, etc. In other words, a birth certificate is a means of proof, bringing together all forms of relevant information – obviously, on the condition that any events that take place abroad are also listed. Other countries do not use this system of concentrating information in a single document. In Belgium and the Netherlands in particular, events involving citizens habitually resident abroad are not recorded. These countries are interested only in those individuals who habitually reside within their territory. They maintain a population register alongside their civil-status registers, and it is the former that contains civil-status records on foreign residents.

Whatever system is used, though, it must be capable of recognising events that take place abroad. Hence the need for organising the international exchange of data. A number of ICCS conventions seek to do this, principally Convention No. 3, published in 1958, and Convention No. 26, published in 1997. Under these Conventions, whenever a civil registrar in a contracting state records a marriage, death, divorce, recognition of a natural child or any of a range of changes in a person's civil-status records, he is required to notify his counterpart in the place where the spouses were born, or where the individual died, or in the place where their marriage was celebrated, and in doing so must make use of standard forms so that the addressee can understand the information provided.

14. The European Commission's proposal contains no provisions on this matter. This is a major omission. It must be said, though, that this is not a straightforward matter. It is not simply a question of agreeing on the type of data that may be exchanged. Identifying the appropriate means of exchanging data is the most difficult aspect. For example, under Convention No. 26, a civil registrar entering a marriage in a civil-status register is required to send an extract from the record of marriage to the civil registrar for the place of birth of each spouse. This is an

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excellent measure from a French viewpoint, given that, as has already been mentioned, French law concentrates all an individual's civil-status data in his or her birth certificate. In other words, notifying the civil registrar who made the original record of events taking place in foreign countries is a big step forward. However, in countries such as Belgium, which do not have this type of system, the civil registrar in the place of birth is not interested in events affecting an individual who no longer lives in the country, which means that the data received from abroad will serve no purpose. In other words, not only does the appropriate addressee need to be identified in each individual country, care must also be taken not to excessively complicate the work of the issuing civil registrar, *i.e.* the civil registrar who recorded the marriage in the above example.

There is no easy solution to this. One potential solution might be to ask each contracting state to indicate, in a statement drawn up before the regulation enters into force, which particular authorities would need to be kept informed. Although this might complicate matters for the issuing authorities, the rapid advance of technology should make things easier for them.

Another solution would be to make use of the central authority designated under the proposed regulation. The civil registrar in the country of origin (*e.g.* the registrar celebrating the marriage in this example) would notify the central authority in his country, which would transmit the information to the central authority in the country of destination. The latter would in turn pass on the data to the competent addressee authority in its own country (a registry office or population register, for example). This administrative cooperation described in Chapter III forms the only real added value in the proposed regulation compared with the ICCSs work. The functions of the central authorities are listed in Article 10. This list could be expanded to include the active and passive transmission of civil-status events taking place in foreign countries, to be entered in the registers of the relevant state.

15. Whatever the case, the real value of the international exchange of data on an individual's civil status comes into play only if the circumstances reported to the authorities in a foreign country are actually recognised by the same authorities. The proposed regulation excludes this aspect from the definition of its scope in Article 2, which is restricted to "the acceptance of public documents". Article 15 states that multilingual forms have the same formal evidentiary value as the equivalent public documents issued by the authorities of the issuing member state, which implies at the very least that this evidentiary value should be recognised by the other member states.

The use of forms is gradually becoming the standard solution. For example, Article 59 of Regulation 650/2012 of 4 July 2012 on matters of succession stipulates that an authentic instrument established in a member state has the same evidentiary effect in another member state, adding that a person wishing to use an authentic instrument in another member state may ask the authority in the member state of origin to fill in a form describing the evidentiary effects in the member state of origin. Although this is getting close to a recognition of circumstances, it is still not quite the same thing.

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In its present form, the European Commission's proposal is still full of gaps and does not keep all the promises made in the green paper. Not only does a lengthy dialogue need to be pursued before it can be adopted, there is also a great deal to be gained from closer cooperation between the European Union and the ICCS.

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TOWARDS THE RECOGNITION OF CIVIL STATUS IN THE EUROPEAN UNION

Christian KOHLER*

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I. Introduction: The Aim of the European Commission's Green Paper of 14 December 2010

Since the entry into force of the Amsterdam Treaty in 1999, discussions on the theory and methods of contemporary private international law increasingly reflect the impact of European Law, as well as the emergence of a private international law of the Union. In this context, the method of "recognition" of legal situations created abroad (*Anerkennungsmethode*), among other techniques of private international law, continues to be a subject of intense debate.[1]

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[1] See the recent contributions in P. LAGARDE (dir.), *La reconnaissance des situations en droit international privé*, Paris 2013; K. FUNKEN, *Das Anerkennungsprinzip im internationalen Privatrecht: Perspektiven eines europäischen Anerkennungskollisionsrechts*,

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One wonders, in particular, about the role of this method compared to the traditional one of conflict of laws which seeks the law applicable to an international situation by means of the rules on *renvoi* (*Verweisungsmethode*). Are these methods mutually exclusive or are they complementary? Is it appropriate to apply, in European private international law, the principles governing the internal market, where an existing status in the State of origin with respect to the commercialisation of a commodity, service or other benefit has to be "recognised" in the host State? In other words, must the requested State recognise a legal situation constituted in another Member State where it has not been subject to a judicial decision? Would such an obligation extend to the elements of the personal status of an individual moving freely within the European Union? Does it matter in this respect, which law was applied in order to create the legal situation? More precisely, can the host State require that its own conflict rules be respected in this regard?

These are some of the questions raised by the intention of the European Commission to promote "recognition of the effects of civil status records", formulated in the context of a Green Paper entitled "Free movement of public documents" and published in 2010.[2] In pursuing this objective, the document devotes a first series of questions to the "technical" side of the free movement of documents, including proof of authenticity, producing translations, *etc*. In April 2013, these issues were the subject of a proposed regulation[3] that Paul LAGARDE analyses in this volume of the *Yearbook*.[4] However, the proposal does not address issues related to the effects of civil status records; Article 2(2) of the proposal specifies that the Regulation "does not apply to the recognition of the content of public documents issued by the authorities of other Member States."[5]

Tübingen 2009; P. LAGARDE, Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures, *RabelsZ* 2004, p. 225 *et seq.*; *idem*, La reconnaissance, mode d'emploi, in *Vers de nouveaux équilibres entre ordres juridiques. Liber amicorum Hélène Gaudemet-Tallon*, Paris 2008, p. 481 *et seq.*; H.-P. MANSEL, Anerkennung als Grundprinzip des europäischen Rechtsraums, *RabelsZ* 2006, p. 651 *et seq.*; H.J. SONNENBERGER, Anerkennung statt Verweisung? Eine neue international-privatrechtliche Methode?, in *Festschrift für Ulrich Spellenberg*, München 2010, p. 371 *et seq.*; on the different variations of recognition, see J. BASEDOW, The Law of open societies – private ordering and public regulation of international relations. General course on Private international law, *Recueil des Cours* vol. 360 (2013), p. 9 *et seq.*, p. 258 *et seq.*

[2] "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records" (COM(2010) 747, of 14.12.2010).

[3] Proposal for a Regulation "on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union" (COM(2013) 228, of 24.4.2013).

[4] P. LAGARDE, The Movement of Civil-Status Records in Europe, and the European Commission's Proposal of 24 April 2013, *YPIL* 2013/2014, p. 1 *et seq*.

[5] The Explanatory Memorandum indicates that "the proposal does not address the issue of recognition of effects of public documents between the Member States nor does it introduce full harmonisation of all public documents existing in the Member States or situations in which they are needed in cross-border scenarios by EU citizens and businesses.

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The following remarks take up this specific point. Indeed, it is still a valid one, as the Commission did not give up the second part of the project presented in 2010. Rather, it seems that, given the complexity of the problem and the very nuanced, often critical responses to questions asked in the Green Paper, the Commission has allocated more time for reflection and preparation even if this means that the project has to be left to the Commission which will be appointed after the European Parliament elections in 2014.[6]

Recall the terms of the issue. The aim of the Green Paper is to "guarantee the continuity and permanence of civil status to all European citizens exercising their right of freedom of movement":

> In deciding to cross the border of a Member State to go and live, work or study in another Member State, the legal status acquired by the citizen in the first Member State (for instance change of surname for a married woman who has legally adopted her husband's surname) should not be questioned by the authorities of the second Member State since this would constitute a hindrance and source of objective problems hampering the exercise of citizens' rights. (4.1)

To achieve this goal, the Green Paper proposes to use the method of recognition for which there are two variants, namely automatic recognition on the one hand, and recognition based on the "harmonisation of conflict-of-law rules". The variant of automatic recognition would be made without harmonisation of the existing rules and would imply that each Member State would "accept and recognise […] the effects of a legal situation created in another Member State […] even if the application of that State's law would have resulted in a different solution." However, two qualifications should accompany this variant of recognition: on the one hand, it would be necessary to provide for "compensatory measures to prevent potential fraud and abuse and take due account of the public order rules of the Member States"; on the other hand, the scope of this type of recognition could be limited to certain civil status situations such as the attribution or change of name; other situations such as marriage might be less suitable in this regard.

The second variant of recognition is based on the "harmonisation of conflict-of-law rules" and would involve the adoption of a set of common rules that would provide the law applicable "to a cross-border situation when a civil status event takes place." Regarding the determination of connecting factors, the objective of facilitating the free movement of citizens should be taken into consideration:

> For instance, citizens living in a Member State other than their Member State of origin could have the law of this country, to which they have developed ties, applied to them rather than the law of their Member State of origin, which they had perhaps left many years before.

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[6] See H.-P. MANSEL/ K. THORN/ R. WAGNER, Europäisches Kollisionsrecht 2013: Atempause im status quo, *IPRax* 2014, p. 1, 5.

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Bearing in mind, however, that the interests of the citizen may be directly opposed, the Commission raised the possibility of a choice of law by interested parties. Indeed, through such choice, citizens could express their "attachment to their own culture and Member State of origin or to another Member State". This freedom of choice should, however, be regulated and "would have to lead to the application of a law with which the citizen has close links".

II. Recognition of Public Documents in Family and Succession Law in the Context of Judicial Cooperation in Civil Matters

There are already several situations in which public documents issued in areas of family or succession law may be subject to recognition according to European Union rules.[7] Admittedly, this is a recent development. The first generation of European instruments of judicial cooperation in civil and commercial matters included provisions whereby "authentic instruments" received and enforceable in a Member State were "declared enforceable" in another Member State; this declaration (the "exequatur") could only be refused if the enforcement of the instrument was contrary to the requested State's public policy.[8] Under the recast of the Brussels I Regulation, authentic instruments shall be enforceable in the other Member States "without any declaration of enforceability being required".[9] However, enforcement of the authentic instrument may still be refused if such enforcement is manifestly contrary to the public policy of the State addressed. To that effect, the new procedure of "refusal of enforcement" provided for in Article 46 shall apply "as appropriate" to authentic instruments. Under these provisions, the effects of authentic instruments outside the State of origin are, therefore, limited to their enforceability and do not extend to their substance, *i.e.* to the *negotium* which forms the basis of the instrument in question.

It is different in the case of more recent regulations in matrimonial matters and matters of parental responsibility, as well as matters relating to maintenance obligations. Indeed, the Brussels II-*bis* Regulation, like Regulation No 4/2009, provides that authentic instruments, to which are added respectively agreements

[7] See H. DUINTJER TEBBENS, Vers une libre circulation des actes authentiques dans l'Union européenne. Réflexions à propos d'un arrêt du Tribunal supremo d'Espagne du 19 juin 2012, in *Entre Bruselas y La Haya. Liber amicorum Alegría Borrás*, Madrid 2013, p. 309 *et seq.*; E. PATAUT, La reconnaissance des actes publics dans les règlements européens de droit international privé, in P. LAGARDE (dir.) (note 1), at 147 *et seq.*

[8] See Article 59 of Regulation No 44/2001 (Brussels I) and Article 57 of the Lugano Convention 2007; analogous provisions exist in the Brussels (1968) and Lugano (1988) Conventions.

[9] Article 58 of Regulation No. 1215/2012 (Brussels I-*bis*).

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between parties and court settlements, "shall be recognised" in another Member State.[10]

Thus, besides enforceability, the instruments also produce other effects that, in the State of origin, follow from the respective instrument according to its nature and content. In either case, the system of recognition is that of the respective regulation, such that the grounds for refusal provided therein apply to the extent that the nature of the instrument allows. In any event, the instruments are recognised regardless of the law applied to the *negotium* in the State of origin. This is in line with the fact that no review as to the applicable law is envisaged for judicial decisions that are subject to the regulations in question. Certainly, as far as judgments are concerned, the lack of such a review is justified to the extent that the conflict-of-laws rules for matters covered by the respective regulations have been unified by the regulations Rome I, II and III, as well as the Hague Protocol on the Law Applicable to Maintenance Obligations. However, these rules are not always respected during the *negotium* which is the basis for the public document, and the unconditional recognition of it may seem questionable given its functional equivalence with a judicial decision.[11]

Relinquishing the possibility to review the law applied in the context of the recognition of judicial decisions or public documents may create particularly troublesome difficulties in sensitive areas such as succession to estates or a couple's property rights. Consequently, in international successions matters, the adoption of a body of common rules on conflict-of-laws in the framework of Regulation (EU) No 650/2012 was not only an indispensable prerequisite for the recognition of judgments, but also for the "acceptance",[12] that is to say the recognition of authentic instruments established in this area.[13] Remedies exist to ensure compliance with the common rules, including an indirect review of the law applied to the *negotium* which forms the basis of the instrument. Indeed, in case of challenges, Article 59 of the Regulation distinguishes between those relating to the authenticity and those aimed at "the legal acts or legal relationships recorded" in the instrument. If the former are within the jurisdiction of the instrument's State of origin, which decides under the law of that State, the latter are brought before the courts with "jurisdiction under this Regulation", who decide "under the law applicable pursuant to Chapter III" of the Regulation. It is likely that similar provisions will be included in the regulations relating to matrimonial property regimes and the property conse-

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[10] Under Article 46 of the Brussels II-*bis* Regulation, authentic instruments and agreements between parties in the State of origin "shall be recognised and declared enforceable under the same conditions as judgments" and Article 48 of Regulation No 4/2009 provides that authentic instruments and court settlements "shall be recognised in another Member State and be enforceable there in the same way as decisions".

[11] See, in this regard, B. ANCEL/ H. MUIR WATT, La désunion européenne : le Règlement dit "Bruxelles II", *Rev. crit. dr. int. pr.* 2001, p. 403, 440 *et seq*.

[12] The term "acceptance" is used in the succession regulation to mean the recognition of both authenticity and the substantive effects of the document.

[13] Unlike what is provided for in Regulation No 4/2009 in terms of transactions relating to maintenance obligations, legal transactions relating to successions are not recognised but simply declared enforceable under Article 61 of Regulation No 650/2012.

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quences of registered partnerships, such that the law applied to an authentic instrument established in these matters shall be indirectly subject to review in case of dispute regarding the substantive validity of the instrument.[14]

In all cases mentioned above, it is certainly correct to say that there is no direct review of the law applied in the State of origin when it comes to recognition of the effects of public documents. Nevertheless, in view of the – at least partial – harmonisation of the conflict rules in the relevant fields, the given legal situations will have often been established under the law that would also have been applicable in the host State. Moreover, in matters of succession and property relations of the couple, compliance with the uniform conflict rules is ensured indirectly in the context of appeals against the recognition of the instrument.

III. Recognition of Legal Status in the Context of Free Movement of Citizens of the Union: The Example of Surnames

A. The Duty to Recognise Surnames as Determined in Another Member State

So far, the focus has been on public documents for which recognition is governed by regulations adopted in the framework of judicial cooperation in civil matters. Yet, the need to give effect to a legal situation created in a Member State also arises in areas of personal status in which the EU legislature has not yet intervened. In the context of freedom of movement or freedom of establishment, when it comes to determining the status of a citizen of the Union, of a marriage entered into in another Member State, of filiation or of another element of personal status determined and recorded there, must there be recognition in the host State, and if so, without regard to the law applied? This question was put to the European Court of Justice (ECJ) for the recognition of surnames.[15] In the relevant cases, the authorities of the host State had, in different contexts and regardless of economic activity, refused to "recognise" the names of interested parties as determined and registered in the Member State of origin, such that they were forced to identify themselves in the host State by a different name from that which had been given to

[14] The provisions envisaged in this regard in the Commission's proposals for the two regulations (COM(2011) 126 and 127) have, in the meantime, been adapted to the provisions of Article 59 of the Regulation on successions; see, in the reports of 20.8.2013 of the committee on legal affairs of the EP (A7-0253/2013 and A7-0254/2013), respectively amendments 98 (concerning Art. 32 of the Regulation on matrimonial regimes) and 100 (concerning Art. 28 of the Regulation on the property consequences of partnerships).

[15] See Ch. KOHLER, La reconnaissance de situations juridiques dans l'Union européenne : le cas du nom patronymique, in P. LAGARDE (dir.) (note 1), p. 67 *et seq.*; see also G. ROSSOLILLO, Personal identity at a crossroad between private international law, international protection of human rights and EU law, *YPIL* 2009, p. 143 *et seq.*

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them in the first Member State. On several occasions, the Court has held that such refusal may constitute a restriction on the freedom of movement of the interested parties, contrary to Article 21 TFEU. Indeed, as the interested parties were subject to EU law, even where they could not rely on the freedoms of the internal market, the Court had to turn to the general principles of non-discrimination and equal treatment as well as to the rights relating to European citizenship,[16] which confer on citizens of the Union movement and residence rights, which are at the same level as the fundamental freedoms. In pursuing this reasoning, the Court considered that "[n]ational legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union."[17]

The Court applies this formula to any measure that requires an EU citizen to take, in the host Member State, a name that is different from that which he had been given or which was his own in the Member State of origin.[18] In the *Garcia Avello* case,[19] the Court censured the Belgian authorities' rejection of a request to change the surname of children residing in Belgium and possessing dual Belgian and Spanish nationality; the surname requested was that to which they were "entitled according to Spanish law and tradition." In the *Grunkin and Paul* case,[20] where all parties concerned were of German nationality, the Court condemned the refusal of the German registry authorities to record the surname of the child as it had been determined and recorded in Denmark where the child was born and resided. The registration of this last name was rejected by the German authorities as being contrary to the substantive provisions of German law[21] applicable under the German conflict rule, namely Article 10, paragraph 1 of the Law introducing the Civil Code (EGBGB), which refers to the national law of the relevant person. In both cases, the Court affirmed the existence of "serious inconvenience" created by the discrepancy of surnames of the interested families; such inconveniences could arise for the parties from the need to dispel doubts about their identity in the Member States concerned. In a third case, *Sayn-Wittgenstein*, the Court, applying the same reasoning regarding the existence of an obstacle to freedom of

[16] See the cases cited in the *Garcia Avello* case (*infra*, note 19), at paras. 22 *et seq*.

[17] See the *Grunkin and Paul* case (*infra*, note 20), at para. 21.

[18] In the words of the Court in the *Garcia Avello* case, the "discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals" (para. 36).

[19] ECJ, 2.10.2003, Case C-148/02.

[20] ECJ, 14.10.2008, Case 353/06; See M. LEHMANN, What's in a name? *Grunkin-Paul* and beyond, *YPIL* 2008, p. 135 *et seq.*

[21] In Denmark, the child's parents had learned that the surname under which their son was registered ("Paul") was transformed by administrative act to a double-barrelled name, composed of the surname of each parent ("Grunkin-Paul"). By contrast, German law does not allow the attribution of a double-barrelled surname and makes parents choose one of their surnames for the child (§ 1617 of the *Bürgerliches Gesetzbuch*).

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movement, admitted, nevertheless, that such an obstacle could be justified by reasons of constitutional public order of the Member State concerned.[22]

B. The Purpose and Content of the Duty to Recognise

To better understand the above-mentioned cases in terms of private international law, it is important to first clarify the object, as well as the content of the duty of "recognition", as reflected in the judgments of the Court. The reasoning of the Court operates entirely within the concepts of EU law, and the term "recognition" should not be understood in a technical sense, like, for example, the recognition of judicial decisions under the regulations of the Union. By this term, the Court refers instead to the process by which the host Member State accepts the surname as it exists in another Member State and refrains from taking a position on its legality. The object of recognition is thus the legal status (*Rechtslage*) concerning the surname of a person as it exists in another Member State. However, to be recognised, the status must have taken some form that expresses a position taken by the authority of the State of origin, for example a court decision or official record. In the absence of such a "crystallisation",[23] the recognition has no object and one has to return to the *application* of legal rules. In cases decided by the Court of Justice, the surnames of the interested persons had been determined by authorities of the States of origin, as they were either registered in the civil status register (*Garcia Avello*[24] and *Grunkin and Paul*), or confirmed by a decision of the competent court (*Sayn-Wittgenstein*). The legal status was therefore sufficiently formalised (or "crystallised") to be recognised in another Member State. But what constitutes such recognition?

It has been mentioned that, according to the Court, the host Member State is required, except for reasons of public policy, to accept the surname as determined (and formalised) in the State of origin. That State has, therefore, to give effect to the legal status determined in the Member State of origin without regard to the law

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[22] ECJ, 22.12.2010, C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien*. The case involved an Austrian national who had been adopted in Germany by a German citizen and had obtained, as affirmed by the German authorities, the surname of the latter, which included a title of nobility and nobiliary particle. In Austria, the initial registration of the surname in the register of civil status was *ex officio* corrected: the applicant found himself stripped of the title and of the nobiliary particle, as the Austrian authorities found these elements to be contrary to Austrian constitutional law, which abolished the nobility in Austria. For the Court of Justice, it did not seem disproportionate that a Member State sought to achieve an objective of the Austrian law, namely to preserve the principle of equality by prohibiting any acquisition, possession or use by its nationals, of titles of nobility or nobiliary elements. Under these circumstances, the refusal, in Austria, to recognise the surname attributed in Germany, in its entirety, was found to be justified.

[23] See P. MAYER, Les méthodes de la reconnaissance en droit international privé, in *Le droit international privé : esprit et méthodes. Mélanges en l'honneur de Paul Lagarde*, Paris 2005, p. 547, 562.

[24] In this case, the children had been registered under the surname "Garcia Weber" at the Consular Section of the Embassy of Spain in Belgium.

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applied. However, if the Court is categorical regarding the result to be achieved, it does not take a position on the methods of internal law that each Member State must use to achieve this result. In the preliminary ruling procedure, it is the national court which must consider the response of the Court in the context of the main proceedings. However, to the extent that the interpretation given by the Court becomes an integral part of the interpreted provisions, Member States are required to take it into account beyond the limits of the case which gave rise to the preliminary ruling. Possible reactions may include both the adoption of legislative or regulatory provisions or measures regarding administrative practices.[25]

For the relevant Member State, the choice of method obviously depends on the state of its national law and will normally be guided by the need to maintain coherence within the internal legal order. The tension that may result from the implementation of the requirement imposed by the Court is a typical consequence of the selective intervention of the Court in the national legal order. In this context, the problem manifests itself in a particular way, as the duty of recognition defined by the Court is sometimes a difficult fit into the national structures of private international law. The aftermath of the above-mentioned cases in some Member States may serve as an illustrative example.

IV. Implementation of the Duty of Recognition in the Member States

A. The Legislature's Intervention in Germany and Sweden

1. *The Consequences of* **Grunkin and Paul** *in Germany*

The discussion preceding the implementation, in Germany, of the duty arising from the judgment in *Grunkin and Paul*,[26] to recognise the name of the child as determined and registered in Denmark, focused on three options, ranging from administrative law and practice to substantive civil law and to conflict-of-laws. The first option, the least "invasive" into domestic law, was to allow a name change under the administrative procedure provided by the *Namensänderungsgesetz,* it being understood that the "important reason" required by law resulted from the judgment of the Court. The second option was the introduction of a rule of substantive law which would have achieved the result required. Among the different variants of this option, that which would have allowed the attribution, to the child, of a double-barrelled surname composed of the surnames of each parent would have required the most incisive modification of substantive law. The third option was to change the conflict rule relating to surnames, namely Article 10 EGBGB, in order to allow the person(s) with parental

[25] A Member State's reaction to a judgment of the Court of Justice may, of course, lead to a (new) preliminary ruling or even infringement proceedings (Art. 258 TFEU).

[26] *Supra*, note 17.

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responsibility to choose, as the law applicable to the determination of the child's surname, the law of the State of the habitual residence of one of the parents. In order to do so, it would have sufficed to "bilateralise" the provisions of paragraph 3, No 2 of Article 10, which in its current wording allows for the choice of German law if one of the parents has his or her habitual residence in Germany.

The German legislature finally adopted[27] a provision of substantive law with a foreign element. Indeed, Article 48 of the revised EGBGB[28] provides that:

> *Unterliegt der Name einer Person deutschem Recht, so kann sie durch Erklärung gegenüber dem Standesbeamten den während des gewöhnlichen Aufenthalts in einem anderen Mitgliedstaat der Europäischen Union erworbenen und dort in ein Personenstandsregister eingetragenen Namen wählen, sofern dies nicht mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist*. (…)[29]

Article 48 of the EGBGB is a minimal response by the legislature to the requirements imposed by the Court of Justice. The provision certainly allows the parents to choose and register, in Germany, the name of their child as determined and registered in another Member State.[30] However, beyond the *Grunkin and Paul* case, its impact is limited by the fact that the choice exists only when the surname issue is governed by *German* law. The provision therefore offers no solution to the many cases where the surname is subject to a foreign law. It is true that the possibilities offered by Article 10, paragraph 3 of the EGBGB to choose the law applicable to the child's name can prevent such situations in many cases. But no solution exists when the child does not have German nationality and the surname acquired in the Member State of habitual residence differs from that provided for by national law (which may be that of a third Member State or a non-Member State). Consequently, the reaction of the German legislature stops halfway and fails to comply, in a significant number of cases, with the Court's case law. Inevitably, this may give rise to new controversies.

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[27] See Article 1, No 7, of the Law of 23.1.2013, *Bundesgesetzblatt* 2013, I, p. 101, which also includes the provisions for implementing Regulation (EU) No 1259/2010 ("Rome III").

[28] On the genesis of this provision, see Ch. KOHLER (note 15), p. 74 *et seq*.

[29] "When the name of a person is governed by German law, that person may, by declaration before the civil status officer, choose the name that he or she acquired while he or she was habitually resident in another Member State of the European Union and which was recorded in a civil status register unless this is manifestly incompatible with the basic principles of German law" (unofficial translation).

[30] The provision was not inserted in the "Private International Law" chapter of the EGBGB, but in the following chapter, entitled "Adaptation; choice of surname acquired in another Member State of the European Union", where it is added to Article 47, which relates to the change of surname acquired under a foreign law but now governed by German law. The purpose of the latter article, introduced in 2007, is to allow, on request, for the adaptation of the content or grammatical form of a surname, formed in a foreign language or according to foreign law or traditions, to the German language or traditions.

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Notwithstanding its exceptional nature, Article 48 EGBGB presents noteworthy peculiarities in terms of method. Applicable only where the surname is subject to German law under Article 10 of the EGBGB, Article 48 is not a classical rule of substantive law. Indeed, it does not itself determine the content of the surname[31] but accepts the name as it exists in the Member State where it was "acquired" and registered in a civil status register. The law applied to this effect in the Member State of origin is irrelevant, the only exception being German public policy. Article 48 EGBGB, therefore, uses the technique of *recognition of a legal status constituted in another Member State*, while integrating the rule of recognition in a provision of internal substantive law. As the provision only applies at the request of the interested person, Article 48 is an atypical amalgam of a rule of choice and a rule of recognition.

2. *The Amendment to the Law on Names in Sweden*

In the context of infringement proceedings initiated by the European Commission in 2007, Sweden recently amended the law on names (*Namnlagen*) to allow registration in Sweden of a surname acquired in another European State.[32] The Commission had received complaints from a Swedish-Spanish couple living in Sweden that had encountered the same difficulties as the Belgian-Spanish couple in the *Garcia Avello* case, with respect to the registration of their child's surname in Belgium. Indeed, the competent Swedish authority (*Skatteverket*) had refused to register the surname of the son, who had both nationalities, according to the Spanish tradition. Referring to the law on names, *Skatteverket* decided to register the surname of the son according to Swedish law.[33] Following criticism from the Commission and in order to satisfy the requirements of EU law,[34] Sweden added an Article 49a to its law on names in 2012, the first paragraph of which reads as follows:

> *Den som har förvärvat ett namn i en annan stat än Sverige inom Europeiska ekonomiska samarbetsområdet eller i Schweiz genom födelse, ändrat civilstånd eller annat familjerättsligt förhållande har genom anmälan till Skatteverket rätt att förvärva det namnet också i Sverige, om han eller hon vid förvärvet i den andra staten var medborgare eller hade hemvist där eller hade annan särskild anknytning dit.*[35]

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[31] Unlike Article 47 EGBGB (see the footnote above).

[32] *Lag om ändring i namnlagen* (1968:670), of 9.2.2012, SFS 2012:66.

[33] The law 1968:670 includes unilateral rules specifying its applicability to Swedish and Nordic citizens; see Articles 50 to 52; on the bilateralisation of these provisions, see M. BOGDAN, *Svensk internationell privat- och processrätt* (8th ed.), Stockholm 2014, chap. 9.11.

[34] The provision also reflects the EEA Agreement and the Agreement with Switzerland on the free movement of persons.

[35] "Where a person has acquired a surname in a State of the European Economic Area other than Sweden or in Switzerland by birth, by a change in personal status or

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The provision resembles Article 48 of the EGBGB, but it differs from the latter in that it applies to both Swedish nationals who have acquired a surname in another European State where they were domiciled and foreign nationals domiciled in Sweden who wish to use the surname acquired in their European State of origin. Given the determination of the Swedish legislature to respect EU law,[36] the provision should be able to address situations of dual nationality as was the case in *Garcia Avello*. Thus, as a Swedish citizen who is also a national of another European State may now, even while residing in Sweden, opt for the surname acquired in that other State. In essence, the new provision is a rule of recognition – even if optional – which, unlike Article 48 of the EGBGB, supplants the conflict rule which would otherwise be applicable.[37] Recognition is, thus, implemented by a *substantive rule of private international law,* which is integrated in the conflict regime and which specifies its own conditions of applicability.

B. Implementation through Administration: The Case of Belgium

To implement the *Garcia Avello* judgment,[38] rendered upon request of the Belgian *Conseil d'Etat*, Belgium opted for the less "invasive" method with respect to domestic law, namely the adoption of administrative provisions directed to the authorities responsible for surname changes. Indeed, the circular dated 23.9.2004 on aspects relating to "personal status" in the new Code of Private International Law,[39] stated that the judgment of the Court of Justice had no impact on the issue of the law applicable to the determination of the surname and that this jurisprudence should apply in case of a voluntary change of surname of a person who has both the Belgian nationality and the nationality of another Member State; the interested person should then have the right to obtain, by an administrative change of name, the surname to which he or she is entitled by virtue of the law and tradition of the second Member State. For the European Commission, this reaction fails to comply with the Court's case law, as the possibility to request a name change involves an indefinite procedure with an uncertain outcome.[40] The Commission therefore decided in 2012 to bring Belgium before the Court of Justice for

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through other circumstances relating to family law, he or she may, after informing *Skatteverket*, use this surname also in Sweden if at the time of acquisition of the surname, he or she was a national of that other State or had his or her residence there or another particular connection" (unofficial translation).

[36] On the genesis of this provision, see the proposal 2011/12:12; see also the information in *Reflets* 2013/2, p. 53 *et seq*., available on the website of the ECJ at <http://curia.europa.eu/jcms/jcms/Jo2_7063/>.

[37] Regarding the place of the new Article 49a in the context of the Swedish conflict rules on surnames, see M. BOGDAN (note 33), chap. 9.10.

[38] *Supra*, note 16.

[39] *Moniteur belge* du 28.9.2004.

[40] In *Garcia Avello*, the Belgian *Conseil d'Etat* set aside, in the main proceedings, the decision of the Minister of Justice dismissing the application for a change of name made by the parents of the children (judgment of 19 December 2003, No 126.675).

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infringement of the right to the free movement of children born in Belgium who have one Belgian parent and one parent with the nationality of another State the Union.[41]

C. Evaluation

Among the various measures described above for the implementation of the duty of recognition, only the one adopted in Sweden seems to meet the requirements resulting from case law of the ECJ. Indeed, Article 49a of the law on names gives effect, in Sweden, to the acquisition of a surname in another Member State without regard to the law applied while specifying the conditions under which the acquisition of the surname must have occurred. By contrast, Article 48 of the EGBGB falls short, as the recognition of the surname acquired in another Member State is only foreseen where German law is applicable by virtue of the German conflict rules. Finally, though meeting the requirements of EU law through administrative measures is not completely out of the question, the measures adopted in Belgium seem inadequate to give effect to the duty of recognition resulting from the judgments of the Court.

V. What Prospects for the Recognition of the Effects of Civil Status Documents?

A. Continuity of the Status Created Abroad or Consistency of the Internal Legal Order?

The examples given above are certainly not sufficient to make generalisations. It is, however, symptomatic of the difficulties that Member States experience when implementing the duty of recognition resulting from the case law of the Court. It also reflects some of the reactions to the second part of the Commission's 2010 Green Paper on the recognition of the effects of civil status documents.[42] Indeed, numerous answers filed with the Commission contain reservations relating to "automatic" recognition, even combined with a list of grounds for refusal, and express a preference for prior harmonisation of the conflict rules.[43]

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[41] See the press release IP/12/1021 of 27.9.2012: the case has not yet arrived at the Court.

[42] *Supra*, note 2.

[43] A different approach has been adopted by Paul Lagarde in his response to the Green Paper's questions. He is in favour of giving the widest possible field to the method of recognition, while highlighting the need for reflection on the precise definition of the grounds for non-recognition of status formalised in civil status documents from another Member State. He also recognises the advantages of harmonising the conflict rules. Responses to the Green Paper were published on the website of the European Commission at <http://ec.europa.eu/justice/newsroom/civil/opinion/110510_en.htm>.

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In Germany,[44] the debate preceding the adoption of Article 48 of the EGBGB demonstrates a similar approach. While the federal government defended its proposal to introduce a rule of substantive law, the *Bundesrat* favoured a revision of the current conflict rule on names in Article 10 of the EGBGB. In its reaction to this alternative, the government reasoned exclusively in terms of harmonisation of conflict rules on the basis of Article 81 TFEU without even mentioning the question of automatic recognition.[45] Recently, the preference for the harmonisation of conflict rules also appeared in the context of the debate initiated by the Commission to prepare the "post–Stockholm" program[46] in which several Member States and professional organisations[47] have stressed that the principle of "mutual recognition" should be used with caution and on the basis of harmonised conflict rules.

Such reservations with regard to automatic recognition demonstrate the desire to preserve the unity of the internal legal order, including the coherence of the conflict rules system. It is true that these objectives can be jeopardized when status under family law, expressed in civil status documents established in another Member State, is recognised without any review of the applied law. However, such doubts are no longer justified to the extent that the relevant conflict rules are unified or at least harmonized.[48] By contrast, in areas where the rules are not unified, such as marriage, partnership and filiation, automatic recognition is likely to override the otherwise applicable conflict rules. It is, of course, possible, even necessary, to make recognition subject to specific conditions relating, namely, to the connection to the State of origin, and to deny recognition in case of breach of

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[44] See the position expressed for the *Deutscher Rat für Internationales Privatrecht* by H.-P. MANSEL/ D. COESTER-WALTJEN/ D. HENRICH/ CH. KOHLER, *IPRax* 2011, p. 335 *et seq*. See also the response of the European Union Committee of the House of Lords which underlines that "[i]n particular, we do not support *automatic* recognition of civil status. Contrary to the Commission's assertion, that would involve a significant change to the law of a Member State (…) If recognition of civil status is shown to be necessary there would be benefits in this forming part of a more extensive harmonisation of conflict of law rules" (emphasis added in the original document).

[45] Deutscher Bundestag, Drucksache 17/11049 (17.10.2012), p. 15; see Ch. KOHLER (note 15), at 75 *et seq*.

[46] See the *Discussion paper 1*: EU Civil law (Assises de la Justice): "[…] there are different approaches that can be employed in building the European area of justice and in overcoming national divergences which impede the smooth functioning of the internal market in the area of civil justice: mutual recognition, traditional harmonisation (for example EU consumer law) or harmonised optional substantive or procedural law regimes (for example the proposed Common European Sales Law). The next steps in EU civil law should rely on a combination of these different approaches, depending on the type of problems which need to be addressed at EU level." (IP/13/919 of 7.10.2013).

[47] Such as the *Notaries of Europe* and the *Europäischer Verband der Standesbeamtinnen und Standesbeamten;* the contributions are accessible at <http:// ec.europa.eu/ justice/events/assises-justice-2013/contributions_en.htm>. The contribution of the *Deutscher Rat für Internationales Privatrecht* is also published in *IPRax* 2014, p. 87 *et seq.*

[48] For conflict rules on successions or property relations of the couple, see *supra*, II.

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public policy of the requested State.[49] However, when these conditions do not include any check on the law applied during the creation of the status, the recognition regime may create a parallel structure of heteronomous conflict rules in the requested State.[50] To avoid such a result, it is normally required, even in legal systems that allow recognition of judgments without a review of the law applied, that the status formalised in a civil status document be validly constituted under the law applicable by virtue of the conflict rules of the requested State.

B. The Requirements of EU Law

In the European Union, relations among the Member States are different from those existing with third countries, and the freedom of Member States to safeguard the coherence of their national legal systems is limited by the requirements of EU law. The quasi-federal ties created by the establishment of the Union require mutual consideration which implies that legal status validly constituted in one Member State should, in principle, also be able to take effect in other Member States. In the common space created by primary law, if uniform conflict rules are lacking, the interest of the host Member State to impose its own conflict rules is, in principle, not above the interest of the Member State of origin to demand respect for a legal situation formalised by its authorities on the basis of the conflict rules of that State. As is clear from the case law of the Court of Justice, the freedom of movement and residence enshrined at Article 21 TFEU confers individual rights that are at the same level as those resulting from fundamental freedoms of the market. In both cases, the exercise of these rights by citizens of the Union should not be hampered by national measures. It is in this context that freedom of movement impacts on the elements of personal status of individuals. Insofar as personal status is determined in a Member State, the right of Union citizens to maintain this status in another Member State, is protected by Article 21 TFEU. However, this continuity of personal status it is not imposed.

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[49] Regarding the conditions for recognition of status, see Articles 145 *et seq*. of l'Embryon de Règlement portant Code européen de droit international privé, proposed by P. LAGARDE, in M.FALLON/ P. LAGARDE/ S. POILLOT-PERUZZETTO (dir. publ.), *Quelle architecture pour un code européen de droit international privé*, Bruxelles (etc.) 2011, p. 365 *et seq*., also published in *RabelsZ* 2011, p. 673 *et seq*. Moreover, such conditions are included in Article 48 of the EGBGB and partly in Article 49a of the Swedish law on names.

[50] In 1961, W. WENGLER considered that the rule that allows for the recognition of foreign judgments without a check on the law applied operates as a "disguised additional allocation rule determining the law governing the relations between parties upon whom foreign judgments are binding" (*Recueil des Cours* vol. 104 (1961-III), p. 443). A decade later, he characterised this phenomenon as „verkapptes zweites Kollisionsnormensystem im Forumstaat", see P. PICONE/ W. WENGLER, *Internationales Privatrecht*, Darmstadt 1974, p. 435. On the institutionalisation of the "second system", see Ch. KOHLER, Der Einfluss der Globalisierung auf die Wahl der Anknüpfungsmomente im Internationalen Familienrecht, in R. FREITAG/ S. LEIBLE/ H. SIPPEL/ U. WANITZEK (eds), *Internationales Familienrecht für das 21. Jahrhundert. Symposium zum 65. Geburtstag von Ulrich Spellenberg*, München 2005, p. 9, 22 *et seq.*

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When the individual wants his or her integration in the host State reflected in his or her personal status, he or she must be able to submit to the status determined by the law of the host State. Indeed, in this highly personal field, it is up to the individual who exercises his or her right to move and to reside in another Member State, to choose between continuity and integration, and the primary law of the Union requires the legal protection of this choice.[51]

C. Recognition of Legal Status and Harmonisation of Conflict Rules

The foregoing considerations apply not only to surnames but also to other elements of personal status; the failure to recognise a marriage entered into or a filiation established in another Member State may equally infringe free movement rights of citizens of the Union.[52] If one wishes to avoid a situation where the ECJ will continue to intervene selectively and unpredictably in order to require Member States to give effect to status created in one of the States, action on the part of the EU legislature is required,[53] and at several levels. In the medium term, a legislative act establishing, within the Union, a system of recognition of formalised legal status in civil status documents[54] seems difficult to avoid. Ideally, such an act would be accompanied by the adoption of uniform conflict rules in the relevant areas: in a perfect world, both would be like Siamese twins. At least for sensitive matters, such as filiation or marriage, which may have an impact on nationality – and therefore Union citizenship – of the interested persons,[55] prior harmonisation of the conflict rules should be a condition for automatic recognition.[56]

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[51] On the role of party autonomy in this context, see Ch. KOHLER, L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme, *Recueil des Cours* vol. 359 (2012), p. 285, 401 *et seq.*; H.-P. MANSEL, Parteiautonomie, Rechtsgeschäftslehre der Rechtswahl und Allgemeiner Teil des europäisches Kollisionsrechts, in S. LEIBLE/ H. UNBERATH, *Brauchen wir eine Rom 0-Verordnung?*, München 2013, p. 241, 288 *et seq.*

[52] See the cases discussed by M. GRÜNBERGER, Alles obsolet? – Anerkennungsprinzip vs. klassisches IPR, in S. LEIBLE/ H. UNBERATH (note 51), at 81 *et seq.*; see also C.F. NORDMEIER, Stand, Perspektiven und Grenzen der Rechtslagenanerkennung im europäischen Rechtsraum anhand Entscheidungen mitgliedstaatlicher Gerichte, *IPRax* 2012, p. 31 *et seq.*

[53] See also H. DUINTJER TEBBENS (note 7), at 317.

[54] Depending on the orientation and with the qualifications proposed by P. LAGARDE (note 49). See also E. PATAUT (note 7), at 164 *et seq.* A general rule of recognition of the legal effects of an act is set out at Article 9 of Book 10 (Private International Law) of the Dutch Civil Code to the extent that the refusal to recognise such effects would violate the legitimate expectations of parties or legal certainty.

[55] See H.-P. MANSEL, Kritisches zur „Urkundsinhaltsanerkennung", *IPRax* 2011, p. 341 *et seq.*

[56] This approach has recently been followed in an academic proposal for a EU Regulation on the private international law of names, see A. DUTTA/ R. FRANK/ R. FREITAG/ T. HELMS/ K. KRÖMER/ W. PINTENS, Ein Name in ganz Europa – Entwurf einer Europäischen Verordnung über das Internationale Namensrecht, *StAZ Das Standesamt* 2014, p. 33 *et seq*; see also WORKING GROUP OF THE FEDERAL ASSOCIATION OF GERMAN

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In any case, the establishment of a system of recognition may give additional impetus to the pursuit of such harmonisation where the tensions resulting from the discrepancy of coexisting legal situations in the Member States should be considered as too disturbing. Thus, the principle of recognition and the harmonisation of conflict rules may play complementary roles to promote the free movement of citizens within the European Union.[57]

CIVIL STATUS REGISTRARS, One Name Throughout Europe – Draft for a European Regulation on the Law Applicable to Names, in this *Yearbook*, p. 31 *et seq.*

[57] The question as to the legal basis for the measures in question requires a separate analysis, which cannot be conducted here. In particular, it should be considered whether a system of recognition of the effects of civil status records could be based on Article 21 TFEU, as proposed by the Commission for the Regulation on the free movement of public documents (*supra*, note 4; see, in this regard, H.-P. MANSEL/ K. THORN/ R. WAGNER (note 6), at 5) However, the adoption of common conflict rules in the field of personal and family law would have to be based on Article 81, para. 3 TFEU, which, unlike Article 21, requires unanimity in the Council.

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ONE NAME THROUGHOUT EUROPE – DRAFT FOR A EUROPEAN REGULATION ON THE LAW APPLICABLE TO NAMES

WORKING GROUP OF THE FEDERAL ASSOCIATION OF GERMAN CIVIL STATUS REGISTRARS[*]

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I. Introduction

With the following draft for a European Regulation on the law applicable to names a proposal is made to create harmony of decision on the legal name of natural persons within the European Union.[1] Point of departure is the fact that, so far, the name of one and the same European citizen is often differently established in the Member States as common conflict rules are currently lacking in the European Union. This state of affairs is not compatible with the idea of a European citizenship and can impede the effective exercise of the fundamental freedoms within the Union. Hence, it is not surprising that the Court of Justice of the European Union on numerous occasions has encroached on the conflict rules of the Member States

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[1] A detailed explanatory report on the Draft is published in German in *Das Standesamt (StAZ)* 2014, p. 33 *et seq.* – available at <www.vfst.de/sites/vfst.site/files/dateien/sd_staz022014.pdf>.

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relevant for names,[2] albeit without triggering substantial reforms of the choice-of-law rules on names in the Member States. In any case, moreover, national conflict rules – even if reformed – could not guarantee a stability of names within the European Union.

II. Cornerstones of the Draft

A. Harmonisation of the Conflict Rules and the Principle of Mutual Recognition of Names – A Twofold Approach

In order to guarantee a stability of names the Draft does not only propose a harmonisation of the pertinent conflict rules (Articles 4 to 11). Rather, it also supplements its choice-of-law provisions by an obligation for all Member States to recognise names which have been registered in a civil status registry of a Member State (Article 12).

A harmonisation of the conflict rules alone would not safeguard that a person has the same name throughout the European Union. The application of foreign law entails difficult questions of interpretation and adjustment. Furthermore, even if a common connecting factor such as habitual residence is used, different authorities can come to the applicability of different laws. Additionally, an incorrect application of the law when registering the name can never be entirely excluded. Nevertheless, the European citizen can have in many cases a stability interest in using a name even if unlawfully registered.

However, also introducing solely an obligation to recognise names registered in other Member States without harmonising the conflict rules does not solve all problems. As the name of a person is established by the competent authority according to its own choice-of-law rules not only at his or her birth but also upon later changes of his or her family status, a mere obligation to recognise could lead to arbitrary results. The civil status of a person would be dependent on the application of the law in the Member State in which the change of the status was initially registered. Furthermore, third state cases would not be dealt with – hence, cases in which the name of the person was registered not within the European Union but abroad.

B. Principle of Habitual Residence (Article 4)

As a general rule, Article 4 of the Draft favours habitual residence as the primary connecting factor even though, in the majority of the European private international law systems, the name of a person is still governed by the law of

[2] ECJ, 30 March 1993, C-168/91, *Konstantinidis*; ECJ, 2 October 2003, C-148/02, *Garcia Avello*; ECJ, 14 October 2008, C-353/06, *Grunkin-Paul*; see also ECJ, 22 December 2010, C-208/09, *Sayn-Wittgenstein*.

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nationality.[3] Following the habitual residence principle is in line with the status quo in current European private international law. In the Rome I Regulation,[4] the Rome II Regulation,[5] the Rome III Regulation[6] and the European Succession Regulation,[7] habitual residence similarly plays an important role as the predominant connecting factor. This decision of the European legislator should also be followed in a European conflict rule on names. Submitting a person to the law of the habitual residence stresses – in accordance with fundamental ideas of primary European Union law (*e.g.* Article 18 and Article 21 of the Treaty on the Functioning of the European Union) – the interests of foreigners in being treated equally and in being integrated in the societies where they actually live. Furthermore, the use of habitual residence as a connecting factor quite often leads to a harmony between jurisdiction and applicable law. Birth and marriage – which are relevant for the name of a person – will mostly be registered in the State in which the person habitually resides. Therefore, the Draft enables the registrars to apply regularly their own law with which they will be most familiar. This factor cannot be overestimated as the certification processes in question constitute day-to-day business.

Article 4(2) clarifies that a change of the habitual residence by the person as such has no consequences on the stability of the name. Only events having relevance to a person's name after the change of the applicable law are governed by the newly applicable substantive law.

C. Choice of Law (Article 5)

Article 5 of the Draft grants a person a limited freedom of choice regarding the applicable law, although the majority of legal systems, so far, provide for mandatory conflict rules.[8] It could be inferred from the decision of the Court of the European Union in *Garcia Avello*[9] that a person being a national of more than one

[3] Exceptions are Denmark, Sweden and Switzerland, where the name of a person is governed by the law of the domicile.

[4] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Art. 4(1) lit. a, b, d, e and f and (2), Art. 5(1) and (2), Art. 6(1), Art. 7(2) subpara. 2 and Art. 11(2), (3) and (4).

[5] 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, Art. 4(2), Art. 5(1) subpara. 1 lit. a and (1) subpara. 2, Art. 10(2), Art. 11(2), Art. 12(2) lit. b.

[6] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Art. 5(1) lit. a and b, Art. 6(2), Art. 7(2)–(4), Art. 8 lit. a and b.

[7] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Art. 21(1), Art. 27(1) lit. d, Art. 28 lit. b.

[8] Exceptions are Germany (Art. 10[2] and [3] of the Introductory Act to the Civil Code) and Switzerland (Art. 37[2] of the Private International Law Act).

[9] ECJ, 2 October 2003, *Garcia Avello* (note 2).

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Member State can choose between the laws of those States. Furthermore, the idea of self-determination and the respect for personality rights would be best implemented if European Union citizens were able to choose, at least within certain limits, the legal system to govern their names. Such an approach would take account of the growing mobility and the multiple legal systems increasingly faced by European Union citizens.

According to Article 5(1) of the Draft, a person can choose that his or her name is governed by the law of nationality. In case of multiple nationalities the person has the choice between the laws of those nationalities. If the person has exercised his or her right to choose the applicable law, a modification of this choice shall only be possible in case of good reasons. These are – according to Article 5(2) – a change of civil status, habitual residence or nationality. As to the choice of spouses and registered partners for their names during their relationship, Article 5(3) contains a special rule. Spouses and registered partners shall have the possibility to commonly submit their names to the law of the habitual residence or nationality of one of them.

D. Principle of Mutual Recognition (Article 12)

Article 12(1) of the Draft provides for automatic recognition of the name which has been recorded in a civil status registry of a Member State. The correct application of the conflict rules or the substantive law in the Member State of initial registration is not a precondition for the recognition of the name. In case of conflicting registrations Article 12(2) establishes a priority principle.

In private international law, so far, such a principle of recognition is not a matter of course. Not all Member States award foreign registration documents binding effect. If, however, the conflict rules for names are harmonised within the European Union, a principle of recognition is well justified because all civil status registrars will then establish the name based on the same law.

E. Change of Name by an Authority (Article 13)

According Article 13(1) the proposed Regulation shall not determine the applicable law for the change of a name by a competent authority. Traditionally, the Member States regard the change of a name by an authority as a matter of their public law not subject to the (private law) conflict rules for names. Nevertheless, the Draft provides for a mutual obligation to recognise such changes of name. However, pursuant to Article 13(2), this obligation is limited to changes of names which have been ordered by a competent authority of a Member State whose nationality the person in question has or in which the person habitually resides.

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III. Draft for a European Regulation on the Law Applicable to Names of Persons

Chapter I *Scope*

Art. 1 *[Scope]*

This Regulation shall apply to the names of persons.

Art. 2 *[Competence of the Member States for the registration of names]*

This Regulation shall not affect the competence of the authorities of the Member States for the registration of names of persons.

Art. 3 *[Universal application]*

Any law specified by this Regulation shall apply even if it is not the law of a Member State.

Chapter II *Applicable law*

Art. 4 *[Applicable law in the absence of choice]*

(1) The name of a person shall be governed by the law of the State in which this person has his habitual residence.

(2) The change of the habitual residence as such shall not alter the name.

Art. 5 *[Choice of law]*

(1) A person may choose that his name is governed by the law of the State whose nationality he possesses. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses.

(2) A person may alter the choice of law if his civil status, habitual residence or nationality changes. The person may stipulate in this case that his name is governed by the law of the State whose nationality he possesses or in which he has his habitual residence. The second sentence of paragraph 1 shall apply accordingly.

(3) Spouses and registered partners may agree that their names are governed by the law of the State

(a) whose nationality one of them possesses; the second sentence of paragraph 1 shall apply accordingly, or

(b) in which one of them has his habitual residence.

For an alteration of this choice of law paragraph 2 shall apply accordingly.

(4) The choice of law must be made before the competent authority and shall be made expressly or shall be clearly demonstrated by the declarations or the circumstances of the case.

(5) The existence and substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

(6) The competent authority shall inform the parties of the possibility of a choice of law.

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Art. 6 [Dependent treatment of preliminary questions]

Preliminary questions on which the name of a person depend are governed by the conflict rules of the State whose law is applicable to the name.

Art. 7 [Exclusion of renvoi]

The application of the law of any State specified by this Regulation shall mean the application of the rules of law in force in that State other than its rules of private international law.

Art. 8 [Public policy]

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the law of the forum.

Art. 9 [States with more than one legal system – territorial conflicts of laws]

Where a State comprises several territorial units each of which has its own system of law or a set of rules concerning the names of persons:

(a) any reference to the law of such State shall be construed, for the purposes of determining the law applicable under this Regulation, as referring to the law in force in the relevant territorial unit;

(b) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

(c) any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the person.

Art. 10 [States with more than one legal system – inter-personal conflicts of laws]

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of the name of a person, any reference to the law of that State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the person has the closest connection shall apply.

Art. 11 [Non-application of this Regulation to internal conflicts of laws]

A Member State which comprises several territorial units each of which has its own rules of law in respect of the name of a person shall not be required to apply this Regulation to conflicts of laws arising between such units only.

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Chapter III Recognition

Art. 12 [Recognition]

(1) A name which has been registered by a competent authority of a Member State shall be recognised in all other Member States.

(2) Paragraph 1 does not apply if the registered name is incompatible with a name which has been previously registered in another Member State.

(3) A Member State may refuse the recognition of a name based on this Article only if such recognition is manifestly incompatible with the public policy (ordre public) of this Member State.

Chapter IV Change of name by the competent authority

Art. 13 [Official change of name by the competent authority]

(1) If the competent authority of a Member State changes the name of a person, the authority is not bound by the provisions in Chapter II.

(2) The recognition of a decision of a competent authority of a Member State, whose nationality the person possesses or in which the person has his habitual residence based on paragraph 1, is subject to Art. 12.

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HARROUDJ V. FRANCE: INDICATIONS FROM THE EUROPEAN COURT OF HUMAN RIGHTS ON THE NATURE OF CHOICE OF LAW RULES AND ON THEIR POTENTIALLY DISCRIMINATORY EFFECT

Patrick KINSCH*

An article published in the 2011 edition of this *Yearbook*[1] sought to provide a general description of the European human rights protection mechanism and of its application to private international law topics. In the two years since publication of that article there have been a significant number of judgments and decisions by the European Court of Human Rights touching on matters of private international law,[2] including an important decision by which the Court has preserved – for the time being at least – the EU European Enforcement Title mechanism as applied to the Brussels II-*bis* Regulation, and thereby a central part of the EU's "free movement of judgments" programme, from challenge under the European Convention on Human Rights.[3]

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* Of the Luxembourg Bar; Professor, University of Luxembourg.

[1] P. KINSCH, Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011), *YPIL* Vol. 13 (2011), p. 37 *et seq.*

[2] The more original judgments during the years 2012 and 2013 appear to be (apart from the *Povse v. Austria* decision mentioned in the next footnote) *Granos Organicos Nacionales S.A. v.* Germany, judgment of 22 March 2012, No 19508/07 (no violation of the non-discrimination provision of Article 14 of the Convention, in combination with the right to access to a court, by the decision of a German court denying legal aid to the applicant company for the purposes of a claim that it intended to bring before a German court; the denial of legal aid was grounded on the applicant's foreign nationality: this rule of German law was held to be justified by "the principle of reciprocity") and *X. v. Latvia* [GC], judgment of 26 November 2013, No 27853/09, confirming the chamber judgment of 13 December 2001 (see *YPIL* Vol. 13 (2011), p. 47-48).

[3] See the decision of 18 June 2013, *Sofia and Doris Povse v. Austria*, No 3890/11. In that case the Court rejected an application against Austria for having enforced an Italian order for the return of a child to Italy obtained by her father. The order had been enforced, as required under Article 42 of Council Regulation (EC) No. 2201/2003 ("Brussels II-*bis*"), "without any possibility of opposing its recognition" and therefore without any review by the Austrian courts (see also the preliminary ruling by the ECJ, C-211/10 PPU, *Doris Povse v. Mauro Alpago*, [2010] *ECR* I-6673), something that usually goes against the by now well-established jurisprudence of the European Court of Human Rights construing the right to family life under Article 8 of the Convention (see, in cases involving the return of children to Israel, *Neulinger and Shuruk v. Switzerland*, judgment of 6 July 2010 [GC], No 41615/07, and to Australia, *X. v. Latvia*, preceding note). In *Povse* however, the Court extended to the Brussels II-*bis* Regulation its holding in *Bosphorus Hava Yolları Turizm ve*

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This article concentrates on another recent judgment of the Court. It does not consider the issues of judgment recognition which, for the time being, tend to be the private international law issues most commonly dealt with by the Court. It deals with fundamental questions of choice of law.

1. In *Harroudj v. France*,[4] the question at issue was a denial by the French courts of a request for adoption. A French national, Ms Harroudj, had been authorized by an Algerian court to take a child, Hind (then aged three months), into her legal care (*kafala*). The court also authorised the child to leave Algeria with Ms Harroudj and settle in France; another Algerian court authorised the change of the child's name to Hind Harroudj. Two years later, Ms Harroudj applied in France for full adoption of the child, arguing that a full adoption was the solution most consistent with "the best interests of the child", within the meaning of Article 3 § 1 of the Convention on the Rights of the Child of 20 November 1989 and Article 1 of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. This request was denied: adoption is a valid concept under the law of France but it is not valid under Algerian law which, in accordance with Islamic law, expressly prohibits it.[5] *Kafala* is not equivalent to adoption. Under a choice of law rule introduced into the French *Code civil* (as Article 370-3) by a law of 6 February 2001,

> "The requirements for adoption are governed by the national law of the adopter or, in case of adoption by two spouses, by the law which governs the effects of their marital relationship. Adoption, however, may not be granted where it is prohibited by the national laws of both spouses.
>
> Adoption of a foreign minor may not be ordered where his or her personal law prohibits that institution, unless the minor was born and resides habitually in France..."[6]

Ticaret Anonim Şirketi v. Ireland [GC] (judgment of 30 June 2005, No 45036/98, ECHR 2005-VI), which had shown the willingness of the Court to leave the obligations of the contracting States under European Union law undisturbed, as long as the standard of human rights protection under EU law could be recognized as equivalent to the protection afforded under the ECHR. – In a later case (*Avotiņš v. Latvia*, judgment of 25 February 2014, No 17502/07) the Court applied similar reasoning to the recognition in Latvia of a Cypriot judgment under the Brussels I Regulation: Article 34(2) of the Brussels I Regulation was allowed to prevail over the fair-trial rights of the defendant to the Cyprus proceedings, who had failed to exercise an appeal in Cyprus against a default judgment entered against him and declared enforceable in Latvia.

[4] Judgment of 4 October 2012, No 43631/09.

[5] Article 46 of the Algerian Family Code: "Adoption (*tabanni*) is prohibited by the *Sharia* and by legislation."

[6] Before that law, the French private international law of adoption was much more flexible and allowed children given in *kafala* to be adopted once they had arrived in France, under the condition of the "consent" of the minor's representative "having regard to the effects attached by French law to adoption and, in particular, in the case of full adoption, to the complete and irrevocable nature of the severance of the relationship between the minor

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Since Hind was not adoptable under her national law, Ms Harrouj's adoption request was denied. Ms Harroudj subsequently brought an application against France alleging violation of Article 8 of the Convention (right to family life) and Article 14 in combination with Article 8 (discrimination in the enjoyment of family life) – the argument for this latter ground for the application was based on the fact that while the applicant could not adopt Hind, there was no obstacle to the adoption of other children, whose national law did not prohibit adoption.

2. The Court approached the claim that the applicant's right to family life had been violated by first pointing out that family life indeed existed between Ms Harroudj and the child. What was disputed was whether there was, in addition, a positive obligation for the French authorities to recognise a legal parent-child relationship by granting the applicant's request for full adoption of Hind. In that respect, the Court found that the French authorities had a broad margin of appreciation[7] and the Court ultimately considered that "the applicant met with refusal largely on account of a concern to abide by the spirit and purpose of international conventions". By this it meant the UN Convention on the Rights of the Child of 20 November 1989, Article 20 of which puts on the same plane (and considers as in accordance with the best interests of the child) adoption and *kafala* under Islamic law, and the Hague Conventions of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption and of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures to Protect Children, all of which are based on the same logic. According to the Court, "the recognition of *kafala* by international law is a decisive factor in assessing how States deal with it in their national laws and envisage any choice-of-law issues that may arise."

Next, the Court noted that although some differences between *kafala* and adoption are insurmountable (especially the fact that *kafala* "has no effects for inheritance"), the restrictions engendered by the impossibility of adopting the child can be remedied to some extent. The Court therefore concluded as follows:

> "The respondent State, applying the international conventions that govern such matters, has put in place a flexible arrangement to

and his blood relatives or the guardianship authorities of his country of origin" (Cour de Cassation, Civ. 1re 10 May 1995, *Rev. crit. dr. int. pr.* 1995, p. 547, with annotation by H. MUIR WATT). But, since the minor's representative frequently was a public authority assuming the function of guardian over an abandoned child, this solution was tantamount to accepting the consent of the child's representative even given in error or illegally under the child's (and the representative's) national law. On the 2001 law, see generally P. LAGARDE, La loi du 6 février 2001 relative à l'adoption international: une opportune clarification, *Rev. crit. dr. int. pr.* 2001, p. 275 *et seq.*; H. MUIR WATT, La loi nationale de l'enfant comme métaphore: le nouveau régime législatif de l'adoption internationale, *Clunet* 2001, p. 995 *et seq.*

[7] § 47-48. The "broad margin of appreciation" existed in view of the considerable differences between the private international law systems of the various member states of the Council of Europe on the proper approach to the choice of law in adoption matters generally and, specifically, to the role of a preexisting *kafala* in an adoption (see §§ 21 and 22 for a summary of the comparative material on which the Court relies).

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> accommodate the law of the child's State of origin and the national law. The Court notes that the prohibition of adoption stems from the choice-of-law rule in Article 370-3 of the Civil Code but that French law provides the means to alleviate the effects of that prohibition, based on the objective signs of a child's integration into French society. Firstly, the choice-of-law rule is expressly set aside by the same Article 370-3 in cases where "the minor was born and habitually resides in France". Secondly, this choice-of-law rule is deliberately circumvented by the possibility for the child to obtain French nationality, within a reduced period of time, and thus to be adopted, when he or she has been in the care of a French national. The Court observes in this connection that the respondent State argued, without being contradicted, that Hind could already benefit from such a possibility.
>
> The Court takes the view that by gradually obviating the prohibition of adoption in this manner, the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant."[8]

As to the claim that the applicant's right to non-discrimination had been violated by submitting the adoptability of Hind to Algerian law (which made her unadoptable) while other children, subject to other national laws without the same types of restrictions on their adoptability, could be adopted in France, this was treated as an issue that did not call for separate treatment:

> "The Government submitted that the alleged difference in treatment stemmed from an objective factor related to the child's personal law and in accordance with the child's best interests and that it was proportionate to the aim pursued.
>
> In the Court's view, the gravamen of the applicant's complaint under Article 14 of the Convention is her inability to adopt Hind on account of the child's personal law. That issue has been examined under Article 8 and no violation thereof has been found. In those circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding."[9]

3. *Harroudj* is remarkable for the attention paid by the European Court of Human Rights to the aims pursued by private international law in general and by the submission of personal status to nationality in particular. It is the first, and so far the only judgment of the Court to enter into a serious discussion of those aims. While not being a mandatory consideration for a court deciding cases solely on the basis of the European Convention of Human Rights – rather it is sufficient if the

[8] § 51.

[9] § 54-55.

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Court correctly understands the operation of the rule and then assesses its consequences in view of the human rights norms relied upon –, nevertheless such concern and consideration is always welcome. The view of the private international law of family relationships that the Court approves of in the *Harroudj* case is the modern (or postmodern) view emphasising the individual's cultural identity and the links of that identity to his or her national origin, rather than the 19th century view (also held by most private international lawyers for much of the 20th century, for that matter) based on the State's interest in the uniform application of its law to its nationals.[10] However it is also clear that the Court does not simply accept, without further review, the solutions provided for by national choice of law rules submitting the question of adoptability to Algerian law. It rules that the solutions of French private international law are compatible with the right to family life and therefore also with the right to non-discrimination, but only because they admit that eventually, in view of "the objective signs of a child's integration into French society", the substantial solution of French law (adoptability of the child) replaces the restrictive substantial solution of Algerian law, and that the connection to Algerian law is not immutable in case of subsequent acquisition of French nationality.

This also appears to mean that the Convention would have been violated if the French system of conflict of laws had proved excessively and unreasonably rigid and admitted no relaxation at all of the rule of non-adoptability of a child whose State of origin does not allow for adoption. Conflict of laws rules are a part of the legal system of the forum State; as such they cannot escape review in light of the human rights norms binding on that State.[11] In particular, they cannot be said to be too abstract for such a review to be conducted. The fact that the child Hind could not be adopted by Ms Harroudj was that Algerian substantive law prohibits adoption as being against the Sharia, and Algeria is not a contracting State to the European Convention on Human Rights. France, on the other hand, is a contracting State and French conflict rules direct that Algerian law is to be applied in this case. That is the ultimate reason why the restrictive attitude of *Algerian* law can and will be subjected to review under the *European* Convention on Human Rights – not because Algeria would be bound by the Convention (it is not), but because France, by referring through its choice of law rules to the substantive solution of Algerian law (and by not displacing it as being against French public policy) gives it effectiveness in France.

Similar reasoning can be applied to the discrimination argument. This would not appear to be contradicted either by the fact that the French conflict rules

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[10] An eminent proponent of the view that the Court thus shares is E. JAYME: Identité culturelle et integration – Le droit international privé postmoderne, *Recueil des Cours* vol. 251 (1995); *idem*, Kulturelle Identität und Kindeswohl im internationalen Kindschaftsrecht, *IPRax* 1996, p. 237 *et seq*.; *idem,* Die kulturelle Dimension des Rechts – Ihre Bedeutung für das Internationale Privatrecht und für die Rechtsvergleichung, *RabelsZ* 2003, p. 211 *et seq*.

[11] That was the great contribution to private international law theory of the *Spanierbeschluss*, the important decision of the German Constitutional Court of 1971 (BVerfGE 31, 58) which deals with the issues raised by conflict rules and the applicable foreign law, as confronted to the fundamental rights defined by the German constitution.

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have no substantive content.[12] Behind the solution adopted by the Court is the idea that there exist, not in French substantive law but still in France and in the French legal system as a whole, two rules of substantive law with respect to the adoptability of children: a rule of adoptability for children whose personal status is governed by a law which allows adoption, and a solution of non-adoptability for children of restrictive personal status. The scope of these two rules is determined by the French conflict rule. Thus, it seems that conflict rules are not, after all, immune from review under the rule of non-discrimination, just as the application of Algerian law designated by the conflict rule of French law is not immune from review in the light of the right to family life.[13] The margin of appreciation of contracting States is a broad one, and no specific choice of law rule can be said to be mandated by the European Convention on Human Rights. However, if a choice of law rule should be seen as irrational, it will be held discriminatory.

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[12] See F. MARCHADIER, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, 2007, p. 272 *et seq*., and the nuanced position taken by J. MEEUSEN, Le droit international privé et le principe de non-discrimination, *Recueil des Cours* vol. 353 (2011), p. 46. The present author admits that he has in the past taken another position, of which it might be thought that it gave excessive emphasis to the absence of substantive content of choice of law rules.

[13] This could also be seen as an illustration of the ideas, frequently dismissed as impractical, of Italian conflicts theorists of the first half of the 20th century on the "reception" or "nationalisation" of foreign law through the forum's choice of law rules: see P. KINSCH, Sur la question de la discrimination inhérente aux règles de conflit de lois. Développements récents et interrogations permanentes, in *Liber Amicorum Laura Picchio Forlati*, Torino 2014.

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THE NATURE, OBJECTIVE AND PURPOSES OF THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS

Jan L. NEELS*

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I. Introduction

In 2009 the Council on General Affairs and Policy of the Hague Conference on Private International Law invited the Permanent Bureau of the Conference to form a Working Group to draft a non-binding instrument, provisionally called the Hague Principles on Choice of Law in International Contracts, affirming the principle of party autonomy in a universal model of conflict rules applicable to choice of law in international contracts. The Working Group met on three occasions between January 2010 and June 2011, chaired by Professor Daniel GIRSBERGER of the University of Lucerne and facilitated by Professor Marta PERTEGÁS of the Permanent Bureau. The draft of the Working Group was considered and largely accepted by the Special Commission on Choice of Law in International Contracts held in The

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Hague from 12-16 November 2012. At its fourth and fifth meetings in The Hague, from 24 to 26 June 2013, and from 27 to 28 January 2014, respectively, the Working Group suggested some further technical improvements to the document. The group also suggested changing the title of the instrument to the Hague Principles on Choice of Law in International Commercial Contracts.[1]

The Working Group was also requested to compile the Hague Conference's official commentary on the Hague Principles. The author was invited to provide the Working Group with draft commentary on *inter alia* the Preamble for consideration at its meeting in June 2013. The text below is based on research undertaken for this purpose.[2] The article introduces the nature, objective and purposes of the draft Hague Principles by providing a commentary on the Preamble.

On 10 April 2014 the Council in principle accepted the substance of the Principles and the draft Commentary. Member States have until 31 August 2014 to submit comments on changes to the draft Commentary that were effected by the Working Group or its Editorial Committee after January 2014. The Working Group was requested to consider the comments and undertake the editorial finalisation of the Principles and the Commentary in the two official languages of the Hague Conference (English and French). The final version of the texts will be submitted to the Member States for approval through a written procedure. The Principles and the Commentary will be approved if no objection is raised within 60 days. The draft Principles may therefore attain the status of an official Hague instrument before the end of the current year.

II. Text of the Preamble to the Hague Principles

The Preamble to the draft Hague Principles, as adopted by the Special Commission, reads as follows:

> "This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
>
> They may be used as a model for national, regional, supranational or international instruments.

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[1] See <www.hcch.net> for the history of the project and all the official documentation, including the Working Group's draft and the text adopted by the Special Commission. See, in general, S.C. SYMEONIDES, The Hague Principles on Choice of Law for International Contracts: some preliminary comments, *The American Journal of Comparative Law* 2013, p. 873 *et seq.*

[2] Some of the text below will be used in the official commentary and such material is included with the permission of the Permanent Bureau of the Hague Conference. In some instances linguistic revisions by the Permanent Bureau and the Working Group were taken into account.

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They may be used to interpret, supplement and develop rules of private international law.

They may be applied by courts and by arbitral tribunals."

III. Commentary on the Preamble

A. Introduction

The Preamble to the Hague Principles on Choice of Law in International Contracts introduces the nature,[3] objective[4] and intended purposes[5] of the Principles as a non-binding instrument.[6]

B. Paragraph 1: Principles

The provisions of the draft Hague Principles are described as "general principles", which term reflects their character as part of a non-binding instrument (hence also the title Hague *Principles*).[7] The principles address freedom of choice of law in international commercial contracts;[8] they do not apply to consumer or employment contracts.[9] The instrument may be considered as a code of current best practice with respect to choice of law in international commercial contracts, as recognised at an international level, with certain innovative provisions where appropriate.[10]

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[3] Paragraph 1.

[4] Paragraph 1.

[5] Paragraph 2-4.

[6] The formulation is partially inspired by the Preamble to its sister instrument, the UNIDROIT Principles of International Commercial Contracts. See UNIDROIT (International Institute for the Unification of Private Law), *UNIDROIT Principles of International Commercial Contracts 2010*, Rome 2010, p. 1.

[7] Compare the use of the word "principles" in the titles of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law, as well as the use of the word "rules" in Paragraph 3, referring to binding norms of private international law on a national, regional, supranational or international level. The use of the word "principles" in Paragraph 1 does therefore not allude to the distinction made between rules and principles made by, for instance, R. DWORKIN, *Taking Rights Seriously*, Cambridge 1978, p. 22-28 and 71-80.

[8] As described in Article 1(1)-(2).

[9] Article 1(1).

[10] See, for instance, Articles 3 (choice of rules of law), 5 (formal validity) and 6(1)(b) (choice of law in the battle of forms).

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The objective of the instrument is the affirmation of the underlying principle of party autonomy[11] with respect to choice of law in the context of international commerce.[12] Endorsing party autonomy meets the legitimate expectations of the parties operating in this environment and, as such, advances foreseeability and legal certainty. The Principles therefore affirm the freedom of parties to an international commercial contract[13] to choose the law applicable thereto.[14] However, the Principles provide limited exceptions to the principle of party autonomy where justified.[15]

C. Paragraph 2: Model

During the past several decades, there has been a proliferation of conflicts codes on a national, regional, supranational and international level.[16] There is nothing to suggest that this phenomenon has come to an end. One of the objectives of the current instrument is the acceptance of its principles in existing and future private international law codes, on all levels, eventually producing a substantial degree of harmonisation of law in respect of choice of law in international commercial contracts. In Paraguay draft legislation was already prepared to incorporate the Hague Principles in domestic private international law.[17] The instrument may also provide an impetus for smaller-scale projects, for example, the proposed changes to the Indian Limitation Act,[18] which are in conformity with Article 9(1)(d) of the Principles.[19]

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[11] The "principle of party autonomy" is clearly seen as an overarching, a fundamental or an underlying principle (see the first sentence of Paragraph 1 and the title of the instrument). Also see the second part of the Preamble to the Basel Resolution of the INSTITUT DE DROIT INTERNATIONAL / INSTITUTE OF INTERNATIONAL LAW: *The Autonomy of the Parties in International Contracts between Private Persons or Entities* (1991) (rapporteur E. JAYME), per <www.idi-iil.org>: "considering that the autonomy of the parties is one of the fundamental principles of private international law".

[12] See, in general, on party autonomy in private international law of contract, the Basel Resolution of the INSTITUT DE DROIT INTERNATIONAL (note 11); and P. NYGH, *Autonomy in International Contracts*, Oxford 1999.

[13] See Article 1(1)-(2).

[14] See Articles 2-3.

[15] Namely in Article 11, on overriding mandatory rules and public policy.

[16] See S.C. SYMEONIDES, Codification and flexibility in private international law, in K.B. BROWN/ D.V. SNYDER (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law / Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, Dordrecht 2011, p. 167, at 168-174.

[17] Available at <www.hcch.net>.

[18] The Law Commission of India proposed in 2005 that "the period of limitation and the principle of extinguishment of the right" of the proper law of the contract (and therefore not the *lex fori*) should apply (Clause 2(2) of the Limitation (Amendment) Bill, 2005, proposing a new Section 11(2) to the Limitation Act 36 of 1963). See LAW COMMISSION OF INDIA *193rd Report on Transnational Litigation – Conflict of Laws – Law of Limitation*, 2005, available at <http://lawcommissionofindia.nic.in/reports/Report193.pdf>. The

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In as far as regional instruments are concerned it has been argued that the Hague Principles may contribute to the refinement of the Mexico City Convention.[20] They will be highly persuasive in the formulation of the envisaged African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts.[21] A similar role for the Principles may be expected with regard to a future revision of the (supranational) Rome I Regulation,[22] for instance, in respect of Article 3 on the choice of non-national rules of law,[23] Article 5 on the formal validity of a choice of law[24] and Article 6(1)(b) on choice of law in the context of the conflict between choice of law clauses in standard terms (choice of law in the battle of the forms).[25]

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proposal extends beyond choice of law, as it will also govern the position in the absence thereof. Also see B.A. MARSHALL, Reconsidering the proper law of the contract, *Melbourne Journal of International Law* 2012, p. 1 *et seq.*, proposing Australian legislation on private international law of contract, based on the Hague Principles and Rome I (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations).

[19] Article 9(1): "The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to – … (d) the various ways of extinguishing obligations, and prescription and limitation periods; […]."

[20] The Inter-American Convention on the Law Applicable to International Contracts (1994) (Mexico City Convention). See J.A. MORENO RODRÍGUEZ/ M.M. ALBORNOZ, Reflections on the Mexico Convention in the context of the preparation of the future Hague instrument on international contracts, *Journal of Private International Law* 2011, p. 491, at 493. In addition, the authors argue that the Hague Principles will be an invaluable aid in the interpretation of the Convention (at 493).

[21] Projects of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg (<www.uj.ac.za/law>). See R.F. OPPONG, *Legal Aspects of Economic Integration in Africa*, Cambridge 2011, p. 302-303 and 306-307.

[22] Compare Article 27 of Rome I.

[23] Article 3: "Under these Principles, the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise." See, for the current position, Article 3(1) of Rome I read with Recital 13.

[24] Article 5: "A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties." Also see Articles 2(3), 7, 9(1)(e) and 9(2) on (formal) validity. See Article 11 of Rome I for the current position.

[25] Article 6(1)(b) (in the version as amended by the Working Group during June 2013) reads as follows: "[I]f the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law." Compare Article 10(1) of Rome I. See Th. KADNER GRAZIANO, Solving the riddle of conflicting choice of law clauses in battle of forms situations: the Hague solution, *YPIL* 2012/2013, p. 71 *et seq*.

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A conceivable more comprehensive future Hague instrument on the law applicable to contractual obligations[26] would probably draw on the current text to a considerable degree.

D. Paragraph 3: Interpretation, Supplementation and Development

1. Introduction

The Hague Principles may be used by courts and arbitral tribunals[27] to interpret,[28] supplement and/or develop rules of private international law in order to increasingly comply with the principle of party autonomy.[29] These rules may exist on a national,[30] regional, supranational or international level and may involve, for instance, conventions, regulations, legislation and case law. Although the various terms used in this regard (interpret, supplement and develop) involve considerable semantic overlap, some differentiation in meaning was nevertheless intended.

2. Interpretation

Interpretation here refers to the process of explaining, clarifying or construing the meaning of existing rules of private international law. The following examples may indicate how the Hague Principles may inspire and support the interpretative process.

(a) The first part of Article 2(2) of the Principles (the parties may choose the law applicable to the whole contract or to only a part thereof) is found in provincial and national codifications in, for example, Quebec,[31] Russia,[32] South Korea[33]

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[26] See Th. KRUGER, *Feasibility Study on the Choice of Law in International Contracts – Overview and Analysis of Existing Instruments*, Preliminary document No 22B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference; and I. RADIC, *Feasibility Study on the Choice of Law in International Contracts – Special Focus on International Arbitration*, Preliminary document No 22C of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, available at <www.hcch.net>.

[27] See Paragraph 4.

[28] Of course, binding law may determine that, for instance, other sources of interpretation have priority (*e.g.* the Vienna Convention on the Law of Treaties of 1969). Interpretation, supplementation and development may also take place by legislative activities, but this is referred to in Paragraph 2.

[29] See Paragraph 1 of the Preamble.

[30] Including provincial or state level.

[31] Article 3111 (third paragraph) of the Civil Code of Quebec (1994).

[32] Article 1210(4) of the Russian Civil Code (Part 3, Section 6) (2001).

[33] Article 25(2) of the South Korean Conflict of Laws Act (2001).

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and Turkey,[34] as well as in Rome I[35] and the Mexico City Convention.[36]

The formulation in the listed provisions leaves the possibility open (and perhaps even implies) that different laws may be chosen for different parts of the contract.[37] This is more clearly expressed in the second part of Article 2(2) of the Principles.[38] Courts and arbitral tribunals are therefore invited to interpret the listed (and similar) provisions in accordance with Article 2(2)(ii) of the Principles.

(b) Article 2(4) contains the principle that no connection is required between the law chosen and the parties or their transaction.[39] This provision may

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[34] Article 24(2) of the Turkish Code on Private International Law and International Civil Procedure (2007).

[35] Article 3(1).

[36] Article 7. Compare Article 8.

[37] See H. CHUNG, Private international law, in KOREA LEGISLATION RESEARCH INSTITUTE, *Introduction to Korean Law*, Heidelberg 2013, p. 271, 288-289; LORD COLLINS OF MAPESBURY (gen. ed.), *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.), Vol. 2, London 2012, p. 1790-1791 and 1805 (compare p. 1814); J.J. FAWCETT/ J.M. CARRUTHERS/ P. NORTH, *Cheshire, North & Fawcett. Private International Law* (14th ed.), Oxford 2008, p. 691-692; J.J. FAWCETT/ J.A. HARRIS/ M. BRIDGE, *International Sale of Goods in the Conflict of Laws*, Oxford 2005, p. 693; J.A. MORENO RODRIGUEZ/ M.M. ALBORNOZ (note 20), at 512; Ch. REITHMANN/ D. MARTINY, *Internationales Vertragsrecht. Das internationales Privatrecht der Schuldverträge* (7th ed.), Köln 2010, p. 94-97; D. SOTBARN, *Russisches internationales Privatrecht der vertraglichen Schuldverhältnisse*, Hamburg 2010, p. 34-35; L. STRIKWERDA, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (10th ed.), Deventer 2010, p. 165; G. TEKINALP/ E. NOMER/ N. AYŞE ODMAN BOZTOSUM, Turkey, in B. VERSCHRAEGEN (ed.), *Private International Law*, in R. BLANPAIN/ M. COLUCCI (gen. eds), *International Encyclopedia of Law*, The Hague 2012, p. 83-84 and 86; O. VOROBIEVA, *Private International Law in Russia*, Alphen aan den Rijn 2012, p. 89-90; J. WALKER, *Castel & Walker. Canadian Conflict of Laws* (6th ed.), Vol. 2, Markham 2005, para. 31.4(a); and J. WALKER, *Halsbury's Laws of Canada. Conflict of Laws* (1st ed.), Markham 2011 reissue, p. 598 and 601 n 13. Also see P. NYGH (note 12), at 130-131; N. RAFFERTY (ed.), *Private International Law in Common Law Canada. Cases, Text and Materials* (3rd ed.), Toronto 2010, p. 716 and 739-740; and I. SCHWENZER/ P. HACHEM/ C. KEE, *Global Sales and Contract Law*, New York 2012, p. 61. However, some of the authorities require that the different laws chosen must apply to severable parts of the contract or at least be logically consistent and not irreconcilably in conflict.

[38] Article 2(2): "The parties may choose (i) the law applicable to the whole of the contract or to only part of it; and (ii) different laws for different parts of the contract."

[39] Article 2(4): "No connection is required between the law chosen and the parties or their transaction." The parties should be able to choose a non-related but, for instance, neutral, stable, familiar and/or developed legal system. See *e.g.* THE AMERICAN LAW INSTITUTE, *Restatement of the Law Second. Conflict of Laws 2d*, Vol. 1, St. Paul 1971, p. 567 (compare § 187(2)(a) of the Restatement 2nd at 561); S.G.A. PITEL/ N.S. RAFFERTY, *Conflict of Laws*, Toronto 2010, p. 272; and E.I. SYKES/ M.C. PRYLES, *Australian Private International Law* (3rd ed.), Sydney 1991, p. 596-600. See R.L. FELIX/ R.U. WHITTEN, *American Conflicts Law* (6th ed.), Durham 2011, p. 431-434, S.C. SYMEONIDES, *American Private International Law*, Alphen aan den Rijn 2008, p. 215-216 and R.J. WEINTRAUB, *Commentary on the Conflict of Laws* (6th ed.), New York 2010, p. 513-516 on the position under the Uniform Commercial Code.

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be helpful to inform interpretation of the Canadian common-law conflict of laws[40] and of contemporary Roman-Dutch private international law,[41] as applicable in Sri Lanka[42] and various countries in Southern Africa.[43]

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[40] Compare S.G.A. PITEL/ N.S. RAFFERTY (note 39), at 272; J. WALKER, *Castel & Walker* […] (note 37), at para. 31.2(a); and J. WALKER, *Halsbury's Laws* […] (note 37), at 597.

[41] See C.F. FORSYTH, *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (5th ed.), Cape Town 2012, p. 320; and E. SCHOEMAN/ C. ROODT, South Africa, in B. VERSCHRAEGEN (ed.), *Private International Law*, in R. BLANPAIN/ M. COLUCCI (gen. eds.), *International Encyclopedia of Law*, The Hague 2007, p. 58.

[42] A.R.B. AMERASINGHE, The Dutch influence on the legal system of Sri Lanka, in S. KELEGAMA/ R. MADAWELA (eds), *400 Years of Dutch-Sri Lanka Relations 1602-2002*, Colombo 2002, p. 287 *et seq.*; A. COORAY, Sri Lanka: oriental and occidental laws in harmony, in E. ÖRÜCÜ/ E. ATTWOOLL/ S. CYLE (eds), *Studies in Legal Systems: Mixed and Mixing*, The Hague 1996, p. 71 *et seq.*; and S. GOONESEKERE, The Roman Dutch law in the plural legal system of Sri Lanka, *Colombo Law Review* 1995, p. 1 *et seq.*

[43] Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe. See C.F. FORSYTH, The provenance and future of private international law in Southern Africa, *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 2002, p. 60, at 68. Furthermore, Article 9(1)(d) of the Principles (see note 19) may prove support for reading the decision of the South African Supreme Court of Appeal in *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) as laying down a general rule that liberative prescription is governed by the law chosen by the parties, or otherwise by the objectively determined proper law of the contract (*in casu* the parties exercised a choice of law). See J.L. NEELS, Falconbridge in Africa. *Via media* classification (characterization) and liberative (extinctive) prescription (limitation of actions) in private international law – a Canadian doctrine on safari in Southern Africa (*hic sunt leones!*); or: *semper aliquid novi Africam adferre*, *Journal of Private International Law* 2008, p. 167, at 197-199. Such an interpretation would be in conformity with the Zimbabwean decision in *Coutts & Co v Ford* 1997 (1) ZLR 440 (H) (liberative prescription is governed by the proper law of a contract, *in casu* determined by a choice of law). See, in general, on private international law and limitation of actions or liberative prescription in Australia, Canada, South Africa and the United Kingdom, R. GARNETT, *Substance and Procedure in Private International Law*, Oxford 2012, p. 261-294. In the original version of the proposed commentary, the present author added to the text above: "In addition, it may strengthen the view in case law from Hong Kong that the absence of any connection of the parties and the contract with the legal system chosen by the parties cannot in itself be evidence of a lack of *bona fides*." The reader was referred to *Shenzhen Development Bank Co Ltd v New Century Int'l Holdings Ltd* [2002] HKEC 1087; *contra Credit Agricole Indosuez v Shanghai Erfangji Co Ltd* [2002] HKCU 706. These decisions of the High Court of the Hong Kong Special Administrative Region may be found at <www.legalref.judiciary.gov.hk>, with references HCA2976/2001 and HCA14569/1999, respectively. See G. JOHNSTON, *The Conflict of Laws in Hong Kong*, Hong Kong 2005, p. 191-192; and L. WOLFF, Hong Kong's conflict of contract laws: *quo vadis*?, *Journal of Private International Law* 2010, p. 465, at 468-469, 484 and 495. (Article 2(4) may also influence the content given to public policy in this regard in South Korea: see H. CHUNG (note 37), at 289.) However, the Guidelines of the Supreme People's Court (dated 10 December 2012) on the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations (2010) today put it beyond doubt that a connection between the contract and the chosen law is not required (see Paragraph 7, which

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(c) In many legal systems it is not always clear what the precise relationship is between a choice of court or arbitral tribunal and a tacit choice of law.[44] Article 4 here provides a plausible solution on a principled basis[45] for consideration by courts and arbitral tribunals, namely that an agreement to confer jurisdiction is not in itself equivalent to a choice of law.[46] Of course, a submission to jurisdiction

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provision also applies in respect of the law in Hong Kong and Macau: Paragraph 19). See Erläuterungen des Obersten Volksgerichts zu einigen Fragen des "Gesetzes der Volksrepublik China über das anwendbare Recht auf zivilrechtliche Beziehungen mit Außenberührung" (teil 1), *Zeitschrift für Chinesisches Recht / Journal of Chinese Law* 2013, p. 107 *et seq.*; P. LEIBKÜCHLER, Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz űber das Internationale Privatrecht der VR China, *Zeitschrift für Chinesisches Recht / Journal of Chinese Law* 2013, p. 89 *et seq.*; and T. XUE, Neue Regeln des Obersten Volksgerichts: die erste Justizielle Interpretation des chinesischen IPR-Gesetzes, *IPRax* 2014, p. 206 *et seq*.

[44] See LORD COLLINS OF MAPESBURY (gen. ed.) (note 37), at 1811-1813; M. DAVIES/ A.S. BELL/ P.L.G. BRERETON, *Nygh's Conflict of Laws in Australia* (8th ed.), Chatswood 2010, p. 398; J.J. FAWCETT/ J.M. CARRUTHERS/ P. NORTH (note 37), at 703-704; J.J. FAWCETT/ J.A. HARRIS/ M. BRIDGE (note 37), at 669-671; C.F. FORSYTH (note 41), at 328; V.C. GOVINDARAJ, *The Conflict of Laws in India. Inter-territorial and Inter-personal Conflict*, New Delhi 2011, p. 57; R.H. HICKLING / WU MIN AUN, *Conflict of Laws in Malaysia*, Kuala Lumpur 1995, p. 164-165; G. JOHNSTON (note 43), at 197-198; J.L. NEELS/ E.A. FREDERICKS, Tacit choice of law in the Hague Principles on Choice of Law in International Contracts, *De Jure* 2011, p. 101 *et seq.*; P. NYGH (note 12), at 116-118; S.G.A. PITEL / N.S. RAFFERTY (note 39), at 274-275; R. PLENDER / M. WILDERSPIN, *The European Private International Law of Obligations*, London 2009, p. 145-150; Ch. REITHMANN/ D. MARTINY (note 37), at 115-119; E.A. SCHOEMAN/ C. ROODT (note 41), at 59; I. SCHWENZER/ P. HACHEM/ C. KEE (note 37), at 55-56; E.I. SYKES / M.C. PRYLES (note 39), at 602-603; J.W.C. VAN ROOYEN, *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg*, Kaapstad 1972, p. 99-100; J. WALKER, *Castel & Walker* […] (note 37), at para. 31.2(c); and J. WALKER, *Halsbury's Laws* […] (note 37), at 603.

[45] Namely that a choice of forum and a choice of law are fundamentally different notions. Parties may choose a court or arbitral tribunal for its convenience, expertise or neutrality rather than for the law which this forum would apply (see *e.g.* J.L. NEELS/ E.A. FREDERICKS (note 44), at 107-108; compare P. NYGH (note 12), at 116) (either the *lex fori* or the legal system indicated by the applicable private international law rules). Such a choice of forum will not be indicative of a choice of the particular legal system. A choice of court or arbitral tribunal cannot therefore on its own indicate a choice of law.

[46] The formulation is based on a proposal by GEDIP (*le Groupe européen de droit international privé*; the European Group for Private International Law (EGPIL)), in the context of the revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): Third consolidated version of a proposal to amend Articles 1, 3, 4, 5, 6, 7, 9, 10*bis*, 12 and 13 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations (Rome I), and Article 15 of Regulation 44/2001 (Brussels I). Tenth, eleventh, twelfth & thirteenth meetings, Rome, 2000, Lund, 2001, Paris, 2002, Vienna, 2003, in M. FALLON/ P. KINSCH/ Ch. KOHLER (eds), *Le droit international privé européen en construction. Vingt ans de travaux du GEDIP. Building European Private International Law. Twenty Years' Work by GEDIP*, Cambridge 2011, p. 425-426: "In particular, the choice of a court or the courts of a given State shall not in itself be equivalent to a choice of the law of that State." Also see *National Thermal Power Corporation v Singer Company* 1993 AIR 998, 1992 SCR (3) 106; S. GAUTAMA/ S.H. WIKNJOSASTRO, Some aspects of

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clause may nevertheless be one of the factors to be taken into account to determine whether there was a tacit choice of law.[47]

3. *Supplementation*

Supplementation in this context refers to the refinement of an existing rule of private international law which does not sufficiently or appropriately provide for a particular type of situation. The following examples may indicate how the Hague Principles may inspire and support the supplementation of existing rules of private international law.

(a) The Chinese[48] and Japanese[49] private international law codes embrace party autonomy in conformity with Paragraph 1 of the Preamble. The Hague Principles could provide further guidance in this regard at least in as far as the provisions in Articles 2-4 are concerned.[50]

(b) Courts and arbitral tribunals may find Article 6(1)(b) useful as a further refinement of the applicable rules on the existence of a choice of law in the context of a conflict between choice of law clauses in standard terms.[51]

Indonesian private international law, *Malaya Law Review* 1990, p. 417, at 431; J.L. NEELS/ E.A. FREDERICKS (note 44), at 107-108; C. FRESNEDO DE AGUIRRE, Party autonomy – a blank cheque?, *Uniform Law Review / Revue de droit uniforme* 2012, p. 655, at 669-670; and P. NYGH (note 12), at 263. Compare Article 7 of the Mexico City Convention, B.A. MARSHALL (note 18), at 16 n 102 and P. NYGH (note 12), at 117, but also see F.K. JUENGER, The Inter-American Convention on the Law Applicable to International Contracts: some highlights and comparisons, *The American Journal of Comparative Law* 1994, p. 381, at 388.

[47] Compare Recital 12 of Rome I in respect of *exclusive* submission clauses to "courts or tribunals of a Member State". The same principle would apply to non-exclusive submission clauses (although to a lesser degree) and submission to courts and arbitral tribunals in non-member states (see LORD COLLINS OF MAPESBURY (gen. ed.) (note 37), at 1813; J.L. NEELS/ E.A. FREDERICKS (note 44), at 107-108; R. PLENDER/ M. WILDERSPIN (note 44), at 149; and Ch. REITHMANN/ D. MARTINY (note 37), at 115; but also see B.A. MARSHALL (note 18), at 14-19). Compare Article 7 of the Mexico City Convention and see J.A. MORENO RODRÍGUEZ/ M.M. ALBORNOZ (note 20), at 509 and 511.

[48] Article 3 and 41 of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations (2010). Compare JIEYING LIANG, Statutory restrictions on party autonomy in China's private international law of contract: how far does the 2010 codification go?, *Journal of Private International Law* 2012, p. 77 *et seq.*

[49] Article 7 of the Japanese Act on the General Rules of Application of Laws (2006).

[50] However, Article 9 of the Japanese private international law code makes provision for the modification of a choice of law, as found in Article 2(3) of the Principles. See K. TAKAHASHI, A major reform of Japanese private international law, *Journal of Private International Law* 2006, p. 311, at 320. Also see the Guidelines of the Supreme People's Court (note 43). Article 2 of the Hague Principles is entitled "freedom of choice", Article 3 deals with the choice of non-national rules of law and Article 4 provides for express and tacit choice of law.

[51] See note 25 for the text of Article 6(1)(b).

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(c) When applying Swiss private international law, courts and arbitral tribunals may wish to consider the provision in Article 123 of the national private international law code[52] (with specific reference to silence following an offer), in as far as it applies to a choice of law,[53] as a manifestation of the wider principle expressed in Article 6(2) of the Principles (reasonability of determining the existence of a choice of law under the putative applicable law),[54] which, of course, has a wider scope of application.

4. Development

Although the *development* of rules of private international law may include their constructive interpretation or supplementation, the concept in the context of Paragraph 3 particularly refers to the addition of new rules where none existed before, or effecting fundamental changes to pre-existing ones. The following examples may illustrate how the Hague Principles may inspire and support development in private international law.

(a) In Brazil, the Hague Principles, particularly Paragraph 1 of the Preamble and Article 2(1),[55] may strengthen the increasing recognition of party autonomy through case law.[56]

(b) The Hague Principles may encourage the recognition of a choice of non-national rules of law by courts and arbitral tribunals along the lines of Article 3.[57]

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[52] Swiss Federal Statute on Private International Law (1987).

[53] See H. HONSELL/ N.P. VOGT/ A.K. SNYDER (eds), *Kommentar zum Schweizerischen Privatrecht. Internationales Privatrecht*, Basel/ Frankfurt am Main 1996, p. 912; and K. SIEHR, *Das Internationale Privatrecht der Schweiz*, Zürich 2002, p. 234.

[54] Article 6(2): "The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1." Article 6(1)(a) provides that, subject to paragraph 2, "whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to". See note 25 for the text of Article 6(1)(b). Also see Article 12 of the Mexico City Convention; Article 10(2) of Rome I; P. NYGH (note 12), at 96-97; and Ch. REITHMANN/ D. MARTINY (note 37), at 202-205.

[55] Article 2(1): "A contract is governed by the law chosen by the parties."

[56] See M.M. ALBORNOZ, Choice of law in international contracts in Latin American legal systems, *Journal of Private International Law* 2010, p. 23, at 44-46, 52-53 and 55-56. Compare J. DOLINGER, *Private International Law in Brazil*, Alphen aan den Rijn 2012, p. 236-240. Also see A. DE AGUILAR VIEIRA, The CISG and party autonomy in Brazilian international contract law, *Panorama of Brazilian Law* 2013, p. 173, at 182-184; N. DE ARAUJO / F.I. GUEDES DE C. SALDANHA, Recent developments and current trends on Brazilian private international law concerning international contracts, *Panorama of Brazilian Law* 2013, p. 73 *et seq*.; and C. TIBURCIO, Private international law in Brazil: a brief overview, *Panorama of Brazilian Law* 2013, p. 11, at 23; available at <www.panoramaofbrazilianlaw.com>.

[57] See note 23 for the text of Article 3.

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(c) Many legal systems do not have particular rules on the law applicable to assignment (in the context of choice of law, or otherwise) and courts and arbitral tribunals may consider developing the applicable system of private international law by adopting Article 10 of the Principles.[58]

E. Paragraph 4: Courts and Arbitral Tribunals

Both courts and arbitral tribunals are invited and encouraged to apply the Hague Principles in the interpretation, supplementation and development of rules of private international law,[59] in all cases where this would not be in conflict with binding law. All articles were therefore drafted for use by courts and arbitral tribunals.[60]

IV. Concluding Remarks

As an international instrument drafted by experts from many countries on various continents and attempting to reflect current best practice in respect of choice of law in international commercial contracts, with some innovative provisions where appropriate, the Hague Principles will undoubtedly strongly influence future comparative research in this field. In due course, the instrument may contribute to the harmonisation and development of private international law on a global scale, thereby advancing party autonomy as one of the fundamental principles of the conflict of laws.

[58] Article 10: "In the case of contractual assignment of a creditor's rights against a debtor arising from a contract between the debtor and creditor – (a) if the parties to the contract of assignment have chosen the law governing that contract, the law chosen governs the mutual rights and obligations of the creditor and the assignee arising from their contract; (b) if the parties to the contract between the debtor and creditor have chosen the law governing that contract, the law chosen governs (i) whether the assignment can be invoked against the debtor; (ii) the rights of the assignee against the debtor; and (iii) whether the obligations of the debtor have been discharged."

[59] See Paragraph 3 of the Preamble.

[60] However, the last part of Article 3 ("unless the law of the forum provides otherwise") (see note 23) exclusively applies to courts, while Article 11 (on overriding mandatory rules and public policy) follows a differentiated approach (Paragraphs 1-4 apply to courts and Paragraph 5 is relevant for arbitral tribunals).

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PRIVATE INTERNATIONAL LAW BEFORE THE INTERNATIONAL COURT OF JUSTICE

Benedetta UBERTAZZI[*]

I. Premise
II. Private International Law "Thoughts"
III. Preliminary Questions: Nationality
IV. Principal Questions: Jurisdiction, Applicable Law, Recognition and Enforcement of Foreign Judgments. In particular, Immunity from Jurisdiction
V. Jurisdiction over Individuals
VI. Jurisdiction over Foreign States: the Case Germany against Italy
  A. Italian Jurisdiction on the Merit over Germany
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VII. Applicable Law
VIII. Recognition and Enforcement of Foreign Judgments
IX. Conclusions

I. Premise

The question of whether private international law and public international law are sufficiently connected to them being researched them together is raised frequently. The high level of specialisation of both private and public international lawyers, their adoption of distinct terminology and perspectives in analysing the same factual situations, and their consequent "communication difficulties" could suggest a negative response to that question.[1] However, this negative response is not entirely convincing; this article instead considers the inherent connections between private and public international law.[2]

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[1] See B. HESS, Staatenimmunität und jus cogens in geltenden Völkerrecht: der Internationale Gerichtshofzeigt die Grenzen auf, *IPRax* 2012, p. 202 *et seq*.

[2] H.G. MAIER, Extraterritorial Jurisdiction at a Crossroads: an Intersection between Public and Private International Law, *Am. J. Int'l L.* 1982, p. 280 *et seq*.; R. MICHAELS, Public and Private International Law: German Views on Global Issues, *J. Pub. Int'l L.* 2008, p. 125 *et seq*.; A. MILLS, *The Confluence Of Public And Private International Law. Justice, Pluralism And Subsidiarity In The International Constitutional Ordering of Private Law,*

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A close connection between private and public international law is illustrated by the attempts to develop a general public international law theory that allocates international jurisdiction in civil matters. These attempts suggest that public international law limits the exercise of international jurisdiction by States within their borders, obliging States to grant the human right to a fair trial to all individuals, and to abandon international civil procedure norms which might deny justice through exorbitant[3] and exclusive[4] jurisdictional rules.

The close connection between private and public international law is also illustrated by public international law aims being reached through private international law, and therefore through the law that regulates private cross-border relationships. In fact, economic globalisation and the ubiquitous availability of communication channels, which are simultaneously accessible in every country of the world, increase individual cross-border relationships and States' activities producing extraterritorial effects. This increases the risk of fundamental human rights violations by private foreign entities, such as multinational corporations, and foreign States. In turn, this increases the risk of litigating cases before foreign national and international courts, which are likely to apply private international law to reach public international law aims.

Cambridge 2009; H. Muir-Watt, Private International Law as Global Governance: Beyond the Schize, from Closet to Planet, Selected Works of Horatia Muir-Watt, 2011, available at <http://works.bepress.com/horatia_muir-watt/1>; F.J. Zamora Cabot, Derecho internacional privado y derechos humanos en el ámbito europeo, in El tiempo de los derechos, 2012, available at <http://www.tiempodelosderechos.es/docs/oct12/dip.pdf>, p. 3 *et seq*. See also R. Michaels/ J. Pauwelyn, Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law, in T. Broude/ Y Shany (eds), *Multi-Source Equivalent Norms In International Law*, Oxford, 2010, available at <http://ssrn.com/abstract=1543774>; N. Boschiero, Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: a private International Law Evaluation of the Recent ICJ Judgment in Germany v. Italy, *Stato, Chiese e Pluralismo confessionale*, December 10th, 2012, available at <http://www.statoechiese.it/images/stories/2012.12/boschierom_jurisdiction.pdf>, 2 and in N. Boschiero/ T. Scovazzi/ C. Ragni/ C. Pitea (eds), *International Courts And The Development Of International Law, Essays In Honour of Tullio Treves,* The Hague 2013; G.P. Romano, Le droit international privé à l'épreuve de la théorie kantienne de la justice, *Clunet* 2012, p. 61 *et seq*.; J. Basedow, The Law of Open Societies – Private Ordering and Public Regulation of International Relations. General Course of Private International Law, 360 *Recueil des Cours* 2012, Leiden/ Boston, 2013.

[3] H.G. Maier (note 2), at 280 *et seq*.; C. Focarelli, The Right of Aliens not to be Subject to So-Called "Excessive" Civil Jurisdiction, in B. Conforti/ F. Francioni, (eds), *Enforcing Human Rights In Domestic Courts,* The Hague 1997, p. 441 *et seq*.; E. Guinchard, Procès equitable (article 6 CESDH) et droit international privé, in N. Watté/ A. Nuyts (eds), *International Civil Litigation In Europe And Relations With Third States*, Bruxelles, 2005, p. 199 *et seq*.; D. Fernández Arroyo, Compétence exclusive et compétence exorbitante dans les relations privées internationales, 323 *Recueil des Cours* 2006, p. 9 *et seq*.; J. Fawcett, The Impact of Article 6(1) of the ECHR on Private International Law, *I.C.L.Q.* 2007, p. 36 *et seq*.; F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la convention des droits de l'homme,* Bruxelles 2007, p. 37 *et seq*.

[4] D. Fernández Arroyo (note 3), *passim*; B. Ubertazzi, *Exclusive Jurisdiction In Intellectual Property*, Tübingen 2012, *passim.*

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Regarding litigation before national courts, certain United States federal courts and European State tribunals have ascertained their international jurisdiction over cross-border cases concerning civil liabilities of multinational corporations. This can be seen as an attempt to reach the public international law objective of granting human rights related to health and environmental protection to individuals. By doing so, the courts' decisions had the very "significant practical consequence"[5] of "inducing" the multinational corporations involved to settle the disputes out of court in at least seventeen cases in the United States, for almost 5.25 million dollars, and in a number of European cases.[6]

Regarding litigation before international court litigation, the European Union Court of Justice typically harmonises the relevant private international law rules of the EU Member States in order to reach the objective of European Union law of equating the recourse to one or the other courts of different EU Member States (*e.g.* mutual recognition principle).[7] Similarly, to ensure fundamental human rights established by the European Convention on Human Rights and Fundamental Freedom (ECHR), the European Court of Human Rights influences private international law rules of States on international jurisdiction and on recognition and enforcement of foreign judgments.[8] The International Court of Justice also applies private international law when adjudicating disputes between States in order to reach public international law objectives.

The following pages will analyse this relationship between the International Court of Justice (ICJ) and private international law. Such analysis is necessary because the relationship between private international law and the ICJ is typically only considered with regard to specific cases and a more comprehensive study has

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[5] See A. BONFANTI, *Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato*, Milano 2012, p. 370 *et seq*. See also C. OTERO GARCÍA-CASTRILLÓN, International Litigation Trends in Environmental Liability: A European Union-United States Comparative Perspective, *Journal of Priv. Int. Law* 2011, p. 551 *et seq*.; T. SCOVAZZI, Maritime Accidents With Particular Emphasis On Liability And Compensation For Damage From The Exploitation Of Mineral Resources Of The Seabed, in A. DE GUTTRY *et al*. (eds), *International Disaster Response Law*, The Hague 2012, p. 287 *et seq*.; N. BOSCHIERO, Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in *Kiobel v. Royal Dutch Petroleum*, *Riv. dir. int. priv. proc.* 2013.

[6] A. BONFANTI, (note 5), at 370 *et seq*.; C. OTERO GARCÍA-CASTRILLÓN, (note 5), at 551 *et seq*.

[7] *E.g.* by invoking the non-discrimination principle and the EU fundamental freedoms. See P. BERTOLI, *Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale,* Milano 2005; J. HEYMANN, *Le droit international privé à l'épreuve du fédéralisme européen,* Paris 2010.

[8] See the literature quoted *supra* (note 3, note 4 and note 5). See also P. KINSCH, Private International Law Topics before the European Court of Human Rights - Selected Judgments and Decisions, in this *Yearbook* 2011, p. 37 *et seq*., and available at <http://ssrn.com/abstract=2171655>; T.JR. SCHILLING, The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights, *Riv. dir. int. priv. proc.* 2012, p. 545 *et seq*.

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not yet been undertaken.[9] On the other hand, the interconnection between private international law and the European Union Court of Justice case-law or the case-law of the European Court of Human Rights has already been examined by various studies.[10]

II. Private International Law "Thoughts"

Justice Rosalyn Higgins, the former President of the International Court of Justice, has emphasised that the ICJ frequently adopts "private international law thoughts".[11] However, in adopting these thoughts, the ICJ does not decide if an internal judge has the jurisdiction to adjudicate a particular case, but rather whether the ICJ is competent to rule on a State's dispute; it does not decide which national laws shall regulate a certain case, but rather how to characterise a relevant legal institution to adjudicate a State's dispute; and finally it does not decide whether or not a judgment of a national or international court or tribunal shall be recognised, but rather how to reconstruct public international law.

These thoughts primarily concern the issue of jurisdiction, and are adopted by the ICJ in a high percentage of cases when deciding on its jurisdiction.[12] Private international law thoughts also concern the issue of "applicable law," and are adopted by the ICJ in applying the substantive or procedural national law of a given State to characterize certain institutions of its legal order. For instance in the *Diallo* case,[13] the ICJ recalled the substantive national law of the Democratic Republic of Congo to establish whether two "sociétés privées à responsabilité limitée" were incorporated under Zairean law and if Mr. Diallo, a Guinean citizen and *associé* and *gérant* of the companies, enjoyed direct rights as *associé* in the two companies.[14] Finally, private international law thoughts concern the

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[9] See however S. DE DYCKER, Private International Law Disputes before the International Court of Justice, *Journal of International Dispute Settlement* 2010, p. 495 *et seq.*; J.H.A. VAN LOON/ S. DE DYCKER, The Role of the International Court of Justice in the Development of Private International Law, in R.C.H. Lesaffer/ J.B. Vervliet/ J.H.A. VAN LOON/ S. DE DYCKER (eds), *One Century Peace Palace, from Past to Present,* The Hague 2013.

[10] See the literature quoted *supra* (note 3 and note 7).

[11] R. HIGGINS, The International Court of Justice and Private International Law Thoughts, The Lalive Lecture. Themes and Theories, in R. HIGGINS, *Selected Essays, Speeches and Writings in International Law,* II, Oxford 2009, p. 1307 *et seq*.

[12] See E. CANNIZZARO, *Corso di Diritto Internazionale*, Torino 2012, p. 369 *et seq*.

[13] See ICJ, *Case Concerning Ahmadou Sadio Diallo, Republic of Guinea* v. *Democratic Republic of the Congo,* Preliminary Objections, May 24, 2007, *I.C.J. Reports* 2007. On this case see *infra*.

[14] *Ibid.,* at paras 50-67 and 99-113. See also R. HIGGINS (note 10), at 1308; K. SHAHABUDEEN, Municipal Law Reasoning In International Law, in V. LOWE/ M. FITZMAURICE, *Fifty Years Of The International Court Of Justice: Essays In Honour Of Sir Robert Jennings*, Cambridge 1996, p. 99; S. DE DYCKER (note 9), at 495.

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"recognition of foreign judgments", and are considered by the ICJ in "utilizing"[15] judgments and awards of other international or national courts and arbitral tribunals to determine whether a rule of general customary international law or a general principle of law recognised by civilized nations exists under Art. 38.1 letters b) and c) of its Statute, or as "subsidiary means for the determination of rules of law" ex Art. 38.1 letter d).[16] For instance, in the case *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*,[17] the ICJ referred to certain judgments of several internal judges to determine whether a rule of general customary international law exists which related to the State's immunity from the jurisdiction of foreign countries.[18]

Among the ICG's thoughts on jurisdiction, applicable law and recognition of foreign judgments, the particularly relevant ones are aimed at diminishing the practical difficulties that are created by the international jurisdictional fora. In fact, the ICJ has established whether it is appropriate to consider itself *forum non conveniens* and to decline exercising jurisdiction, for instance, when another international court has already decided on the same controversy that is before the ICJ.[19] For example, in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, by an order dated 23 January 2007 the ICJ considered itself *forum conveniens* to hear a request for the indication of provisional measures, despite the fact that Uruguay had already seized an ad hoc Tribunal on the basis of the Treaty of Asunción on the Southern Common Market. In fact, the decision of the ad hoc Tribunal of 6 September 2006 concerned different facts compared to those referred to by the new request for provisional measures to the ICJ.[20]

Also, to diminish the practical difficulties that are determined by the multiplication of the international jurisdictional fora, the ICJ takes into account other international courts' and tribunals' judgments that define a controversy according to a certain treaty, a rule binding even the parties of the proceedings pending before the ICJ.[21] So, in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* in its judgment of 26 February 2007 the ICJ applied the "consistent rulings" of the International Criminal Tribunal for the former Yugoslavia to support the characterization of the requirement of substantiality of the crime of genocide made by the ICJ.[22] In the future, the ICJ could even recall the

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[15] See R. HIGGINS (note 10), at 1309.

[16] See E. CANNIZZARO (note 12), at 105 *et seq*.

[17] ICJ, *Jurisdictional immunities of the State (Germany* v. *Italy: Greece intervening),* Judgment 3 February 2012, available at <http://www.icj-cij.org/>. On this case see *infra*.

[18] *Ibid.*

[19] E. CANNIZZARO (note 12), at 391. See also R. MICHAELS/ J. PAUWELYN (note 2).

[20] See R. HIGGINS (note 12), at 1315. See ICJ, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports* 2007, p. 3.

[21] E. CANNIZZARO (note 12), at 392.

[22] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports* 2007, p. 43.

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norms that are referred to by other competent international courts and tribunals as the law applicable to the ICJ's relevant proceeding, according to the "principle of the unity of the applicable law".[23]

In this context, the ICJ's above mentioned thoughts on jurisdiction, applicable law or recognition of foreign judgments concern topics which are traditionally within the scope of private international law. Thus, the ICJ does not apply a legal theory related to the conflicts among national jurisdictions corresponding to the one that is proper of the private international law discipline; instead, it applies unilateral coordination instruments.[24] It is apparent, then, that the ICJ's thoughts "arise somewhat differently from the way they present themselves in private international law",[25] while traditional private international law questions will be examined in detail in the following pages.

III. Preliminary Questions: Nationality

The private international law question of a preliminary nature which is raised before the ICJ concerns the nationality of physical or juridical persons. In fact, in the broad Franco-Belgian conception of PIL, the nationality issue is included in the scope of this paper. When physical or juridical persons are injured by a State's wrongful acts or omissions, protection can be secured by their States of nationality on that persons behalf. States exercise diplomatic protection by bringing a legal suit before the ICJ against the injuring State to obtain reparation for the internationally wrongful act inflicted, according to Article 1 of the "draft Articles on Diplomatic Protection" of the International Law Commission.[26]

According to public international law, a State has the right to exercise diplomatic protection on behalf of a national. It is for the State of nationality to determine, in accordance with its municipal law, who qualifies for nationality. To this end, States determine opposite rules of a public nature that are, however, also relevant to their private international law systems.[27] These rules are of fundamental importance to the ICJ, since, before deciding on the violation of public international law by the defendant State, the Court applies them to establish whether the

[23] E. CANNIZZARO (note 12), at 391-392.

[24] *Ibid.*

[25] See R. HIGGINS (note 10), at 1307. In general see also H. GRUSE-KHAN, A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging between Intellectual Property, Trade, Investment and Health, *Journal of Priv. Int. Law* 2013.

[26] ILC, *Draft Articles on Diplomatic Protection*, in *International Law Commission. Report on the work of its fifty-eighth session. Official Records of the General Assembly. Sixty-first Session, Supplement No. 10* (A/61/10). See C.F. AMERASINGHE, *Diplomatic Protection*, Oxford, 2008.

[27] See T. BALLARINO/ B. UBERTAZZI, On Avello and other Judgments: a new Point of Departure in the Conflict of Laws, this *Yearbook* 2004, p. 85 *et seq.*; S. DE DYCKER (note 9), at 477.

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State acting as a plaintiff before the ICJ satisfies the requirements to act for diplomatic protection, among which is the rule related to the nationality of the injured persons at stake.

Moreover, according to the ICJ, public international law requires a State to prove an effective or genuine link between itself and its nationals to exercise diplomatic protection on behalf of individuals, whereas the International Law Commission does not consider such a requirement to be relevant.[28] The ICJ posed an additional factor for the exercise of diplomatic protection in the Nottebohm case.[29] In this case, Liechtenstein filed an application with the International Court of Justice against the Guatemalan Government to seek reparation for damage allegedly caused to Nottebohm, a Liechtenstein national. on account of acts said to be contrary to international law committed by organs of the Guatemala Government. However, Guatemala challenged the admissibility of Liechtenstein's ICJ application by arguing that Liechtenstein was not entitled to extend its protection to Nottebohm *vis-à-vis* Guatemala, because Nottebohm was a German national. Applying Liechtenstein rules of private international law related to nationality, the ICJ found that Nottebohm qualified as a Liechtenstein national also. However, when applying the States' rules of private international law on the positive conflict of nationalities, the ICJ considered the Liechtenstein nationality ineffective and therefore the application against Guatemala inadmissible. This is because Nottebohm was born in Germany, was resident in Germany, and only became a Liechtenstein national by means of nationalisation during the second World War, with the aim of belonging to a neutral State rather than to an aggressor country.[30]

According to public international law, for the purposes of diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. Thus, even when the corporation is controlled by nationals of another State or States, has no substantial business activities in the State of incorporation, the seat of management and the financial control of the corporation are both located in another State, such factors will not bear on the corporation's State of nationality.[31] No additional factors for the exercise of diplomatic protection on behalf of corporations is considered, such as the effective link. Moreover, when deciding on the admissibility of a State's application for diplomatic protection on behalf of corporations, the ICJ does not refer explicitly to a States' private international law rule on the granting of nationality to corporations. However, the ICJ applies implicitly PIL rules to establish whether the State under whose law the corporation was incorporated considers this corporation as being its national.

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[28] ILC, *Draft Articles* (note 26), at 32 *et seq*.

[29] ICJ, *Nottebohm Case (second phase), Judgment of April 6th, 1955, I.C.J. Reports* 1955, p. 4.

[30] See F. RIGAUX, Le droit international privé face au droit international, *Rev. crit. dr. int. priv* 1976, p. 261 *et seq*.; S. DE DYCKER (note 9), at 480.

[31] See, however, Art. 9 of the *Draft Articles,* note 26. See A. PELLET, Le projet d'articles de la C.D.I. sur la protection diplomatique: une codification pour (presque) rien, in M. KOHEN (ed.), *Promoting Justice, Human Rights And Conflict Resolution Through International Law. Liber Amicorum Lucius Caflisch*, Leiden 2007, p. 1133; C.F. AMERASINGHE (note 25), at 122.

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In the Barcelona Traction case[32] the Belgian Government filed an application with the ICJ against the Spanish Government, seeking reparation for damages allegedly caused to Barcelona Traction, Light and Power Company Limited. The Belgian Government's application was based on alleged acts in violation of international law, committed by branches of the Spanish Government. Barcelona Traction was a holding company incorporated in Toronto (Canada), where it had its head office. However, Barcelona Traction's substantial business activities were conducted in Spain. Furthermore, a very high percentage of Barcelona Traction's shares belonged to Belgian nationals. However, the Spanish Government argued that the claim was inadmissible because the Belgian Government lacked *jus standi* to intervene or make a judicial claim on behalf of Belgian interests in a Canadian Company. The ICJ found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain and therefore rejected the Belgian Government's claim. The right to intervene on the company's behalf remained with Canada, since Canada was the State in which Barcelona Traction was incorporated. Moreover, the Canadian Government itself never appeared to have doubted its right to intervene on the company's behalf, since it considered Barcelona Traction as being its national, according to its private international law rules on the granting of nationality to judicial persons.

In the *Diallo*[33] case, the Republic of Guinea brought proceedings before the ICJ against the Democratic Republic of Congo (hereinafter the DRC) due to a dispute concerning "serious violations of international law" allegedly committed "upon a Guinean national", Mr Ahmadou Sadio Diallo. According to Guinea, Mr Diallo was unjustly imprisoned by DRC authorities after being resident there for thirty-two years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled. Mr Diallo was both *gérant* and *associé* of two companies incorporated under Zairean law and in full charge and control of them. Guinea maintained that the DRC, in expelling Mr Diallo, deprived the two companies of their *gérant* and *associé,* and therefore violated the rights of the two companies. However, the DRC, relying on the ICJ's judgment in *Barcelona Traction*, raised an inadmissibility objection due to Guinea's lack of standing to offer Mr Diallo diplomatic protection, since these companies were not incorporated in Guinea but rather in the DRC. The ICJ considered this objection of inadmissibility well founded, emphasizing that the companies at stake were of Congolese nationality.[34]

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[32] ICJ, *Case concerning the Barcelona Traction, Light and Power Company Limited, Belgium* v. *Spain,* Judgment 5 February 1970, *I.C.J. Reports* 1970. See also ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI), United States* v. *Italy,* Judgment 20 July 1989, *I.C.J. Reports* 1989, p. 15, implicitly confirming the conclusions reached by the ICJ in *Barcelona Traction*. See H. Muir-Watt (note 2), at 14; A. Bonfanti (note 5), at 141; G. D'Agnone, Determining the nationality of companies in ICSID arbitration, in A. Annoni/ S. Forlati (eds), *The Changing Role Of Nationality In International Law,* London 2013, p. 154 *et seq*.

[33] ICJ, *Case Concerning Ahmadou Sadio Diallo,* (note 13). For the PIL relevance of this case see R. Higgins (note 10), at 1316; S. De Dycker (note 9), at 494.

[34] *Ibid,* at para. 94.

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Finally, according to public international law, to the extent that an internationally wrongful act of a State under whose laws a company is incorporated causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of these shareholders is entitled to exercise diplomatic protection over its nationals, even if the company at stake is not incorporated under the laws of the State acting in diplomatic protection.[35] Therefore, in the *Diallo* case[36] Guinea maintained that, in expelling Mr Diallo, the DRC deprived him of his direct rights as *associé*, namely to take part and to vote in general meetings, to exercise his functions as *gérant*, to oversee and monitor the management of property in the companies at stake. These rights were guaranteed by the relevant Congolese national statutes. Guinea claimed that under DRC law these rights could not be exercised from outside the territory. However, the DRC invoked inadmissibility of the Guinean action because the relevant statutes were aimed at protecting the companies' rights rather than the individual rights of Diallo. The ICJ concluded that the objection of inadmissibility raised by the DRC due to Guinea's lack of standing could not be upheld in so far as it concerned Mr Diallo's direct rights as *associé* of the companies at stake. In fact, the measures adopted by the DRC in violation of Mr Diallo's direct rights as *associé* had been adopted by the State under whose laws the companies' were incorporated, and Mr Diallo was a Guinean national.[37]

IV. Principal Questions: Jurisdiction, Applicable Law, Recognition and Enforcement of Foreign Judgments. In particular, Immunity from Jurisdiction

The private international law questions of a principal nature which are raised before the ICJ concern violations of public international law caused by the exercise of international jurisdiction, application of a determinate law and recognition and enforcement, or non recognition and enforcement, of the foreign judgments that are rendered by the courts of the forum States (for simplicity and unless stated otherwise, "recognition and enforcement" will include non-recognition and non-enforcement). When such violations of public international law damage private persons or foreign countries, these countries may act before the ICJ against the interested forum State.

Despite being subject to ICJ adjudication, these questions are also relevant to private international law. In fact, on the one hand it is evident that the heart of private international law is composed by the question of the applicable law to cases with elements foreign to the legal system of the forum. On the other, it is also

[35] See Art. 12 of the *Draft Articles on Diplomatic Protection* (note 26).

[36] *Ibid*. See the doctrine mentioned supra (note 33).

[37] R. HIGGINS (note 19), at 1316.

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evident that questions of international jurisdiction and recognition and enforcement of foreign civil judgments are included in private international law. These questions have a private international law nature even when the exercise of international jurisdiction by national courts does not concern private persons, but rather foreign States, since it is through such cases that the question of so-called immunity arises.[38] While it is true that this question is "regulated by public international law",[39] immunity impedes judicial bodies of the forum States from exercising their jurisdiction over foreign countries. So, despite the immunity question being "different than and prior to"[40] the international jurisdiction one,[41] the former "pertains"[42] to the latter for the simple reason that immunity aims at denying international jurisdiction. Therefore, immunity constitutes a negative jurisdiction criterion that is relevant not only for public international law but also for the law that regulates international jurisdiction,[43] which is included in private international law.

V. Jurisdiction over Individuals

A first group of private international law questions of a principal nature raised before the ICJ concern the violation of public international law by the exercise of international jurisdiction against private persons which is rendered by the courts of the forum State. Such a violation stands at the basis of the Belgian application against Switzerland on 21 December 2009. This application will be examined in

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[38] C. CONSOLO, Jus cogens e rationes dell'immunità giurisdizionale civile degli Stati esteri e loro funzionari: tortuosità finemente argomentative (inglesi) in materia di "tortura governativa" (saudita), in V. COLESANTI/ C. CONSOLO/ G. GAJA/ F. TOMMASEO (eds), *Il diritto processuale civile nell'avvicinamento giuridico internazionale: omaggio ad Aldo Attardi*, Padova 2009, p. 314 *et seq*., at 334-335.

[39] ICJ, *Jurisdictional immunities of the State,* (note 17) On this case see A. CIAMPI, The International Court of Justice between "Reason of State" and Demands for Justice by Victims of Serious International Crimes, *Riv. dir. int.* 2012, p. 374; B. HESS, *Staatenimmunität,* (note 1), at 202; O. LOPES PEGNA, Breach of the Jurisdictional Immunity of a State by Declaring a Foreign Judgment Enforceable?, *Riv. dir. int.* 2012, p. 1074 *et seq*. Before the ICJ judgment see C. TOMUSCHAT, The International Law of State Immunity and Its Development by National Institutions, *Vand. J. Transnat'l L.* 2011, p. 1105 *et seq*.; A. GATTINI, The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?, *Leiden Journal of International Law* 2011, p. 173 *et seq*.; E. SCISO, Italian Judges' Point of View on Foreign States' Immunity, *Vand. J. Transnat'l L.* 2011, p. 1201 *et seq*.

[40] C. CONSOLO, *Jus cogens*, (note 38), at 334-335.

[41] *Ibid*.

[42] *Ibid*.

[43] B. HESS, *Staatenimmunität* (note 1), at 201-202. See also B. UBERTAZZI, Intellectual Property and State Immunity from Jurisdiction in the New York Convention of 2004, in this *Yearbook* 2009, p. 599 *et seq*., and *ibid.* with further references.

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this article, despite the proceedings being discontinued in March 2011 and the case being removed from the Court's List at Belgium's request.[44] In this case, the Belgian State, as the main shareholder in Sabena, the former Belgian national airline, which was by then bankrupt, sued Sabena's other shareholders (namely Swissair (subsequently Renamed SAirGroup) and its subsidiary SAirLines (the "Swiss shareholders" or the "Swiss companies")) before the Belgian Commercial Court. The Belgian shareholders claimed damages to compensate for the amount lost on investments made on the basis of representations by the Swiss shareholders and for the expenses incurred as a result of the defaults by the Swiss shareholders. The Commercial Court of Brussels found jurisdiction in the actions in contract and non-contractual liability on the basis of Articles 17 and 5(3) of the Lugano Convention:[45] these Articles provide for matters relating to a contract for the exclusive jurisdiction of the courts chosen by the parties in the contract, and for matters of non-contractual liability for the jurisdiction of the courts for the place where the harmful event occurred. However, while the Belgian proceeding was afoot, the Swiss companies submitted an application for a debt-restructuring moratorium to the District Court of Zurich, as a result of which they were placed in liquidation. The Belgian shareholders then gave notice in the Swiss debt-restructuring proceedings of the debts owed to them by the Swiss companies. Thus, like the Swiss companies' other creditors, they sought to have their debt claims entered onto the schedule of claims; that is to say, the list drawn up by the liquidators of the persons entitled to share in the liquidation proceeds. The Belgian shareholders' claims were those arising out of the Swiss companies' contractual and non-contractual liability in respect of which the Belgian shareholders had brought the earlier action in the

[44] ICJ, Jurisdiction and enforcement of judgments in civil and commercial matters (Belgium v. Switzerland), Press Release, 22 December 2009. See F. MARONGIU BUONAIUTI, Una controversia relativa alla Convenzione di Lugano giunge innanzi alla Corte internazionale di giustizia, *Riv. dir. int.* 2010, p. 454 *et seq*.; B. HESS/ R. VLEK, Private International Law Dispute Before the ICJ (Belgium v. Switzerland on the Interpretation and Application of the Lugano Convention), available at <http://www.conflictoflaws.net>; S. DE DYCKER (note 9), at 479 *et seq*.

[45] The Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 16 September 1988, was revised by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded in Lugano on 30 October 2007. The signatories of such last Conventions are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland. The Lugano Convention serves as a parallel agreement to the Brussels Convention of 1968, then Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), and nowadays the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (so called Brussels I Regulation Recast). The Brussels I Recast is published in the Official Journal, OJ 20 December 2012, L 351/1, and will apply from 10 January 2015 (see Article 81). See F. POCAR/ I. VIARENGO/ F. C. VILLATA (eds), *Recasting Brussels* I, Padova 2012. See also A. Dickinson, European Parliament Votes to Recast the Brussels I Regulation, 21 November 2012, available at <http://conflictoflaws.net/2012/european-parliament-votes-to-recast-the-brussels-i-regulation/>.

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Belgian courts. However, without waiting for the conclusion of the Belgian proceedings, the liquidators of the Swiss companies rejected all the debt claims submitted by the Belgian shareholders in Sabena.

The Swiss court refused to grant the request by Belgium and the other Belgian shareholders for a stay pending the conclusion of the Belgian proceedings to determine the Swiss companies' contractual and non-contractual liability. In their opinion, any future Belgian judgments would not be recognized in Switzerland and therefore there was no cause under Swiss municipal law to stay the proceedings on the issue of the Swiss shareholders' civil liability pending the Belgian judgment.[46]

In this context, Belgium initiated proceedings against Switzerland before the ICJ, claiming that the exercise of international jurisdiction by the Swiss courts on the Swiss companies' application for a debt-restructuring moratorium breached the rule of general public international law which dictates that State authority, especially in the judicial domain, must be exercised reasonably and therefore in a non exorbitant way.[47] Belgium also claimed a violation of Articles 21 and 22 of the aforementioned Lugano Convention. According to Art. 21, where proceedings involving the same cause of action between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court. According to Art. 22 where related actions are brought in the courts of different Contracting States, any court other than the court first seized may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seized has jurisdiction over both actions. For the purposes of this Article, actions are deemed to be related when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

The ICJ was requested to decide first whether the rule of general public international law on international jurisdiction being exercised reasonably and in a non-exorbitant way existed, and whether it was applicable to this case; and second whether the Articles on *lis pendens* and related actions of the Lugano Convention were applicable. These rules and articles of general and conventional public international law belong to the field of law which regulates the vesting of international jurisdiction. Thus, a judgment of the ICJ on the case Belgium against Switzerland would have applied private international law and would have constituted a leading case important to the development of such field of law.

While the ICJ ultimately did not hand down a decision on these matters in the case brought by Belgium against Switzerland, one academic conclusion is that general public international law does not limit the exercise of international

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[46] See also Section VIII.

[47] See the application at p. 2, available at <http://www.icj-cij.org/docket/files/145/15765.pdf>. On the exorbitant jurisdiction see Section I.

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jurisdiction of a certain State inside its borders, does not establish any rule on the exorbitant jurisdiction and *a fortiori* does not mandate the States to coordinate their actions related to the ones of foreign countries. According to this same opinion, even if a rule of general public international law on exorbitant jurisdiction existed, it would not be applicable to the Belgium against Switzerland case. In fact, the ICJ is competent to adjudicate on public international law according to Art. 38 of its Statute, but cannot adjudicate on the rules on the vesting of international jurisdiction of the various States and on their eventual exorbitant nature.[48]

However, this approach is not convincing. First, public international law of a general nature establishes the fundamental right of access to a court, which impedes States from exercising their jurisdiction in an exorbitant way and *a fortiori* from duplicating their proceedings, particularly when such duplication leads to high costs and risks of obtaining an inefficient administration of justice.[49] Second, the public international law rule on exorbitant jurisdiction applies to the case at hand, since the ICJ is competent to adjudicate on the exorbitant nature of the rules related to the vesting of international jurisdiction of the States to establish if such rules violate public international law, and therefore to adjudicate on this last field of law according to Art. 38 of its Statute.

The same opinion then maintains that the rules on *lis pendens* and related actions of the Lugano Convention are not applicable to the case Belgium against Switzerland,[50] since this Convention, like the Brussels Convention, does not apply to insolvency. In fact, according to this opinion, insolvency is regulated by EU Regulation 1346/2000 on insolvency proceedings.[51] Furthermore, even if the Lugano Convention applied to insolvency, this Convention would not oblige the Swiss courts to decline jurisdiction or to seize their proceedings. In fact, since the Belgian and Swiss proceedings are structurally different[52] they fall outside the scope of Art. 21, which concerns proceedings between the same parties with the same cause of actions. On the other hand, even though the Belgian and Swiss actions are related, ex Art. 22 of the Lugano Convention merely allows, but does not oblige, the courts other than the court first seized to stay its proceedings.

However, this approach is also not convincing. Firstly, the exclusion of insolvency from the scope of the Brussels Convention is grounded on the fact that insolvency is within the scope of EU Regulation 1346/2000. However, this Regulation does not apply to cases between EU Member States (like Belgium) and non EU countries (such as Switzerland). Thus, they fall into the scope of the Lugano Convention. Only this conclusion allows Belgium and Switzerland to cooperate internationally in this field. Second, in any case, even if Art. 21 on *lis pendens* of the Lugano Convention is not applicable, Art. 22 on related actions applies together with the public international law rule on the right of access to a court, on exorbitant jurisdiction and on the obligation to avoid duplicating

[48] F. MARONGIU BUONAIUTI (note 44), at 460-461 and *ibid.* further references.

[49] See Section I.

[50] See F. MARONGIU BUONAIUTI (note 44), at 462.

[51] See Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ* L 160 of 30 June 2000, p. 1–18.

[52] See F. MARONGIU BUONAIUTI (note 44), at 462.

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proceedings on related actions. Thus, the refusal to stay the proceedings by a court other than the court first seized violates Art. 22 when interpreted on the basis of general public international law. This is even more true since the Swiss courts refused to stay their proceedings on the basis of a mistaken evaluation of the unrecognisable nature of the Belgian future decision, as will be emphasised in Section IX.

VI. Jurisdiction over Foreign States: the Case Germany against Italy

A second group of private international law questions of a principal nature raised before the ICJ concern violations of public international law by the exercise of international jurisdiction against foreign countries by the courts of the forum State. Such a violation stands at the basis of the application filed by Germany to the International Court of Justice against Italy and decided by the ICJ in favour of Germany on February the 13th, 2012.[53] In this case, Germany argued that Italy violated its immunity from jurisdiction to which it is entitled under international public law of a general nature. According to Germany, Italy first violated German immunity from jurisdiction by allowing its courts to exercise jurisdiction in relation to the proceedings instituted against Germany in the Italian courts by several Italian nationals. These proceedings were brought to claim compensation for being arrested during the World War II and for being deported to Germany, where they were detained and forced to work in munitions factories until the end of the war. Second, Germany argued that Italy had violated its immunity from jurisdiction by allowing the Italian courts to exercise jurisdiction on the enforceability in Italy of the Greek judgment rendered by the Areios Pagos (Supreme Court), which ordered Germany to compensate the damage caused on 10 June 1944, during the German occupation of Greece, when German armed forces committed a massacre in the Greek village of Distomo, involving many civilians.[54] Third, Germany argued that Italy had violated its immunity from jurisdiction for having allowed Italian courts to exercise their jurisdiction on the enforcement in Italy of the Greek judgment at stake, taking measures of constraint against property belonging to Germany located on Italian territory.[55]

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[53] ICJ, *Jurisdictional immunities of the State*, (note 17).

[54] See Hellenic Supreme Court (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, 4 May 2000, *Int. Law Reports*, vol. 129, p. 513 *et seq.*

[55] See the references to the relevant Italian case-law in P. DE SENA/ F. DE VITTOR, State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case, *European Journal of Int. Law* 2005, p. 89 *et seq.*; C. FOCARELLI, Denying Foreign State Immunity for Commission of International Crimes: the Ferrini Decision, *I.C.L.Q.* 2005, p. 951 *et seq.*; P. FRANZINA, Norme sull'efficacia delle decisioni straniere e immunità degli Stati dalla giurisdizione civile, in caso di violazioni gravi dei diritti dell'uomo, *Dir. umani e dir. int.* 2008, p. 638 *et seq.*; M. FRULLI, The times they are a changing' – the Italian Court

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The following pages will analyse these three hypothesis of immunity from jurisdiction, since despite being interconnected based on a strict interpretation, they are grounded on distinct and autonomous premises and are regulated by different rules and are therefore best kept separate. This is illustrated by the fact that violation of one of these three hypothesis does not necessarily lead to a breach of the others.[56] The exercise of jurisdiction on the enforceability of a foreign judgment condemning a third party country in violation of its immunity from the jurisdiction on the enforceability of the forum State could potentially lead to the exercise of jurisdiction of this last State on the enforcement of the judgment at stake, namely to the taking of measures of constraint on property located on the forum State territory. However, it does not follow ipso facto that such exercise of jurisdiction on taking measures of constraint violates the immunity from the jurisdiction on the enforcement of the condemned country. For instance, there might be cases where the measures at stake concern property of the foreign State located in the forum country, and therefore do not fall under the scope of the immunity of the former from the jurisdiction on the enforcement of the latter. In other cases, the foreign country might have waived its immunity from enforcement as regards to property belonging to it situated in the forum State territory.[57]

Similarly, the exercise of jurisdiction on the enforceability of a judgment against a third party country in violation of the immunity of such country from the jurisdiction or on the enforceability of the forum State, does not *ipso facto* imply the exercise of the jurisdiction on the enforcement of such a judgment with the taking of measures of constraint on property of the country at stake located in the territory of the forum State. For instance, there may be cases where the third party country involved convincingly argues against such enforcement before the courts of the forum State or where the government of such State does not authorize such enforcement. In fact, several legal systems have government authorisation requirements to allow the government to stop courts from violating the jurisdictional immunity of foreign countries from the enforcement of the forum State.[58]

We will analyse the last two hypotheses on immunity from jurisdiction in an inverted order with respect to the way these hypothesis were analysed by the ICJ. In fact, the Italian courts took the measures of constraint on the property belonging to Germany located on Italian territory and exercised their jurisdiction to enforce the Greek judgments only after having declared such judgments enforceable in Italy, and thus having exercised their jurisdiction on the enforceability of the relevant judgments. The enforcement of the Greek judgments then follows their

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of Cassation denies Germany Immunity from Execution to allow Compensation to War Crime Victims, *International Journal of Criminal Justice* 2011, p. 1129 *et seq*.

[56] V. ICJ, *Jurisdictional immunities of the State,* (note 17), at para. 113 and 124. See also P. FRANZINA (note 55), at 638; O. LOPES PEGNA (note 40), at 1084 *et seq*. With respect to recognition and enforcement of foreign arbitral awards against third States, see R. KLÄGER, Case Comment. Werner Schneider (liquidator of Walter Bau AG) v Kingdom of Thailand. Sovereign Immunity and Enforcement Proceedings under German Law, *ICSID Review* 2014, p. 145.

[57] See Section VI., A.-C.

[58] *Ibid*.

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having been declared enforceable: therefore it seems necessary to analyse the issue of the enforceability of the Greek judgments before examining the question of their enforcement.

A. Italian Jurisdiction on the Merit over Germany

Germany firstly invoked the rule of customary international law on the jurisdictional immunity of the States, according to which the courts of different countries can adjudicate on foreign States' activities of a private nature – *jure gestionis* – but not on ones expressing their sovereign powers – *jure imperii*. Germany argued that Italy had violated its immunity.[59] Italy did not contest the existence or customary nature of the rule on immunity from jurisdiction invoked by Germany, but rather invoked several exceptions to this rule on the basis of which Italian courts could adjudicate on the claims against Germany. The first of these is the "territorial tort exception", according to which Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled because customary international law precludes a State's entitlement to immunity in acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperi.*[60] Second, the "last resort mechanism",[61] according to which Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity, and therefore of peremptory norms *(jus cogens)*; and because, since the claimants had been denied all other forms of

[59] See the Italian case-law quoted by the doctrine recalled at note 56.

[60] See, ICJ, para. 62. V. also Art. 11 of the European Convention on State Immunity adopted in Basle in 1972 and available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/074.htm>; Art. 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted in New York in 2004 and available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf>; and the national legislation of several countries referred to by the ICJ, *Jurisdictional immunities of the State* note 17 para. 62 and in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Dissenting opinion of Judge ad hoc Gaja,* para. 1 *et seq*. See also ILC, *Draft Articles on Jurisdictional Immunities of States and Their Property, Yearbook of the Int. Law Commission,* 1991, vol. II (Part Two), Commentary to Art. 12. See K. TRAPP/ A. MILLS, Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of Germany v Italy, *Cambridge Journal of International and Comparative Law* 2012, p. 155; O. LOPES PEGNA (note 39), at 1085.

[61] See K. TRAPP/ A.MILLS (note 60), at 162; E. CANNIZZARO/ B. BONAFÈ, Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights, in U. FASTENRATH/ R. GEIGER/ D. E. KAHN/ A. PAULUS/ S. SCHORLEMER/ C. VEDDER (eds), *From Bilateralism To Community Interests. Essays In Honour Of Judge Bruno Simma,* Oxford 2011, p. 839 *et seq*.; M. KRAJEWSKI/ C. SINGER, Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights (September 16, 2012), in A. VON BOGDANDY/ R. WOLFRUM (eds), *Max Planck Yearbook of United Nations Law*, 2012, available at <http://ssrn.com/abstract=2147386>, p. 24 *et seq*.

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redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort.

The ICJ rejected all Italian arguments and adjudicated the case in favour of Germany for various reasons principally based on public international law and only residually grounded in private international law. It is worth noting that immunity from jurisdiction constitutes a negative jurisdiction criterion of private international law and therefore any arguments related to immunity, even of a public international law character, are relevant for private international law also. However, due to space concerns hereinafter only the private international law reasons grounding the judgment, and the criticisms of the judgment based on private international law, will be examined.

The ICJ emphasised that it is necessary to separate the procedural aspects of cases, including the limits to jurisdiction constituted by German immunity, from the limits to jurisdiction of a substantive nature, including the *jus cogens* nature of the public international law rule violated by Germany. In fact, Germany argued that the substantive aspects are relevant only with respect to the procedural phase related to the merit of the claims, whereas they are irrelevant with respect to the preliminary procedural phase related to the exception of a procedural nature. Under this approach, substantive aspects shall be decided only after the decision on the procedural aspects, on which in any case the former cannot impact.[62] Thus, the *jus cogens* nature of the public international law rule allegedly violated by Germany, does not imply any substantive restriction on the German immunity from Italian jurisdiction but rather is relevant only for the procedural phase related to the merit. Yet, the Italian courts could not reach such procedural phase on the merit, but rather should have declined their jurisdiction on the basis of German immunity.[63]

However, this strict separation between substance and procedural aspects on which the ICJ grounded its decision is unconvincing.[64] This is suggested by the same exceptions to German immunity from the Italian jurisdiction, which were invoked by Italy before the ICJ. In fact, such exceptions correspond (are "comparable")[65] to certain positive criteria of international jurisdiction, which seek to favour "the adaptation of procedural rules to ensure that substance is given effect".[66]

The "territorial tort exception" therefore requires a spatial connection between the court and the place where the harmful event occurred in order to satisfy procedural needs, such as proximity of the court to the case and effective administration of justice. Yet, the same exception also aim at satisfying substantive needs, such as allowing the plaintiff to obtain effective justice by way of a court that is more proximate to the case. Indeed, these procedural and substantive needs

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[62] ICJ, *Jurisdictional immunities of the State* (note 17), at para. 93.

[63] K. TRAPP/ A. MILLS (note 60), at 159; N. BOSCHIERO (note 2), at 36.

[64] K. TRAPP/ A. MILLS (note 60), at 163; N. BOSCHIERO (note 2), at 37; R. GARNETT, Substance *And Procedure In Private International Law*, Oxford 2012. See also B. BONAFÈ, The ECHR and the Immunities Provided by International Law, *Italian Yearbook of International Law* 2010, p. 55 *et seq.*

[65] K. TRAPP/ A. MILLS (note 60), at 162.

[66] *Ibid.*, 163.

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are also at the basis of the jurisdiction criterion of the *forum damni*, which is established by a relevant number of PIL rules of a national nature, of EU member or non-member States, and of an international universal and regional character. Among such rules Art. 5.3 of the Brussels Convention of 1968 and of the Brussels I Regulation of 2002 and recast in 2012 (Art.7.2) should be mentioned.[67] The jurisdiction criterion of the *forum damni* is particularly relevant here, since it grounded the international jurisdiction of the Italian courts on the proceedings against Germany, as codified not by Art. 5.3 of the Brussels Convention – which is not applicable to claims related to war crimes, as will be discussed in the following Section –, but rather on Art. 20 of the Italian civil procedural code, which is applicable to the matters falling outside the scope of the Brussels Convention, as stated in Art. 3 para. 2 of the Italian law n. 218 of 31 of May 1995 on private international law (hereinafter: law 218/1995 or Italian PIL law).

Therefore, the "last resort mechanism" allows the exercise of jurisdiction against foreign countries in order to satisfy procedural needs, such as the access to court and an equal and effective administration of justice. Yet, the same exception also pursues substantive needs, such as allowing the judicial adjudication on the merit of the case and therefore the eventual satisfaction of the substantial reasons of the alleged victim. Indeed, these procedural and substantive needs are also at the basis of the jurisdiction criterion of the jurisdiction by necessity, or *forum necessitatis*, which is established by a relevant number of PIL rules of a national nature, of EU member or non-member States, and of an international universal and regional character.[68]

B. Italian Jurisdiction on the Enforceability of the Greek Judgments

Germany secondly invoked the rule of customary international law on the jurisdictional immunity of States, and alleged that its immunity from jurisdiction was also violated by the decisions of Italian courts declaring enforceable in Italy judgments rendered by Greek courts, ordering Germany to compensate the damage caused to the victims of the Distomo massacre.[69] The enforcement of these judgments was requested to the Italian courts: (i) as they had remained unenforced in Greece, since Art. 923 of the Greek Code of Civil Procedure requires authorization from the Minister for Justice to enforce a judgment against a foreign State in Greece, which in the *Distomo* case was not granted;[70] (ii) following this the claimants brought

[67] See note 45.

[68] On residual jurisdiction see K. TRAPP/ A. MILLS (note 60), at 162; O. LOPES PEGNA (note 39), at 1086; N. BOSCHIERO (note 2), at 39; R. CAFARI PANICO, Forum necessitatis. Judicial Discretion in the Exercise of Jurisdiction, in F. POCAR/ I. VIARENGO/ F. C. VILLATA (eds), *Recasting Brussels I* (note 45), at 127 *et seq.*; B. UBERTAZZI (note 4), at 245 *et seq.*

[69] See note 55.

[70] See Art. 923 of the Greek Civil Procedural Code. See on other national systems A. REINISH, European Court Practice Concerning State Immunity from Enforcement Measures, *European Journal of Int. Law* 2006, p. 803 *et seq.*

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proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, par. 1, of the ECHR by refusing to comply with the decision of the Greek courts (as to Germany) and failing to permit the enforcement of that decision (as to Greece). but in its decision of 12 December 2002 the European Court of Human Rights, referring to the rule of State immunity, held that the claimants' application was inadmissible; [71] (iii) finally, the Greek claimants brought proceedings before German courts in order to enforce in Germany the Greek judgments, but the German Federal Supreme Court in its judgment of 26 June 2003 held that those Greek judicial decisions could not be recognized in Germany because they violated Germany's rights of immunity.[72]

The Greek claimants then sought to enforce the judgments of the Greek courts in the *Distomo* case in Italy. The Italian courts declared the Greek judgments enforceable by applying the rules of the Brussels I Regulation on the recognition and enforcement of judgments of EU member States, such as Greece.[73] Yet, these rules do not apply to judgments rendered in legal actions brought by natural persons in a Contracting State against another Contracting State for compensation in respect of damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State,[74] such as the actions related to the Distomo massacre. The Italian courts then declared the Greek judgments enforceable by applying Italian domestic legislation on the recognition and enforcement of foreign judgments, namely Articles 64 and 67 of the Law 218/1995,[75] as suggested by the Judge *ad hoc* Giorgio Gaja.[76] According to Articles 64 and 67 of the Law 218/1995, foreign judgments automatically produce effects other than the enforced ones, for which they produce effects by going

[71] *Kalogeropoulou and others* v. *Greece and Germany*, Application No. 59021/00, Decision of 12 December 2002, *ECHR Reports* 2002-X, 417; *ILR*, Vol. 129, p. 537. See B. HESS (note 1), at 203; M. KRAJEWSKI/ C. SINGER (note 61), at 15; O. LOPES PEGNA (note 39), at 1088.

[72] *Greek citizens* v. *Federal Republic of Germany*, case No. III ZR 245/98, *Neue Juristische Wochenschrift (NJW)*, 2003, p. 3488; *ILR*, Vol. 129, p. 556. See B. HESS (note 1), at 201; M. KRAJEWSKI/ C. SINGER (note 61), at 15; O. LOPES PEGNA (note 39), at 1081.

[73] See note 55.

[74] See judgment of the Court of 15 February 2007, *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, Case C-292/05, in Reports of Cases 2007 I-1519. See M. REQUEJO ISIDRO, The Use of Force, Human Rights Violations and the Scope of the Brussels I Regulation, in this *Yearbook* 2012.

[75] See the references at note 55.

[76] See Declaration of Judge ad hoc Gaja, *Riv. dir. int.* 2011, p. 1212 *et seq*. See O. LOPES PEGNA (note 39), at 1080. On intervention under Art. 62 of the ICJ Statute in general see P. PALCHETTI, Opening the International Court of Justice to Third States: Intervention and Beyond, in J.A. FROWEIN/ R. WOLFRUM (eds), *Max Planck Yearbook Of United Nations Law* 2002, p. 139 *et seq.*; B. BONAFÈ, Interests of a Legal Nature Justifying Intervention before the ICJ, *Leiden Journal of International Law* 2012, p. 739 *et seq*.

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through proceedings to verify their enforceable nature in their countries of origin and the fulfilment of all other necessary requirements.[77]

For the Italian courts, the Greek judgments at stake fulfilled Art. 64 and 67's requirement of being enforceable in their country of origin. Although these judgments could not be enforced in Greece, such practical unenforceability did not render said judgments unenforceable in nature or against public policy.[78] This conclusion is in line with the principle in the ECJ case *Apostolides,* which concerns the Brussels I Regulation, but nevertheless is applicable *mutatis mutandis* to cases regulated by Arts. 64 and 67 of the Italian PIL law.[79] In the *Apostolides* case, Mr Apostolides, a Cypriot national, owned a real property in the northern area of Cyprus which was invaded by the Turkish army in 1974. As members of the Greek Cypriot community, Mr Apostolides' family was forced to abandon their house and take up residence in an island effectively controlled by the Cypriot Government. The property at stake was then nationalised by the Republic of Northern Cyprus, an entity which, to this day, has not been recognised by any State except the Republic of Turkey, and sold to a third party and then from this third party, acquired by Mr and Mrs Orams, a British couple. Mr Apostolides brought an action against the Orams before the Cypriot courts, which ordered them with two judgments to deliver immediately to Mr Apostolides free possession of the land. Since these judgments were not enforced in Northern Cyprus, because in such area the Government of Cyprus exercises effective control, Mr Apostolides produced them in England to apply for their recognition and enforcement pursuant to the Brussels I Regulation. The Court of Appeal decided to stay the proceedings and to refer the question to the ECJ for a preliminary ruling on whether a judgment of a Member State court, sitting in an area of that State over which the Government of that State exercises effective control, in respect of land in that State in an area over which the Government does not exercise effective control, can be denied recognition or enforcement under the Brussels I Regulation, and that the judgment is against public policy. The ECJ answered in the negative allowing for the recognition in England of the Cypriote judgments at stake.

For the Italian courts the Greek judgments fulfilled all other requirements for being considered enforceable in Italy according to Arts. 64 and 67 of the Italian PIL law, such as being final in the country of origin (Art. 64.d), and not being against the public policy (Art.64.g). The Greek judgments were final in Greece, and Italian courts also considered the Greek judgments compatible with the absolute primacy of the fundamental values of liberty and dignity of human beings and therefore totally in line with public policy.[80]

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[77] See P. FRANZINA (note 55), at 638.

[78] On the public policy exception see further in this Section also.

[79] See Judgment of the Court of 28 April 2009, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Case C-420/07, Reports of Cases 2009 I-03571. See B. HESS, European Civil Procedure and Public International Law, in U. FASTENRATH/ R. GEIGER/ D. E. KAHN/ A. PAULUS/ S. SCHORLEMER/ C. VEDDER (eds), *From Bilateralism* (note 61), at 940.

[80] See P. FRANZINA (note 55), at 638; O. LOPES PEGNA (note 39), at 1081; N. BOSCHIERO (note 2), at 34.

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Finally, the Italian courts considered the requirement posed by Art. 64.a) of the Italian PIL law, according to which the judicial authority that recognizes a foreign judgment in Italy has to have international jurisdiction over the case, irrelevant. Yet, according to the same Italian courts immunity constitutes a negative jurisdiction criterion and thus falls within the scope of Art. 64.a) of the Italian PIL law. Therefore, the Italian courts had to consider whether the Italian rules on the negative jurisdiction criterion constituted by immunity would have allowed the Greek courts to exercise their jurisdiction on the Distomo massacres. The Italian rules on immunity from jurisdiction on enforcement originate from customary international law and allow such immunity to be overcome only when specific exceptions to immunity are present, namely the "territorial tort exception" and the "last resort mechanism". The massacre of Distomo occurred in Greece and the victims had already initiated several proceedings without success, in other States such as Germany, suggesting the unconvincing nature of the opinion according to which these proceedings might succeed only when initiated before the courts of the country that perpetrated the crimes.[81] The Greek proceedings fulfilled the requirements of the restrictions to immunity constituted by the "territorial tort exception" and the "last resort mechanism", and respected the rules on the negative criterion of jurisdiction constituted by immunity, which are proper of the Italian legal order. Then, the Greek courts could exercise their jurisdiction on the Distomo massacre according to Art. 64 letter a), which would have confirmed the enforceability in Italy of the Greek judgments.[82]

In this context, Germany argued that the Greek judgments violated German immunity from jurisdiction for the same reasons that the exercise of Italian jurisdiction against Germany on the Italian national claims violated its immunity.[83] Germany even argued that according to the international customary law rule on immunity from jurisdiction of foreign countries, judgments rendered in violation of such immunity cannot be enforced in third party countries. Germany then argued that the granting of exequatur to the Greek judgments by Italian courts violated this customary international law rule and German immunity from jurisdiction.[84]

Italy did not contest the existence of such rule, but rather argued that it was not applicable to the case because the Greek judgments did not violate the German immunity for the same reasons that the exercise of Italian jurisdiction over the Italian national claims did not violate the German immunity from jurisdiction. This was because the Greek proceedings (as with the Italian ones) fulfilled the requirements of the "territorial tort exception" and the "last resort mechanism".[85]

The ICJ, however, adopted a "significantly different viewpoint"[86] with respect to the Italian courts and the German action and the Italian defence. In fact,

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[81] B. HESS, *Staatenimmunität* (note 1), at 206.

[82] See O. LOPES PEGNA (note 39), at 1082.

[83] See previous Section.

[84] ICJ, *Jurisdictional immunities of the State* (note 17), at 122.

[85] *Ibid*, at para. 123.

[86] *Ibid*, at para. 127. See O. LOPES PEGNA (note 39), at 1077; N. BOSCHIERO (note 2), at 14.

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Italian courts ruled that the German immunity from Italian jurisdiction did not affect the exercise of such jurisdiction on the Greek judgments, but rather concerned only with the Italian jurisdiction on the enforcement of such judgments. On the contrary, the ICJ ruled that the German immunity from jurisdiction of the Italian courts was relevant to establish whether Italian courts had jurisdiction on the enforceability of the Greek judgments.[87] Similarly, for the German action and the Italian defence, the Italian courts did (or did not) violate the German immunity on the Greek judgments when they declared enforceable such judgments despite them being (or not) rendered in violation of the German immunity from the Greek jurisdiction on the merit.[88] The ICJ, on the other hand, considered that the Italian courts violated the German immunity on the enforceability of the Greek judgments simply by exercising their jurisdiction on the enforceability of the Greek judgments, without any relevance to be given to any alleged violations by the Greek courts of the German immunity from the Greek jurisdiction on the merit.[89]

In other words, where a court is requested to grant *exequatur* to a foreign judgment against a third party State, it is itself being called upon to exercise its own jurisdiction in respect of such State. It is true that the purpose of *exequatur* proceedings is not to decide the merits of a dispute, but simply to render the judgment enforceable, and therefore it is not the role of the court requested to grant exequatur. Nevertheless, in adjudicating on whether or not to grant exequatur, the requested court still exercises a jurisdictional power over the third party State, which results in the foreign judgment being given effects with respect to those of a judgment rendered on the merits in the requested State. The proceedings brought before the requested court must therefore be regarded as being conducted against the third party State. This conclusion is confirmed by Art. 6 para. 2 of the United Nations Convention of 2004 on the jurisdictional immunities of States and their property.[90] Hence, States shall respect the rules on immunity of foreign countries from jurisdiction even in adjudicating on whether or not to grant exequatur to a foreign judgment.[91]

Thus, according to the ICJ, the court seized of an application for *exequatur* of a foreign judgment rendered against a third party State has to ask itself whether the respondent State enjoys immunity from jurisdiction if demanded before the courts of the State in which exequatur proceedings have been instituted (rather than before the courts that rendered the judgment to be declared enforceable) with an action on the merit (rather than with an exequatur proceeding) regarding a case "identical" to the one in relation to which that judgment was given. Only in case of

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[87] See further, this same Section.

[88] ICJ, *Jurisdictional immunities of the State* (note 17), at para. 126.

[89] See further, this same Section.

[90] See ICJ, *Jurisdictional immunities of the State* (note 17), at para. 129. See H. Fox, *The Law Of State Immunity,* 2 ed., Oxford 2008, p. 29 *et seq.*; O. Lopes Pegna (note 39), at 1079; N. Boschiero (note 2), at 1 *et seq.*

[91] ICJ, *Jurisdictional immunities of the State* (note 17), at paras 127-133, particularly para. 130. See also C. Keitner, Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity, *ASIL Insights* 16, Issue 5 (2012), available at <www.asil.org>.

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a negative answer, then, the requested courts can adjudicate on whether to grant exequatur to the foreign judgment at stake, verifying if such judgment fulfils all requirements to be declared enforceable on the territory of the requested State.[92]

Also, the Italian courts had to ask themselves whether Germany enjoyed immunity from jurisdiction if demanded before the Italian courts (rather than before the Greek courts) with an action (rather than with an exequatur proceeding) regarding the Distomo massacres. Only if the answer was negative could the Italian courts have adjudicated on whether to grant exequatur to the Greek judgments, and to verify whether these judgments fulfilled all requirements to be declared enforceable in the Italian territory. Furthermore, during the exequatur proceedings, and the verification of the fulfilment by the Greek judgments of the requirements posed by the Italian PIL, the question of German immunity from Italian jurisdiction could arise again. This time, however, the immunity question would not be related to the hypothetical Italian action regarding the Distomo massacres, but rather to the Greek proceedings themselves, to establish whether the Greek judgments were rendered by Greek courts that would have international jurisdiction according to the rules the Italian legal order (Art. 64.a) and if these judgments were compatible with public policy (Art. 64.e).

Indeed, for the ICJ the Italian courts could not verify if the Greek judgments fulfilled the requirements to be declared enforceable in Italy, because Italian courts had to stop at the preliminary procedural phase on the verification of the existence of German immunity from Italian jurisdiction. In fact, this preliminary verification had to consider German immunity from jurisdiction in relation to the Italian hypothetical action regarding the Distomo massacres, for the same reasons at the base of the existence of the German immunity from the Italian jurisdiction on compensation claims raised by Italian nationals for having been arrested during the second world war and deported to Germany. In fact according to the ICJ, international law recognises the immunity of States from the jurisdiction of foreign countries in relation to legal actions concerning acts perpetrated by armed forces in the course of warfare correspondent to the Greek and Italian ones; however such immunity is not to be considered overcome when the territorial and residual remedy exceptions are met; and in any case such exceptions to immunity were not met in the Italian hypothetical action regarding the Distomo massacres, since this massacre was committed in Greece and not in Italy.[93] Consequently, for the ICJ the Italian courts had violated German immunity from their jurisdiction in adjudicating on the application for *exequatur* of the Greek judgments.[94]

Moreover, in *Germany v. Italy* the ICJ affirmed the existence of a customary international law obligation on States requested to declare enforceable foreign judgments rendered in proceedings related to third party States. This obligation requires requested States to respect the immunity of the third party State subject of the judgments at stake from the jurisdiction of the requested States on the enforceability of such judgments. The same obligation arises in cases where the international procedural law of the requested State establishes an opposite judicial

[92] ICJ, *Jurisdictional immunities of the State* (note 17), at paras 127-133.

[93] *Ibid*. See O. Lopes Pegna (note 39), at 1085 *et seq*.

[94] ICJ, *Jurisdictional immunities of the State* (note 17), at paras 127-133.

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proceeding to declare enforceable foreign judgments, since in these cases the requested State exercises its jurisdictional powers over the foreign country. However, the obligation does not arise in cases where the international procedural law of the requested State does not establish an opposite judicial proceeding to declare foreign judgments enforceable, but rather foresees the automatic enforceability of such judgments, since in these cases the requested State does not exercise any jurisdictional powers over the foreign country.[95] In these last cases, a fundamental role is to be assigned to the immunities of the third country other than the immunity from the jurisdiction on enforceability, namely the immunity from the jurisdiction of the State that rendered the judgment to be declared enforceable and the immunity on the enforcement (rather than on the enforceability) of the requested State. In fact, even though these immunities are distinct and violation of one does not imply the violation of the other, the compliance with one can nevertheless avoid the violation of the other. For instance the compliance with the immunity of the States from the jurisdiction of another country can avoid the case where the latter renders a judgment against the first State, which would then be considered automatically enforceable in a third requested State. Furthermore, the compliance with the immunity of the States from the jurisdiction on the enforcement of the requested countries can avoid cases where judgments to which third party countries are the subject might be considered automatically enforceable in requested States and then enforced there.[96]

Finally, the decision of *Germany v. Italy*, despite denying the enforceability in Italy of the Greek judgments on the Distomo massacres, does not deny the possibility of foreign judgments rendered against foreign States being declared enforceable and then enforced in States other than the countries that rendered the judgments and those that are the subject of such judgments. In fact, *Germany v. Italy* explicitly recognises this possibility.[97] It is true that the ICJ limits such possibility by imposing upon the requested State an obligation to comply with the immunity of the foreign State from the jurisdiction of the requested country in a hypothetical proceeding on an action identical to the one that was subject to the one adjudicated by the rendering court. As such, the ICJ impedes the applicability of all exceptions to immunity of foreign countries that are grounded on territorial criteria[98] – such as the *territorial tort exception* under examination.[99] The fact nevertheless remains that this limit does not impact on the exceptions to immunity of foreign countries that are based on non-territorial criteria, such as the ones relating to the nature and the purpose of the activities. This result is in line with the

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[95] For instance in the framework of the Brussels I recast the exequatur proceedings have been abolished. See B. HESS (note 1), at 206; T. PFEIFFER, Recast of the Brussels I Regulation: The Abolition of Exequatur, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds) (note 45), at 311 *et seq*.; M. DE CRISTOFARO, The Abolition of Exequatur Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds) (note 45), at 353 *et seq.*

[96] See B. HESS (note 1), at 206.

[97] ICJ, *Jurisdictional immunities of the State* (note 17), at 113.

[98] See O. LOPES PEGNA (note 39), at 1087-1088; N. BOSCHIERO (note 2), at 17.

[99] See O. LOPES PEGNA (note 39), at 1087 *et seq*..

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international law rules of *hard* and *soft law,* which are relevant with regard to immunity from jurisdiction of foreign countries.[100] The same result is also in line with recent case-law of various States, such as Canada and the UK, who declared enforceable in their territories Kuwaiti and US judgments rendered against Iraq and Argentina respectively in relation to activities performed *jure gestionis.* The Canadian and UK Supreme Courts rendered these declarations of enforceability only after determining that Iraq and Argentina enjoyed immunity from the same Canadian and UK jurisdictions on the enforceability of the judgments at stake. Thus, the Canadian and UK Supreme Courts adopted an analogous legal argument to the one followed by the ICJ[101] and this is why the ICJ referred to these judgments as case law supporting its decision in *Germany v. Italy*.[102]

C. Italian Jurisdiction on the Enforcement of the Greek Judgments

Germany, thirdly, invoking the rule of customary international law on the jurisdictional immunity of States from foreign jurisdictions over their property, complaining that it was violated by the Italian courts' enforcement of the Greek judgments on the Distomo massacre and ordering registration with the Como provincial office of the Italian Land Registry of a legal charge over Villa Vigoni, a property of the German State near Lake Como.[103] For the ICJ, a judgment rendered against a foreign country can be enforced in a third party country,[104] permitting to the requirements posed by Article 19 of the United Nations Convention entitled "State immunity from post-judgment measures of constraint". In fact, despite such Convention not yet entering into force, in relation to the issue of immunity from enforcement it codifies the existing rules under general international law and therefore it is binding inasmuch as it reflects customary law on the matter.[105] According

[100] See the UN Convention of 2004, (note 61); the Draft Convention on State Immunity of the International Law Association, in *International Legal Materials,* 1983, p. 287; and the resolution of the Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, adopted on September the second 1991 in Basle. See also Art. 20 of the European Convention on State Immunity (note 61).

[101] See Supreme Court of Canada, *Kuwait Airways Corp.* v. *Iraq* [2010] *SCR,* Vol. 2, p. 571 and United Kingdom Supreme Court in *NML Capital Limited* v. *Republic of Argentina* [2011] *UKSC* 31. See A. DICKINSON, State Immunity and Foreign Judgments in the United Kingdom – The Vulture Swoops, *Lloyd Maritime and Commercial Law Quarterly* 2011, p. 581 *et seq*.; O. LOPES PEGNA (note 39), p. 1076, 1080-1081 and 1083; N. BOSCHIERO (note 2), at 15 *et seq.* In general on these cases see H. MUIR-WATT (note 2), at 20 note 111; H. FOX, Rain on the just and on the unjust, *Law Quarterly Review* 2012, p. 14; M. RISVAS, Argentina's Sovereign Debt Default Cases: Some Recent Developments in a Continuing Saga, EJIL: Talk, 12 November 2012, available at <http://www.ejiltalk.org/argentinas-sovereign-debt-default-cases-some-recent-developments-in-a-continuing-saga/>.

[102] ICJ, *Jurisdictional immunities of the State* (note 2), at para. 130.

[103] *Ibid*, at para. 35.

[104] *Ibid*, at para. 113.

[105] *Ibid*, at para. 117.

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to Art.19 before any measure of constraint may be taken against property belonging to a foreign State, the State which owns the property must have expressly consented to the taking of the measure, or must have allocated this property for a *jure gestionis* activity or for the satisfaction of a specific judicial claim.

Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy, which are organized and administered on the basis of an agreement between Italy and Germany dated 21 April 1986. Germany had not in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it. Thus, according to the ICJ Villa Vigoni is a German property immune from Italian jurisdiction on enforcement. Therefore the registration of a legal charge on Villa Vigoni constituted a violation by Italy of its obligation to respect this immunity.[106]

VII. Applicable Law

A third group of private international law questions of a principal nature raised before the ICJ concern violations of public international law caused by the application by the courts of a particular States of a determinate law, which is recalled by PIL rules as the law applicable to a concrete case. Among these questions is the one which was the subject of the application filed by the Netherlands against Sweden in the *Boll* case, and decided by the ICJ on November the 28th 1958.[107]

The Netherlands brought an action relating to the application of the Convention of 1902 governing the guardianship of infants,[108] questioning the validity of a measure taken by the Swedish authorities in respect of an infant, Marie Elisabeth Boll, of Dutch nationality, residing in Sweden. The Netherlands alleged that this measure was incompatible with the provisions of The Hague Convention 1902 governing the guardianship of infants, according to which the law of the infant's nationality is applicable, therefore the law of the Netherlands. Thus, the Netherlands asked the ICJ to declare that the measure at stake was not in conform-

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[106] *Ibid*, at para. 119.

[107] ICJ, *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands* v. *Sweden),* Judgment of November 28th, 1958, *I.C.J. Reports* 1958, p. 55. On this case see H. BATIFFOL/ Ph. FRANCESCAKIS, L'arrêt Boll et la Cour international de justice et sa contribution à la théorie du droit international privé, *Rev. crit. dr. int. pr.* 1959, p. 255 *et seq*. More recently see J.G. SAUVEPLANNE, Developments in private international law: a retrospective look at the Boll case, in A. BOS/ H. SIBLESZ, *Realism in Law-making: Essays on International Law in Honour of Willem Riphagen*, Dordrecht 1986, p. 185. On the applicable law question related to contracts raised before the Permanent Court of International Justice see: PCIJ, *Case concerning the payment of various Serbian loans issued in France*, *judgment of 12 July 1929, series A, No. 20,* p. 41 and PCIJ, *case concerning the payment in gold of Brazilian federal loans contracted in France, judgment of 12 July 1929, series A, No. 21,* p. 93.

[108] At that time binding both States.

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ity with the obligations imposed upon Sweden by virtue of the Convention and to order the termination of the measure.

Sweden did not dispute the fact that protective upbringing temporarily impedes the exercise of custody to which the guardian is entitled under the Dutch law, but rather contended that this measure did not breach the 1902 Convention. According to Sweden, the Convention should be understood as containing an implied reservation[109] allowing State parties to apply their measures falling within the category of *ordre public,*[110] such as the Swedish one[111], to infants residing in their territories.[112]

So, in this case the key question was whether Sweden violated the 1902 Convention by instituting the protective upbringing measure. The real issue related then to jurisdiction, not to applicable law. Yet, the ICJ emphasised that the Convention of 1902 governs conflicts of law in respect of guardianship, whereas the Swedish rules are designed to meet preoccupations of a general character and social order related to young people.[113] Thus, the Swedish rules under examination seek to be applicable beyond the functioning of the conflict of law provisions of the Hague Convention. The Convention also seeks to facilitate solutions rather than create obstacles to the solution of social problems and therefore does not impede States other than the national ones of the interested children to apply their own rules of *ordre public* on protective measures, which would today be characterized as mandatory provisions of States.[114] Thus, a comparison between the purpose of the 1902 Convention and the Swedish Law shows that the purpose of the latter places it outside the field of application of the Convention. Consequently, Sweden did not violate the Convention in applying the latter to Boll.[115]

VIII. Recognition and Enforcement of Foreign Judgments

A fourth group of private international law questions of a principal nature raised before the ICJ concern the violations of public international law caused by the recognition and enforcement of foreign judgments by States' courts. The question is to be distinguished by the fact that the judgments are either rendered against a foreign State, such as the Greek judgments in *Germany v. Italy*,[116] or are taken

[109] ICJ, *Case Netherlands* v. *Sweden,* at 70.

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*, at 68.

[113] *Ibid.*, at 71.

[114] See S. De Dycker (note 9), at 478 *et seq.* and the doctrine recalled *supra* (note 107).

[115] *Ibid.*, at 70 and 71.

[116] See Section VI.

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against private persons, as with the action brought by Belgium against Switzerland before the ICJ.[117]

In particular in this last case Belgium maintained that Switzerland violated the Lugano Convention on the recognition and enforcement of foreign judgments when it allowed the Swiss courts to refuse to grant Belgium's request the Belgian shareholders for a stay of the debt-scheduling proceedings pending the conclusion of the proceedings to determine the Swiss companies' contractual and non-contractual liability to the Belgian shareholders. Switzerland, however, contended that the Lugano Convention did not apply to the future Belgian judgment since such recognition ought to have occurred in Swiss proceedings related to actions contesting the schedule of claims which concerned insolvency and therefore did not fall within the scope of the Lugano Convention. Switzerland also contended that even if the Lugano Convention was applicable, the future Belgian judgment would not have been recognized in Switzerland, because it would have been rendered in violation of the exclusive jurisdiction vested in proceedings concerned with the enforcement of judgments by Art. 16.5 of the Lugano Convention to the courts of the State in which the judgment is to be enforced, therefore the Swiss courts rather than to the Belgian courts.

The ICJ was requested to decide if the Lugano Convention on recognition and enforcement of foreign judgments was applicable and if the Swiss courts had violated it. The Lugano Convention pertains to the field of law that regulates the vesting of international jurisdiction. Thus, a judgment of the ICJ on this part of the case Belgium against Switzerland would have applied private international law (also) and would have constituted a leading case important to the development of such field.

Despite the fact that this case was not ultimately decided by the ICJ (since the proceedings were discontinued and the case was removed from the Court's List at the request of Belgium) it is useful to examine it anyway[118] in particular to argue that the reasons behind the Swiss court's decisions were surely grounded on a false premise.[119] In fact, in establishing whether a matter is within the scope of the Lugano Convention it is necessary to examine the subject matter of the judgment requested to be recognised and enforced, rather than of the proceeding in which the recognition and enforcement of such judgment is sought. The future Belgian judgment concerned the contractual and tort liability of the Swiss companies and therefore matters which were not related to insolvency, but rather had a civil and commercial nature which fell within the scope of the Lugano Convention.

Moreover, to establish if a judgment was rendered in violation of an exclusive jurisdiction rule of the Lugano Convention, it is necessary to examine which international jurisdiction criterion the proceedings are based upon that lead to the judgment which has to be recognised and enforced, rather than the proceeding in which such recognition and enforcement was sought. The Belgian proceedings were grounded on international jurisdiction criteria regarding contractual and non-contractual claims, for which there were no exclusive jurisdiction rules, whilst

[117] On this case, see also *supra*, Section VII.

[118] S. De Dycker (note 9), at 478 *et seq.*

[119] See F. Marongiu Buonaiuti (note 44), at 459.

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at the same time the exclusive jurisdiction of the Swiss courts on the enforcement of the future Belgian judgment was respected since such enforcement was asked to these courts rather than to the Belgian ones.[120]

While the Swiss reasoning seems unconvincing, the Belgian request to the ICJ on the Swiss violation of the Lugano Convention rules should not be considered to have been made out. In fact, these rules concern already rendered foreign judgments, rather than yet to be rendered judgments. Therefore, such rules do not oblige the Swiss courts to recognise and enforce the pending Belgian judgment.[121] This being said, the Lugano Convention still imposes an obligation on States to verify the possibility to recognise and enforce a pending judgment in the framework of the prognostic evaluation established by Art. 22 on related actions. It is true then that the Swiss courts considered the pending Belgian judgment unrecognisable and unenforceable in Switzerland. The fact nevertheless remains that this prognostic evaluation of the Swiss courts was based on a wrongful application of the Lugano Convention on recognition and enforcement of foreign judgments. As a consequence, even though Swiss courts did not violate the Convention rules on recognition and enforcement of foreign judgments, the same courts rendered an erroneous evaluation on the related actions under Art. 22, which is a further confirmation of the violation of this Article, as suggested at Section V.

IX. Conclusions

All in all, the jurisprudence of the ICJ relating to private international law "thoughts" or "questions" highlights the importance of this Court for the development of this area of law. The Court is requested to establish or has established relevant private international law rules on nationality, the prevalent norms on "public policy" over the *lex causae*, and the applicability of the Lugano Convention to insolvency matters. The jurisprudence of the ICJ also highlights the importance of private international law in adjudicating disputes between the Member States and to achieve public international law aims. Thus, the Court is requested to apply or has applied private international law to adjudicate questions between the States, such as the ones on nationality and its effectiveness, on the law of guardianship of minors and on international civil procedures related to insolvency matters.

Particularly, in *Germany v. Italy* the ICJ develops private international law, by acknowledging that foreign States' decisions condemning third party States may produce extraterritorial effects, even if under certain conditions, that were not encountered in the case. In addition, the judgment confirms the relevance of private international law to adjudicate disputes between States and to reach public international law purposes. Thus this judgment invokes the relevant international civil procedure norms on recognition and enforcement of foreign decisions to allow the

[120] *Ibid.*

[121] *Ibid.*

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cross-border circulation of judgments condemning foreign countries. Indeed, this circulation can grant an effective remedy to individuals who are the victim of States' activities that are contrary to public international law, in particular when the relevant decision that condemns a foreign State is not enforced either in the rendering State, or in the condemned one. As such, the recent judgment of the ICJ in *Germany v. Italy* illustrates that private international law could be a relevant tool to efficiently internationalise the costs of foreign States' unlawful activities.[122]

[122] C. CONSOLO (note 39), at 329. See also the doctrine quoted at *supra* (note 2).

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THE BRUSSELS I-*BIS* REGULATION AND FUTURE PERSPECTIVES

LIS ALIBI PENDENS AND RELATED ACTIONS IN THE RELATIONSHIPS WITH THE COURTS OF THIRD COUNTRIES IN THE RECAST OF THE BRUSSELS I REGULATION

Fabrizio MARONGIU BUONAIUTI*

I. Regulation (EU) No. 1215/2012 ("Brussels I Recast Regulation") and its Mild Opening to Third-Country-Related Disputes

II. Taking into Account Parallel Proceedings Pending before Third Country Courts: Justification for the Innovation Introduced by the Recast Regulation

III. Discretion as a Distinctive Feature of the Rules Concerning *lis alibi pendens* and Related Actions before Third Country Courts

IV. Grounds for Resuming Proceedings as a Safeguard for the Procedural Rights of the Parties

V. Effects of the Judgment Delivered by the Third Country Court in the Same or in a Related Action on the Proceedings Pending before the Member State Court

VI. Residual Role of Domestic Rules on *lis alibi pendens* and Related Actions before Foreign Courts

VII. Final Remarks: The New Rules as a Revival of the Long-Standing Opposition between Certainty and Flexibility in the Allocation of Jurisdiction

I. Regulation (EU) No. 1215/2012 ("Brussels I Recast Regulation") and its Mild Opening to Third-Country-Related Disputes

The Proposal submitted by the European Commission on 14 December 2010 for the recast of EC Regulation No. 44/2001 ("Brussels I Regulation") presented, among its distinctive features, a deviation from the traditional *inter partes*

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approach to jurisdiction, which is a salient feature of both the Regulation and the pre-existing Brussels Convention of 27 September 1968.[1]

In fact, the distribution of jurisdiction among the courts of the various Member States, as established first under the Brussels Convention and developed subsequently under the Brussels I Regulation, is based on the assumption that only the jurisdiction of Member States' courts is addressed by the rules contained in these instruments. Such an assumption appears inevitable, due to the inapplicability, to third countries, of rules contained either in treaties, such as the Brussels Convention, or acts adopted by the EU institutions, such as the Brussels I Regulation. Besides, the assumption underlying the distribution of jurisdiction among Member States' courts as embodied in both the Brussels Convention and Regulation is that the rules contained in either instrument should in principle only address disputes presenting a relevant connection with the EU legal order. The said relevant connection is identified, as a general rule, in the defendant being domiciled in a Member State, even though, by virtue of the interplay of alternative rules, jurisdiction is eventually vested in the courts of a different Member State.[2] The general relevance of the domicile of the defendant in a Member State as a ground for the application of the rules of jurisdiction contained in either instrument is nonetheless subject to exceptions within the framework of the Brussels I Regulation, namely in case an exclusive head of jurisdiction is applicable, since those could apply irrespective of the domicile of the defendant. The rationale of the exception lies in the assumption that the localisation of the ground for exclusive jurisdiction in a Member State constitutes by itself a sufficient connection to the sphere of the Member State in order to justify the application of the rules as contained in either the Convention or the Regulation.[3]

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[1] COM(2010) 748 final, of 14 December 2010; revised version COM(2010) 748 final/2, of 3 January 2011. See in this respect, among others, A. Borrás, Application of the Brussels I Regulation to External Situations: From Studies Carried Out by the European Group for Private International Law (EGPIL/GEDIP) to the Proposal for the Revision of the Regulation, *YPIL* 2010, p. 333 *et seq.*; B. Hess, The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast, *Common Market Law Review* 2012, p. 1075 *et seq.*, esp. p. 1105 *et seq.*; R. Hausmann , The Scope of Application of the Brussels I Regulation, in F. Pocar/ I. Viarengo/ F.C. Villata (eds), *Recasting Brussels I*, Padua 2012, p. 3 *et seq.*, esp. p. 21 *et seq.*; R. Luzzatto, On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants, *ibidem*, p. 111 *et seq.*; F. Pocar, Révision de Bruxelles I et ordre juridique international: quelle approche uniforme?, *Riv. dir. int. priv. proc.* 2011, p. 591 *et seq.*; J. Weber, Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation, *RabelsZ* 2011, p. 619 *et seq.*

[2] The general relevance of the domicile of the defendant as a ground triggering the application of the jurisdiction rules as contained in the Regulation can be desumed from the interplay of Articles 2 and 4 of the Brussels I Regulation, as from the corresponding provisions of the Brussels Convention of 1968: see, among others, L. Mari, *Il diritto processuale civile della Convenzione di Bruxelles I, Il Sistema della competenza*, Padua 1999, p. 129 *et seq.*; Th. Kruger, *Civil Jurisdiction Rules of the EU and Their Impact on Third States*, Oxford 2008, p. 59 *et seq.*

[3] See, *e.g.*, on the capability of the exclusive grounds of jurisdiction to establish by themselves a sufficient connection between the dispute and the legal order of the Member

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The system is nonetheless awkward in its application since it compels the courts in the Member States to apply two parallel sets of rules with respect to jurisdiction over actions falling within the material scope of application of the Brussels Convention first and then the Brussels I Regulation, subject to whether or not the defendant was domiciled in a Member State. Therefore, since the presentation of a proposal in 2006 for the amendment of the parallel Brussels II-*bis* Regulation concerning jurisdiction in matrimonial matters,[4] the European Commission has studied solutions to overcome the said difficulty, by providing for residual jurisdictional rules intended to regulate, uniformly and without reference to domestic rules, jurisdiction in those cases where the defendant is not domiciled in a Member State.[5] This solution has been incorporated namely in Regulation No. 4/2009 in matters of maintenance obligations[6] as well as in Regulation No. 650/2012 in matters of succession.[7] The two Regulations, in fact, provide in very similar terms for residual jurisdiction rules, introducing supplementary grounds of jurisdiction to be applied in order to establish the jurisdiction of a Member State court whenever the defendant is not domiciled in the EU, coupled, as a last resort, with a provision for a *forum necessitatis*. The latter provides for the jurisdiction of the courts of a Member State having a sufficient connection with the dispute whenever the parties are unable to bring their case before the courts of a third country with which the case would otherwise be connected.[8]

States concerned, D.P. FERNANDEZ ARROYO, Exorbitant and Exclusive Grounds of Jurisdiction in European Private International Law: Will They Ever Survive?, in *Festschrift für Erik Jayme*, Vol. I, München 2004, p. 169 *et seq.*

[4] COM(2006) 399 final, of 17 July 2006, Article 7. The proposal was subsequently set aside and replaced by the establishment of an enhanced cooperation in order to complete the rules as contained in the said regulation with provisions concerning applicable law, as contained in Regulation (EU) No. 1259/2010 ("Rome III Regulation"). See A. FIORINI, Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?, *I.C.L.Q.* 2010, p. 1143 *et seq.*

[5] See, for a discussion of the solution advanced in the said proposal by the European Commission, A. BONOMI, Sull'opportunità e le possibili modalità di una regolamentazione comunitaria della competenza giurisdizionale applicabile *erga omnes*, *Riv. dir. int. priv. proc.* 2007, p. 313 *et seq.*

[6] See Articles 6-7 of Regulation (EC) No. 4/2009, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations.

[7] See Articles 10-11 of Regulation (EU) No. 650/2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the establishment of a European Certificate of Succession.

[8] See with regard to the introduction of a provision on *forum necessitatis* in Regulation (EC) No. 4/2009 on maintenance obligations, among others, P. FRANZINA, Sul *forum necessitatis* nello spazio giudiziario europeo, *Riv. dir. int.* 2009, p. 1121 *et seq.*; G. ROSSOLILLO, *Forum necessitatis* e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea, *Cuadernos de derecho transnacional* 2010, No. 1, p. 403 *et seq.*, esp. p. 413 *et seq.*; concerning the corresponding provision introduced in Regulation (EU) No. 650/2012 in matters of succession, A. DAVÌ/ A. ZANOBETTI, Il nuovo diritto internazionale privato delle successioni nell'Unione europea,

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The proposal for a recast of the Brussels I Regulation submitted by the European Commission in December 2010 advanced a solution following the same pattern,[9] but no consensus was reached within the Council and the European Parliament regarding the solution proposed, since a more conservative position prevailed in both instances.[10] Substantively, the distribution of jurisdiction of the Brussels I Recast is very much on the same lines as that contained in the existing Brussels I Regulation, thus maintaining in principle the distinction between cases in which the defendant is domiciled in the EU and cases in which the defendant is domiciled in a third country. The latter cases continue to be governed by domestic rules of jurisdiction. The only mild opening to the *erga omnes* approach advocated by the Commission in its proposal which has been retained in the rules of jurisdiction as contained in the Recast Regulation consists of the availability of protective rules of jurisdiction. These protective rules are available to consumers and employed workers as against non-EU domiciled counter-parties. Furthermore, the Recast Regulation provides for the applicability of the rules concerning choice-of-court agreements to those designating Member States courts irrespective of the domicile of either party. By contrast, the corresponding rules as contained in Brussels I required at least one of the parties to be domiciled in a Member State.[11]

Cuadernos de derecho transnacional 2013, No. 2, p. 5 *et seq.*, esp. p. 119 *et seq.*; the rules on *forum necessitatis* as contained in both Regulations appear inspired by the model offered by domestic provisions, such as Article 3 of the Swiss Federal Private International Law Act (LDIP). See S. OTHENIN-GIRARD, Quelques observations sur le for de necessité en droit international privé suisse, *RSDIE* 1999, p. 251 *et seq.* See also Article 11 of the Belgian Code of Private International Law and J.-Y. CARLIER, Le Code belge de droit international privé, *Rev. crit. dr. int. pr.* 2005, p. 11 *et seq.*; esp. p. 22 *et seq.* For a broader comparative overview, see V. RÉTORNAZ/ B. VOLDERS, Le for de nécessité: tableau comparative et évolutif, *Rev. crit. dr. int. pr.* 2008, p. 225 *et seq.*

[9] See Articles 25-26 of the Commission Proposal, COM(2010) 748 final, on which we may refer to F. MARONGIU BUONAIUTI, La tutela del diritto di accesso alla giustizia e della parità delle armi tra i litiganti nella proposta di revisione del regolamento n. 44/2001, in A. DI STEFANO/ R. SAPIENZA, *La tutela dei diritti umani e il diritto internazionale* (XVI Convegno SIDI, Catania, 23-24 giugno 2011), Naples 2012, p. 345 *et seq.*, esp. p. 355 *et seq.*

[10] See the General Approach adopted by the Ministers of Justice sitting in the Council on 1 June 2012, doc. No. 10609/12, JUSTCIV 209, CODEC 1495, Article 4-*bis* and the Opinion Delivered by the European Parliament on 20 November 2012, doc. Pt_TA-PROV(2012)11-20, PE 495.880, Article 6.

[11] See, among others, on the solutions finally retained in Regulation (EU) No. 1215/2012 ("Brussels I-*bis* Regulation" or "Brussels I Recast Regulation") in respect of jurisdiction in situations connected to third countries, among others, J.-P. BERAUDO, Regards sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Clunet* 2013, p. 741 *et seq.*, esp. p. 746 *et seq.*; F. CADET, Le nouveau règlement Bruxelles I ou l'itinéraire d'un enfant gaté, *ibidem*, p. 765 *et seq.*, esp. p. 772 *et seq.*; H. GAUDEMET-TALLON/ C. KESSEDJIAN, La refonte du règlement Bruxelles I, *Rev. trim. droit eur.* 2013, p. 435 *et seq.*, esp. p. 439 *et seq.*; A. LEANDRO, Prime osservazioni sul regolamento (UE) n. 1215/2012 ("Bruxelles I bis"), *Il giusto processo civile* 2013, p. 583 *et seq.*, esp. p. 594 *et seq.*; P.A. NIELSEN, The New Brussels I Regulation, *Common Market Law Review* 2013, p. 503 *et seq.*, esp. p. 512 *et seq.*;

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II. Taking into Account Parallel Proceedings Pending before Third Country Courts: Justification for the Innovation Introduced by the Recast Regulation

With respect to the rules on *lis alibi pendens* and related actions, the attitude regarding their subjective scope of application has been different from the start, that is, already within the text of the 1968 Brussels Convention. In fact, these rules were conceived within the original architecture of the Brussels Convention to complement the rules regarding mutual recognition and enforcement of judgments as among the Member States of the then European (Economic) Community. They were clearly conceived to prevent the risk of conflicting decisions being handed down by courts in different Member States, a circumstance which could easily be identified as an obstacle to the achievement of the objective of mutual recognition. Accordingly, since the objective of mutual recognition of judgments as among the Member States was to be achieved irrespective of the domicile of either of the parties to the dispute, the aim of preventing the occurrence of conflicting or irreconcilable judgments was clearly pursued to the same extent. Therefore, the rules on *lis alibi pendens* and related actions, as contained in the Brussels Convention first and then in the Brussels Regulation, are meant to apply irrespective of any subjective requirement of connection of the parties to the Member States, since the circumstance of the proceedings being actually pending before the courts of different Member States is the sole decisive element in this respect.[12]

Nonetheless, the possible involvement of third country courts alongside Member States' courts with respect to the same dispute or related disputes cannot be disregarded if we accept the applicability of the said rules of coordination among proceedings pending before courts of different Member States to actions allegedly implying also third-country related parties or material elements of the case. This possibility was envisaged from the start by the Brussels Convention of 1968 which, in a provision that appears in the same terms in Regulation Brussels I, as well as in the Recast Regulation, provides for the refusal of recognition of a judgment delivered by the courts of another Member State in case of conflict with a judgment previously delivered in a third country on the same dispute and between the same parties, provided the said third-country judgment can be recognised in the Member State concerned.[13]

A. Nuyts, La refonte du règlement Bruxelles I, *Rev. crit. dr. int. pr.* 2013, p. 1 *et seq.*, esp. p. 4 *et seq.*

[12] The point has been stressed already with regard to the rules on *lis alibi pendens* as contained in the Brussels Convention of 1968 by the ECJ, 27 June 1991, C-351/89, *Overseas Union Insurance Ltd. et al. v. New Hampshire Insurance Co.*, *ECR* [1991] I-3317 *et seq.*, paras 13 *et seq.* For further references, see F. Marongiu Buonaiuti, *Lis Alibi Pendens* and Related Actions in Civil and Commercial Matters Within the European Judicial Area, *YPIL* 2009, p. 511 *et seq.*, esp. p. 519 *et seq.*

[13] See the rules as contained, respectively, in Article 27 No. 5 of the Brussels Convention of 1968, as introduced by the Accession Convention of 1978; in Article 34 No. 4 of Regulation (EC) No. 44/2001 ("Brussels I Regulation") and in Article 45 (1)(d) of Regulation (EU) No. 1215/2012 ("Brussels I Recast Regulation").

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Accordingly, just as the occurrence of the delivery of conflicting judgments by the courts of different Member States is to be prevented by means of the rules on *lis alibi pendens* and related actions, a corresponding need exists with respect to third country courts, which may be concurrently seized of actions regarding either the same dispute pending before the courts of a Member State or a related dispute. This is precisely the aim of the innovation introduced by the Recast Regulation, which purports to remedy the lack of coordination with the recognition rules in the Brussels I Regulation by expressly regulating, under Articles 33 and 34 respectively, the occurrence of the presence of actions on the same dispute or related actions pending before the courts of third countries.[14] The Recast Regulation does not, however, regulate the recognition in the Member States of judgments delivered by third country courts which, following the same lines of the existing Brussels I Regulation, remain subject to individual Member States' rules on the recognition of foreign judgments or, eventually, to any applicable international convention. In this respect, it might be considered that the Recast Regulation has given rise to a situation of asymmetry between the territorial reach of its rules concerning coordination among competing jurisdictions, which now extend to situations where third country courts are involved, and its rules concerning the recognition and enforcement of judgments, which remain confined to the *intra*-EU domain. A corresponding asymmetry is, accordingly, to be noted with respect to the impact of the rules contained in the Recast Regulation on domestic rules regarding either aspect. In fact, whereas the application of domestic rules on the recognition and enforcement of foreign judgments remains unprejudiced in respect of judgments delivered by third country courts, the new rules contained in Articles 33 and 34 of the Regulation will have a destructive effect on domestic rules concerning *lis alibi pendens* and related actions pending before foreign courts, a consequence which could be considered as unwarranted since in most cases those rules are already capable of ensuring comparable effects in terms of coordination with the jurisdiction of third country courts and prevention of conflicting judgments.[15]

Before addressing the manner in which the rules as introduced in the Recast Regulation purport to achieve the desired aim of coordination with the courts of third countries, it is to be observed that the said aim is not pursued in respect of any

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[14] The innovation was already present within the proposal for a recast of the Brussels I Regulation submitted by the European Commission in December 2010. The proposal, nonetheless, provided only for a rule in respect of *lis alibi pendens* before third country courts, without taking into consideration related actions pending before such courts: see COM(2010) 748 final, Article 34. We commented on the solution advanced by the proposal in this respect in F. MARONGIU BUONAIUTI, La disciplina della litispendenza nei rapporti tra giudici di paesi membri e giudici di paesi terzi nella proposta di revisione del regolamento n. 44/2001, *Riv. dir. int.* 2011, p. 496 *et seq.* See also L. FUMAGALLI, *Lis Alibi Pendens*. The Rules on Parallel Proceedings in the Reform of the Brussels I Regulation, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 237 *et seq.*, esp. p. 249 *et seq.*

[15] This aspect of the introduction of the new rules will be examined *infra*, par. VI, discussing the residual role of domestic rules on *lis alibi pendens* and related actions pending before foreign courts.

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action falling within the material scope of application of the Regulation itself. Instead, the application of both provisions is limited to those cases in which the court seized in a Member State is neither vested with exclusive jurisdiction (on a ground directly established by the Regulation or pursuant to a choice of court agreement), nor with jurisdiction pursuant to the special rules of jurisdiction established by the Regulation for matters presenting the need to protect weaker parties. The said limitation marks a difference from the ordinary rules on *lis alibi pendens* and related actions as among courts of different Member States. These rules apply irrespective of the ground on which the jurisdiction of the seized courts is based, with the sole exception, introduced by the Recast Regulation, of the second seized court being vested with exclusive jurisdiction pursuant to a choice of court agreement. In that case, nonetheless, the application of the rule on *lis alibi pendens* is not excluded altogether, though it differs substantially in terms of its mode of operation.[16] The exclusion of the application of the rules on *lis alibi pendens* and related actions *vis-à-vis* the courts of third countries in the said cases is to be considered as due to the need to ensure respect for the exclusive jurisdiction of Member States courts granted by the Regulation directly or by the will of the parties. It also complies with the allocation of jurisdiction specifically devised by the Regulation for weak-party relationships, in respect of which third country courts are not subject to comparable rules of jurisdiction nor to any duty to accept the jurisdiction of Member States courts as exclusive or the relevant allocation as mandatory.[17]

Nonetheless, a problem of coordination arises with respect to the abovementioned provision, which still appears under Article 45(1)(d) of the Recast Regulation, whereby recognition of a judgment delivered by a Member State court

[16] See Article 31(2) of Regulation (EU) No. 1215/2012, which provides for a substantial reversal of the rule on *lis alibi pendens* in such a case, so that any other court sitting in another Member State shall stay its proceedings until the designated court has declared whether it will exercise jurisdiction pursuant to the choice of court agreement. The said exception to the rule on *lis alibi pendens* has been introduced in order to overcome the apparent obstacle to the effectiveness of a choice of court agreement inherent in the functioning of the rules on *lis alibi pendens*, whereby the court designated in the agreement would have been compelled to stay its proceedings if a court sitting in another Member State had been seized first, until that court – which would have been vested with the competence to assess the validity and applicability of the choice of court agreement – had declined jurisdiction, as stressed by the ECJ, 9 December 2003, C-116/02, *Erich Gasser GmbH v. MISAT Srl*, *ECR* [2003] I-14693 *et seq*. The solution maintained by the ECJ in that case has been criticised especially by jurists from common law jurisdictions: see in particular T.C. HARTLEY, Choice-of-court Agreements, *Lis Pendens*, Human Rights and the Realities of International Business: Reflections on the *Gasser* Case, in *Le droit international privé: esprit et methods, Mélanges en l'honneur de Paul Lagarde*, Paris 2005, p. 383 *et seq.*; L. MERRETT, The Enforcement of Jurisdiction Agreements Within the Brussels Regime, *I.C.L.Q.* 2006, p. 315 *et seq.*; R. FENTIMAN, Parallel Proceedings and Jurisdiction Agreements in Europe, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland/ Oregon 2007, p. 27 *et seq*.

[17] This is probably a shortcoming which is inherent in the unilateral mode of operating of the coordination with the jurisdiction exercised by third country courts introduced by the provisions under consideration, which are deemed to operate beyond any reciprocity, as correctly observed by L. FUMAGALLI (note 14), at 249.

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in another Member State may be refused if the judgment is in conflict with an earlier judgment delivered by a third country court between the same parties and concerning the same cause of action, which is eligible for recognition in the Member State concerned. In fact, the said rule, which the Recast Regulation has maintained unchanged from the text of the existing Brussels I Regulation, applies regardless of the basis for jurisdiction of the Member State court that handed down the judgment to be recognised. Consequently, whereas the exercise of jurisdiction by a Member State court under one of the heads concerned may not be precluded by the existence of a parallel action pending before the courts of a third country, the recognition of a judgment delivered by that court under such a head of jurisdiction in the other Member States could be precluded by a judgment delivered in the meantime by a court sitting in a third country even if, hypothetically, the latter had been seized later than the Member State court.

III. Discretion as a Distinctive Feature of the Rules Concerning *lis alibi pendens* and Related Actions before Third Country Courts

We move now to an analysis of the mode of operation of the rules regarding *lis alibi pendens* and related actions in the relationships with third country courts. The most salient feature of these rules as compared to the rigid approach which inspires the corresponding rules regarding the same relationships among the courts of different Member States is the broad discretion which they confer on Member States' courts in respect of the appropriateness of applying them in the individual case.[18]

Particularly striking in this respect is the difference in approach between the rules addressing the two situations of *lis alibi pendens*. In fact, the application of the rules of *lis pendens* as among the courts of different Member States is mandatory. This implies, first, that the Member States' courts have a duty to apply those rules *ex officio*. Secondly, they are obliged to stay the proceedings pending before them and dismiss the case once the relevant grounds are met. Conversely, the application of the rules of *lis pendens* with respect to proceedings pending before third country courts is left to the discretion of the Member State court seized. Articles 33 and 34 of the Recast Regulation firstly leave it to the domestic law of the Member State of the court seized to determine whether the courts are to apply the rule *ex officio*, failing which both rules are to be intended as applicable only *ex*

[18] This is probably the most striking feature of the innovation introduced by the Recast Regulation, which has been frequently underlined in the first commentaries: cf., particularly, L. FUMAGALLI (note 14), at 249 *et seq.*, and, among general comments on the Recast Regulation as a whole, J.-P. BERAUDO (note 11), at 753 *et seq.*; F. CADET (note 11), at 775 *et seq.*; H. GAUDEMET-TALLON/ C. KESSEDJIAN (note 11), at 442 *et seq.*; A. LEANDRO (note 11), at 603 *et seq.*; P.A. NIELSEN (note 11), at 513 *et seq.*; A. NUYTS (note 11), at 7 *et seq.* The inherently flexible nature of the instrument of coordination with the jurisdiction of third country courts is underlined also in the Preamble to the Recast Regulation, Recital No. 23.

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parte.[19] Secondly, the courts seized in the Member States are under no duty to stay proceedings in favour of a third country court, even when the requirements established by the rule are met. Inevitably, this difference is less sensible with respect to related actions, where also the rules regarding the relationships among Member States' courts provide for a discretionary evaluation by the court second seized. This is justified in light of the different contexts and the different perspectives in which the two sets of rules operate.

In fact, whereas among the Member States the relevant context is that of the European Judicial Area within which the automatic recognition of judgments is the general rule and where, due to the significant innovations introduced in this respect by the Recast Regulation itself, judgments delivered in a Member State are, subject to certain conditions, directly enforceable in the other Member States without need for any declaration of enforceability (*exequatur*),[20] the context is not the same with respect to actions pending before third country courts.[21] Accordingly, the perspective from which the Regulation operates, consisting of a distribution of jurisdiction within a closely integrated system sharing common values and traditions and, crucially, common standards of procedural fairness, cannot be extended to the relationships with third countries. In terms of the latter, the perspective from which the innovation introduced by the Recast Regulation moves is that of a unilateral effort

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[19] See, respectively, Article 33(4) of the Recast Regulation in respect of *lis alibi pendens* and Article 34(4) concerning related actions. See *infra*, VI, concerning the residual role of the domestic rules on *lis alibi pendens* and related actions in the relationships with third countries.

[20] This is probably the most significant innovation introduced by the Recast Regulation since it extends to all judgments in civil and commercial matters, falling within the material scope of application of the Regulation, a solution strictly inspired, albeit with some modifications, to that previously introduced, in respect of judgments on non-contested claims, in Regulation (EC) No. 805/2004 on the establishment of a European enforcement order. See for an analysis of the new regime introduced by the Recast Regulation in this respect, among others, J.-P. BERAUDO (note 11), at 756 *et seq.*; F. CADET (note 11), at 770 *et seq.*; H. GAUDEMET-TALLON/ C. KESSEDJIAN (note 11), at 451 *et seq.*; A. LEANDRO (note 11), at 610 *et seq.*; P.A. NIELSEN (note 11), at 524 *et seq.*; A. NUYTS (note 11), at 22 *et seq.*; with regard to the solutions, from which the final text of the Regulation slightly departed, advanced in the proposal submitted by the European Commission, Th. PFEIFFER, Recast of the Brussels I Regulation: The Abolition of *Exequatur*, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 311 *et seq.*; M. DE CRISTOFARO, The Abolition of *Exequatur* Proceedings: Speeding up the Free Movement of Judgments while Preserving the Rights of the Defense, *ibidem*, p. 353 *et seq.* See also, concerning the latter aspect, F. MARONGIU BUONAIUTI (note 9), at 361 *et seq.*

[21] As noted already (*supra* II.), the Recast Regulation, following the same approach as the current Brussels I Regulation, regulates only the recognition and enforcement of judgments delivered by Member States' courts, whereas the recognition of judgments delivered by third country courts is left to the domestic law of the Member States or to international conventions as may be applicable to the relationships between the individual Member State and the third country concerned. See, on the opportunity to provide for common rules regarding the recognition in the Member States of judgments delivered by third country courts, S.M. CARBONE, What About the Recognition of Third States' Foreign Judgments?, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 299 *et seq.*, esp. p. 301 *et seq.*

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of coordination with the jurisdiction of third country courts, which is attempted independently from any condition of reciprocity and towards third countries belonging to various legal traditions. Within the much broader context in which the rules attempting the said unilateral effort of coordination are deemed to operate, it is clearly impossible to place a comparable degree of reliance on the likelihood of the proceedings pending before a third country court to end up with a judgment capable of recognition in the Member State of the court seized as would apply in *intra*-EU cases.[22]

This justifies the express provision in both Articles 33 and 34 of the Recast Regulation of a requirement for granting a stay of the proceedings pending before a Member State court which is frequently present within domestic rules concerning *lis alibi pendens* or related actions before foreign courts, whereby the court is to establish that the judgment to be delivered by the third country court concurrently seized of the same or of a related action is capable of being recognised in the Member State of the court seized.[23] Such an assessment, which substantially

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[22] In substance, in the relationships with the courts of third countries it proves difficult to establish a principle of reciprocal faith, which is distinctive of the European judicial area as a space where judges of a Member State may entrust those sitting in the other Member States to deliver judgments capable of being recognised and enforced in the other Member States and to correctly apply the same set of rules concerning jurisdiction. The principle of reciprocal faith has been used on various occasions by the ECJ to stress the need for Member States' courts to respect the determinations made by other Member States' courts regarding jurisdiction: in particular, ECJ, 9 December 2003, C-116/02, *Erich Gasser GmbH v. MISAT Srl* (note 16), concerning the competence to decide on the validity of a jurisdiction agreement designating a court of another Member State; ECJ, 27 April 2004, case C-159/02, *Turner v. Grovit*, *ECR* [2004] I-3565 *et seq.*, concerning the exclusion of the power to issue *anti-suit injunctions* which could have the effect of preventing a judge sitting in another Member State from exercising his jurisdiction; ECJ, 10 February 2009, *Allianz S.p.a. c. West Tankers Inc.*, *ECR* [2009] I-663 *et seq.*, extending the same solution to a case where the injunction had been issued to enforce an arbitration clause.

[23] Such a requirement is present, among others, under Italian law, under Article 7 of law No. 218/1995 providing for the reform of the Italian system of private international law: see, among others, C. CONSOLO, Profili della litispendenza internazionale, *Riv. dir. int.* 1997, p. 5 *et seq.*, esp. p. 38 *et seq.*; R. MARENGO, *La litispendenza internazionale*, Turin, 2000, p. 98 *et seq.*; F. MARONGIU BUONAIUTI, *Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in material civile*, Naples 2008, p. 34 *et seq.*, p. 399 *et seq.* In French Law, see the judgment of the French Cour de cassation, 1re Ch. Civ., 26 November 1974, *Soc. Miniera di Fragne*; annotated by A. PONSARD, *Clunet* 1975, p. 108 *et seq.*; annotated by D. HOLLEAUX, *Rev. crit. dr. int. pr.* 1975, p. 491 *et seq.* In German law, see judgment of the Bundesgerichtshof, 2 October 1957, *Neue Juristische Wochenschrift* (NJW) 1958, p. 103 *et seq.* and R.A. SCHÜTZE, Die Berücksichtigung der Rechtshängigkeit eines ausländischen Verfahrens, *NJW* 1963, p. 1486 *et seq.* In Austrian law, see the case law of the *Oberster Gerichtshof* (OGH), among which OGH, 23 February 1982, *Zeitschrift für Rechtsvergleichung* (ZfRV) 1984, p. 145 *et seq.*; annotated by A. KONECNY, Zur Einrede der Streitanhängigkeit, *ibidem*; OGH, 12 February 1997, *IPRax* 1999, p. 385 *et seq.*; annotated by B. HEIDERHOFF, Widerklage und ausländische Streitanhängigkeit, *IPRax* 1999, p. 392 *et seq.* In Swiss Law, see Article 9 of the Swiss federal law on private international law (LDIP) and I. SCHWANDER, Ausländische Rechtshängigkeit nach IPR-Gesetz und Lugano-Übereinkommen, in *Beiträge zum schweizerischen und internationalen Zivilprozessrecht. Festschrift für Oscar Vogel*, Freiburg (CH) 1991, p. 395

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consists of a forecast, a prognostic evaluation as significantly conveyed by the German expression *Anerkennungsprognose*, is to be performed on the basis of the domestic rules on recognition of foreign judgments, due to the inapplicability to third-country judgments of the rules contained in the Regulation. Due to its prognostic nature, the said assessment inevitably implies a certain degree of discretion, alongside an inevitable margin of uncertainty, by the judge. In fact, subject to the peculiarities of the relevant domestic rules, such an evaluation is inherently incomplete. Actually, some of the elements to be taken into consideration are present already at the moment when the assessment takes place, such as those regarding the jurisdiction of the foreign court and the regularity of the introductory phase of the proceedings. Others are inevitably to be appreciated by inference from the circumstances of the case as they appear at the moment when the evaluation is performed. Accordingly, the assessment regarding the latter may eventually be rebutted based on subsequent developments and by the judgment to be delivered by the foreign court. Among these, feature the compatibility of the judgment to be delivered by the third country court with the public policy of the Member State of the court seized; the capacity of the judgment to become final and, where applicable, to acquire the force of *res iudicata* in the country of origin; and finally, reflecting the most commonly contemplated grounds of recognition, the absence of any conflict with judgments to be delivered in the Member State of the court seized – excluding the judgment to be delivered by the court seized in the proceedings concerned, which, due to the stay granted, will certainly not be delivered earlier than the foreign judgment – or with judgments enforceable in the same country.[24]

If the requirement just mentioned is not novel to the regulation of *lis alibi pendens* before foreign courts at a domestic level, as it finds its justification from a systematic perspective in the attitude of *lis pendens* to promote a coordination among competing jurisdictions, paving the way for the recognition of the judgment to be delivered by the foreign court seized of the concurrent action, more peculiar is the second requirement of Articles 33 and 34 of the Recast Regulation. In fact, the requirement that the granting of a stay is necessary for the proper administration of justice appears more strictly inspired, in its broadly discretionary nature, to a different technique of coordination among competing jurisdictions, which is inherent in the doctrine of *forum non conveniens*. Such a doctrine, which is familiar uniquely to common law countries, is based on an exercise of self-restraint by the court seized of an action. Such self-restraint presupposes that the action, though

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et seq. In Belgian law, see Article 14 of the Belgian code of private international law and J.-Y. CARLIER (note 8), at 25.

[24] The inevitable prognostic and incomplete nature of the assessment to be performed by the judge regarding the likelihood of the proceedings pending abroad to result in a judgment capable of recognition in the *forum* at the stage when the judge is expected to decide on the granting of a stay due to *lis alibi pendens* has been historically a ground for resistance from a systematic perspective to the attribution of effects to the mere fact of proceedings pending abroad, since this would have caused a significant element of uncertainty: see, in particular, G. MORELLI, *Diritto processuale civile internazionale*, II ed., Padua 1954, p. 169 *et seq.*, who pointed to this shortcoming in order to justify the negative attitude towards *lis alibi pendens* in respect of proceedings pending abroad adopted at that time under Italian law, pursuant to Article 3, Code of civil procedure.

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falling within the limits of the court's jurisdiction, nonetheless appears weakly linked to the *forum*. At the same time, the application of the doctrine presupposes that the action presents stronger connections with another country, in whose courts, on an overall assessment of the relevant circumstances, it would be likely to be entertained more appropriately than in the *forum*. The decision to grant a stay of an action on the grounds of *forum non conveniens* is generally made subject to a further condition, which is the same as that contemplated by the Recast Regulation for the purposes of granting a stay of an action on grounds of *lis alibi pendens* or of a related action pending before a third country court. The court is to be satisfied that the granting of a stay is necessary for the correct administration of justice.[25]

Such a requirement, which is inevitably discretionary in nature, is strictly due to the need to ensure that the decision to grant a stay of an action pending before the court of a Member State based on the presence of a parallel action pending before the court of a third country does not endanger the right of the applicant to obtain a fair trial. Such a right could be jeopardized not only by the wait until the end of proceedings pending before the third country court concurrently seized, but also, particularly in case of *lis alibi pendens* where the same action is pending abroad, by a lack of familiarity by the defendant of procedure in the third country court, which may provide less satisfactory standards of procedural fairness than those generally available in a Member State court. The requirement under examination is to be evaluated carefully by the Member State courts, since a decision to stay proceedings pending before them in order to give way to a concurrent action pending before a third country court could entail a responsibility for the Member State whose courts exercised their discretion recklessly. In such a situation, in fact, a Member State could face the risk of being held liable for having violated the provisions under Article 6 of the European Convention on Human Rights as well as under Article 47 of the Charter of Fundamental Rights of the EU, which applies to action taken by a Member State court pursuant to a provision contained in a EU Regulation,[26] in case the third country court appears unable to

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[25] The requirements to which the granting of a stay on *forum non conveniens* grounds is subject have been clearly specified, under English law, by the well-known House of Lords judgment in the case of *Spiliada Maritime Corporation v. Cansulex Ltd.*, [1987] *A.C.* 460 *et seq.*, esp. p. 475. Literature on the said doctrine is particularly extensive: we may refer, among others, to Ch. CHALAS, *L'exercice discrétionnaire de la compétence juridictionnelle en droit international privé*, Aix-Marseille 2000, p. 220 *et seq.*; M.A. LUPOI, *Conflitti transnazionali di giurisdizioni*, Milano 2002, p. 145 *et seq.*, esp. p. 167 *et seq.*; A. NUYTS, *L'exception de forum non conveniens (Etude de droit international privé comparé)*, Bruxelles 2003, p. 183 *et seq.* The doctrine has also formed the subject of a resolution adopted by the INSTITUT DE DROIT INTERNATIONAL, Le recours à la doctrine du *forum non conveniens* et aux « anti-suit injunctions »: principes directeurs/ The Principles for Determining When the Use of the Doctrine of *forum non conveniens* and Anti-Suit Injunctions is Appropriate, *Annuaire de l'Institut de droit international* vol. 70-I (2003), p. 1 *et seq.*; A. NUYTS, Les principes directeurs de l'Institut de droit international sur le recours à la doctrine du *forum non conveniens* et aux antisuit injunctions, *Revue belge de droit international* 2003, p. 536 *et seq.*

[26] Pursuant to Article 51 of the Charter of Fundamental Rights of the European Union, the latter applies to the institutions of the EU and to Member States only insofar as they are implementing provisions of EU law: see, among others, A. ROSAS/ H. KAILA,

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secure satisfactory standards of fair trial as established pursuant to those provisions according to their interpretation by the European Court of Human Rights.[27]

IV. Grounds for Resuming Proceedings as a Safeguard for the Procedural Rights of the Parties

It is in light of the risk inherent in the exercise of such a discretion that both provisions under Articles 33 and 34 of the Recast Regulation provide for exceptional circumstances under which a Member State court having stayed proceedings due to *lis alibi pendens* or to a related action pending before a third country court may decide to resume proceedings without waiting for the proceedings pending before that court to have come to an end. The said exceptional grounds for resuming proceedings broadly correspond, in negative and alternative terms, to the requirements allowing, cumulatively, for the granting of a stay, and, inherently, they imply in turn the exercise of a certain degree of discretion on the part of the Member State court seized. The Member State court having stayed proceedings may, in fact, discretionally decide to resume proceedings in a series of circumstances in which, on different grounds, the third country court seized of the concurrent action no longer appears to be in a position to grant an effective, timely and fair handling of the case pending before it. This may in turn occur either due to the fact that the third country court stayed or discontinued the proceedings pending before it, or

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L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan, *Il diritto dell'Unione europea* 2011, p. 1 *et seq.*; J. ZILLER, I diritti fondamentali tra tradizioni costituzionali e "costituzionalizzazione" della Carta dei diritti fondamentali dell'Unione europea, *ibidem*, p. 539 *et seq.*

[27] We discussed this issue in F. MARONGIU BUONAIUTI, *Forum non conveniens* e art. 6 della convenzione europea dei diritti dell'uomo, *Riv. dir. int.* 2001, p. 420 *et seq*, commenting on the House of Lords judgment in the case of *Lubbe and ors. v. Cape Plc.*, [2000] UKHL 41, where the House of Lords excluded the possibility of granting a stay on *forum non conveniens* grounds when, due to the absence of measures of legal aid comparable to those available before the English courts, the applicants would not be in a position to entertain proceedings before the allegedly more appropriate court. More broadly, on the relevance of a correct establishment of jurisdiction for the right of the parties to obtain a fair trial, among others, J.J. FAWCETT, The Impact of Article 6(1) of the ECHR on Private International Law", *I.C.L.Q.* 2007, p. 1 *et seq.*; A. HALFMEIER, Menschenrechte und internationales Privatrecht im Kontext der Globalisierung, *RabelsZ* 2004, p. 653 *et seq.*; P. KINSCH, Droits de l'homme, droits fondamentaux et droit international privé, *Recueil des Cours* vol. 318 (2005), p. 9 *et seq.*, esp. p. 65 *et seq.*; F. MARCHADIER, *Les objectives généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Bruxelles 2007, p. 183 *et seq.*; P. SCHLOSSER, Jurisdiction in International Litigation: The Issue of Human Rights in Relation to National Law and to the Brussels Convention, *Riv. dir. int.* 1991, p. 5 *et seq.*

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that the third court appeared unable to deliver a timely judgment on the merits, or, more generally, due to the need to ensure the correct administration of justice.[28]

Again, whereas the first ground contemplated for a resumption of proceedings by the Member State court, albeit subject to its discretionary evaluation, is linked to objective circumstances of fact, such as the proceedings before the third country court having materially been stayed or discontinued, the others imply a much broader degree of discretion. In particular, the appearance of the third country court being unable to conclude its proceedings in a timely manner introduces an element which, though relevant within the context of the guarantee of a fair trial pursuant to both Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the EU, has been considered by the European Court of Justice as alien to the logic of the rules on *lis alibi pendens* as contained formerly in the Brussels Convention of 1968 and then in the Brussels I Regulation.[29] Although the principle of mutual faith among the judicial systems of the Member States has precluded the attribution of relevance to that factor, the difference in treatment between proceedings pending before Member State courts and third country courts appears unwarranted. As it is well known, from case law of the European Court of Human Rights and domestic legislation passed to remedy the situation, lengthy proceedings are certainly not an exclusive prerogative of third country courts.[30]

Oddly, whereas one of the requirements for granting a stay of proceedings is the appearance that the third country court is likely to deliver a judgment capable of recognition in the Member State of the court seized, the subsequent appearance to the contrary due to the emergence of new elements is not contemplated as a ground for resuming proceedings. Such a situation may, nonetheless, be considered as likely to fall under the catch-all provision allowing for the resumption of proceedings in order to ensure the correct administration of justice.

Symmetry is instead to be found with respect to the additional requirements for granting a stay and resuming proceedings in case of a related action pending

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[28] See, respectively, Art. 33(2) of the Recast Regulation in respect of *lis alibi pendens* before a third country court and Art. 34, par. 2 of the same Regulation in respect of related actions pending before such a court.

[29] ECJ, *Gasser* (note 16), at paras 70 *et seq.* See, among others, J.J. FAWCETT (note 27), at 13 *et seq.*; R. FENTIMAN, Access to Justice and Parallel Proceedings in Europe, *Cambridge Law Journal* 2005, p. 312 *et seq.*; T.C. HARTLEY (note 16), at 389 *et seq.*; Th. SCHILLING, Internationale Rechtshängigkeit vs. Entscheidung binnen angemessener Frist. Zum Zusammenspiel von Art. 6 I EMRK, Art. 307 EGV und Art. 27 EuGVV, *IPRax* 2004, p. 294 *et seq.*

[30] Most notably, in Italy such a problem has become so significant, after a long series of judgments delivered by the European Court of Human Rights affirming the violation of the rule under Article 6(1) of the ECHR due to the excessive length of proceedings before the Italian courts, to cause the passing of a law providing for compensation to the parties aggrieved by such violations: law No. 89 of 24 March 2001, so called "legge Pinto" from the name of its promoter. See, concerning its interpretation by the Italian Court of Cassation, M.L. PADELLETTI, Le sezioni unite correggono la rotta: verso un'interpretazione della legge Pinto conforme alle decisioni della Corte europea dei diritti dell'uomo, *Riv. dir. int.* 2004, p. 452 *et seq.*

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before a third country court under Article 34 of the Recast Regulation. In this case, in fact, since the appropriateness of a joint hearing and decision of the related causes in order to prevent the risk of irreconcilable decisions figures among the requirements for the granting of a stay of proceedings pending before a Member State court, the subsequent appearance that such a risk is not material any longer is contemplated among the alternative grounds for the resumption of proceedings. Nonetheless, it seems that this requirement, which appears in precisely the same terms for related actions pending before other Member States' courts under Article 30(3) of the Recast Regulation[31] pertains to the mere existence of the requirements for the concurrent actions to be considered as related for the purposes of the rule under consideration, and not to the distinct level of the appropriateness of a stay to be granted when a related action is pending before a third country court. Furthermore, whereas, in the context of intra-EU relationships, the granting of a stay of an action due to a related action pending before another Member State's courts is a prelude to a consolidation of the actions before the court first seized, provided the further requirements established in this respect are met, such a perspective is more difficult to achieve with regard to related actions pending before third country courts. A provision in this sense could hardly be unilaterally adopted in an EU act, which by definition cannot be binding on third countries. Therefore, the stay of proceedings due to a related action pending before a third country court as conceived under Article 34 of the Recast Regulation can hardly be considered as likely to ensure a joint hearing and decision of the related causes, whereas it could more modestly be held to allow the Member State court seized to wait for the third country court to decide on the related cause in order to take account of the judgment delivered in its respect for the purpose of deciding on the action pending in the *forum.*[32]

[31] The same terms appeared in the corresponding provisions of Article 28(3) of the Brussels I Regulation as well as, earlier, in Article 22(3) the 1968 Brussels Convention.

[32] In fact, the consequences likely to derive from the granting of a stay of proceedings pending before a Member State court due to a related action pending before a third country court are to be considered as quite similar to those deriving from the application of analogous provisions contained in Member States' laws, such as Article 7(3) of Law No. 218/1995 providing for the reform of the Italian system of private international law, which provides for a discretionary power of the seized court to suspend proceedings in case of an action concerning a preliminary issue pending before a foreign court. The purpose of the rule is clearly that of waiting for the preliminary issue to be decided by the foreign court in order to take account of the decision delivered, provided the latter meets the requirements for recognition, for the adjudication of the action pending in the *forum*. See, among others, C. CONSOLO (note 23), at 67 *et seq.*; R. MARENGO, (note 23), at 132; F. MARONGIU BUONAIUTI (note 23), at 481 *et seq.*

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V. Effects of the Judgment Delivered by the Third Country Court in the Same or in a Related Action on the Proceedings Pending before the Member State Court

The last point addressed brings us to the discussion of a critical element of the new rules concerning *lis alibi pendens* and related actions in the relationships with third country courts. This consists of the effects produced by the judgment delivered by the court seized in a third country on the action pending before the Member State court having stayed proceedings.[33]

In this respect, the difference in approach as compared to the solutions adopted for *intra*-EU cases under Articles 29 and 30 of the Recast Regulation is significant, and cannot but reflect the difference between the contexts in which the two sets of rules are intended to operate. In fact, whereas in the *intra*-EU context, sufficient reliance may be placed on the assumption that the proceedings pending before the court of another Member State which has affirmed its jurisdiction will end up with a judgment entitled to recognition and enforceable in the Member State of the second seized court, the same is not true in respect of the relationships with third country courts. With respect to proceedings pending before such courts, no reliance can be placed on the possibility of the judgment to be delivered by the court seized in a third country to be recognised or enforced in the Member State of the concurrently seized court, nor, as mentioned already, on the possibility for the applicant in the proceedings before the Member State court to have his cause consolidated with that pending on a related action before a third country court. This different state of affairs, which was underlined since the very beginning by subjecting the granting of a stay due to proceedings pending before a third country court to the requirement of a positive *Anerkennungsprognose*, turns into a radically more restrictive regulation of the effects ensuing from the granting of a stay of the proceedings. In fact, under both Articles 33 and 34 of the Recast Regulation, the proceedings in respect of which a stay has been granted shall remain suspended – unless they are resumed under one of the grounds examined above – for the entire duration of the proceedings pending before the third country court.[34] The Member

[33] See, respectively, Article 33(3) of the Recast Regulation in respect of *lis alibi pendens* before a third country court and Article 34(3), in respect of related actions pending before such a court.

[34] The solution retained by the Recast Regulation in this respect is similar to that adopted in some domestic rules concerning *lis pendens* before a foreign court, where, accordingly, no reliance may be placed on the proceedings pending abroad to end up with a judgment amenable to recognition in the *forum*. See, with regard to Art. 7 of law No. 218/1995, providing for the reform of the Italian system of private international law, A. DI BLASE, Influenza della Convenzione di Bruxelles sulla disciplina della litispendenza nella legge di riforma del diritto internazionale privato italiano, in F. SALERNO (ed.), *Convenzioni internazionali e legge di riforma del diritto internazionale privato*, Padua 1997, p. 195 *et seq.*, esp. p. 196 *et seq.*; F. MARONGIU BUONAIUTI (note 23), at 504 *et seq.*; concerning Art. 9(3) of the Swiss Federal Act on Private International Law, among others, B. DUTOIT, *Commentaire de la loi fédérale du 18 décembre 1987*, 2nd edn, Bâle 1997, p. 19

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State court having stayed the proceedings pending before it is allowed, or rather, in case of *lis pendens*, obliged to decline jurisdiction only once the proceedings before the third country court have been concluded with a judgment which can be recognised and, eventually, enforced in the Member State of the court seized. The particularly cautious approach adopted in this respect by the Recast Regulation inevitably confirms, if need be, the scarce reliance which may be placed on the prognostic evaluation performed by the Member State court upon deciding on the granting of a stay in respect of the likelihood of the proceedings pending before the third country court to end up with an enforceable judgment.

As for the difference between the regime respectively applicable to situations of *lis alibi pendens* and of related actions pending before a third country court, the solution adopted by the Recast Regulation appears reasonable in providing for a duty of the Member State court to decline jurisdiction in the former case and for a mere discretion in the latter. In fact, in case of *lis pendens* the two actions pending respectively before a Member State court and before a court sitting in a third country are assumed to be identical, albeit with the flexibility which the ECJ has adopted in interpreting the relevant requirements in respect of *intra*-EU cases.[35] Accordingly, the judgment delivered by the third country court, once recognised in the Member State of the concurrently seized court, is likely to fully absorb the object of the action which has been introduced before that court. Instead, in case of related actions, the objects of the concurrent actions are by definition not the same, except, of course, in case the applicant in the action pending before the Member State court seized has succeeded in having his action consolidated with that pending before the third country court. Therefore, the Member State court must be left with the necessary discretion in order to be able to assess the extent to which the judgment delivered by the third country court is capable, once recognised, to absorb the subject-matter of the action introduced before the Member State court or whether, conversely, an interest persists in the resumption of proceedings before that court in order to proceed with the case on the basis of the judgment delivered by the third country court on the related action.[36]

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et seq.; P. VOLKEN, Kommentierung zu Art. 9, in *Zürcher Kommentar zum IPRG*, 2nd edn, Zürich 2004, p. 111 *et seq.*, esp. p. 127 *et seq.*

[35] See, particularly, in respect of the requirement of the identity of the causes of action of the concurring proceedings, ECJ, 8 December 1987, case 144/86, *Gubisch Maschinenfabrik v. Palumbo*, *ECR* [1987], 4861 *et seq.*; ECJ, 6 December 1994, C-406/02, *Tatry (Owners of the cargo lately laden on board the ship) v. Maciej Rataj (Owners of the ship)*, *ECR* [1994] I-5439 *et seq.*, both concerning cases of actions for negative declarations as opposed to actions seeking the enforcement of a contract or the establishment of liability for damages; ECJ, 19 May 1998, C-351/96, *Druot assurances S.A. v. Consolidated Metallurgical Industries*, *ECR* [1998] I-3075 *et seq.*, concerning the requirement of the identity of the parties. We may refer, among others, to A. DI BLASE, *Connessione e litispendenza nella Convenzione di Bruxelles*, Padua 1993, p. 83 *et seq.*; F. MARONGIU BUONAIUTI (note 23), at 291 *et seq.*; *idem* (note 12), at 528 *et seq.*; C. MCLACHLAN, Lis pendens *in International Litigation*, Leiden/ Boston 2009, p. 117 *et seq.*

[36] An interest in the resumption of the proceedings stayed by the Member State court will subsist whenever the action pending before that court is dependent from the result of the action which has formed the subject of the proceedings pending before the third country court, in case the latter concerned a preliminary issue to be decided beforehand, as

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VI. Residual Role of Domestic Rules on *lis alibi pendens* and Related Actions before Foreign Courts

The introduction within the Recast Regulation of uniform rules addressing the situation where the same or related actions are pending before the courts of third countries provides an answer to a question which has been left open by the Brussels I Regulation and which has never been addressed expressly by the ECJ, that is, the applicability by Member State courts of domestic rules on *lis alibi pendens* or related actions pending before foreign courts to cases where the parallel proceedings are pending before third country courts.

This issue could apparently be easily disposed of by observing that since the rules on *lis pendens* and related actions as contained in the Brussels I Regulation applied only in respect of actions bending before other Member States' courts, no apparent obstacle existed to the applicability of domestic rules to a situation which the Regulation, just as previously the Brussels Convention of 1968, did not intend to regulate.[37] Nonetheless, the point proved controversial as a consequence of the position adopted by the ECJ in its case law related to both the Convention and the Regulation. In the said case law, in fact, the ECJ has developed the assumption that jurisdiction conferred upon the courts of a Member State by the provisions of the Brussels I Regulation or the Brussels Convention alike is to be considered as mandatory, so that the courts of a Member State vested with such a jurisdiction are not allowed to decline it in favour of third country courts applying their domestic rules.[38]

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contemplated under Italian law by Article 7(3) of Law No. 218/1995: see, among others, C. CONSOLO (note 23), at 67 *et seq.*; R. MARENGO (note 23), at 132; F. MARONGIU BUONAIUTI (note 23), at 481 *et seq.*

[37] Such has been the solution defended by the English Court of Appeal in the well-known judgment in the case of *In Re Harrods (Buenos Aires) Ltd.*, [1992] Ch. 72, and finds support also in the opinion of one of the first scholars addressing comprehensively the system established by the Brussels Convention of 1968: G.A.L. DROZ, *Compétence judiciaire et effets des jugements dans le Marché commun*, Paris 1972, p. 198 *et seq.*, who admitted that courts sitting in Member States whose laws contemplated a *lis alibi pendens* rule in respect of proceedings pending before a foreign court could apply those rules in the relationships with third countries, so as to achieve the same objective of sound administration of justice which the Convention pursued as among the Member States. Perplexities were nonetheless raised by the cited judgment of the English Court of Appeal, insofar as it admitted the possibility of granting a stay on *forum non conveniens* grounds, due to the element of discretion which this would have introduced in a system based on rigid rules, whose application was aimed to ensure certainty and predictability: see, in particular, H. DUINTJER TEBBENS, The English Court of Appeal in *Re Harrords*: An Unwelcome Interpretation of the Brussels Convention, in M. SUMAMPOUW (ed.), *Law and Reality, Essays on National and International Procedural Law in Honour of C.C.A. Voskuil*, The Hague 1992, p. 47 *et seq.*; H. GAUDEMET-TALLON, Le "*forum non conveniens*", une menace pour la convention de Bruxelles?, *Rev. crit. dr. int. pr.* 1991, p. 491 *et seq.*

[38] The applicability of the rules of jurisdiction as contained, at the relevant time, in the Brussels Convention of 1968 on the sole ground of the domicile of the defendant in a

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Such a position, which can be considered as dictated by the logic of *effet utile*, whereby in having recourse to domestic rules to settle matters not expressly regulated by provisions of EU law, the Member States may not prejudice the attainment of the objective of EU rules applicable in the field concerned,[39] has been clearly maintained in the well-known *Owusu* case. The said case dealt with the application of a mechanism inherent in the doctrine of *forum non conveniens*, which does not find a direct parallel within the system of the Brussels I Regulation.[40] Nonetheless, it has been questioned whether the negative solution adopted by the Court could also extend to the applicability of other instruments, more homogeneous to those contemplated at an *intra*-EU level within the Regulation itself, by means of which Member States' courts could be brought to decline jurisdiction in favour of third country courts.[41] In this sense, the English Court of Appeal, not long after the ECJ judgment in the *Owusu* case, has maintained that the latter was of no prejudice to the power of the English courts to decline jurisdiction in a case subject to the Brussels I Regulation due to a choice of court clause designating a third country court, with due account taken of the weight attached to the will of the parties in the allocation of jurisdiction within the system of the

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Member State has been stressed by the ECJ particularly in its judgment of 13 July 2000, C-412/98, *Group Josi Reinsurance Co. v. UGIC*, *ECR* [2000] I-5925 *et seq.*, and the mandatory nature of the jurisdiction conferred by the Convention has been stressed by its well-known judgment of 1st March 2005, C-281/02, *Andrew Owusu v. N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, *ECR* [2005] I-1383 *et seq.*, where the ECJ notably excluded the applicability by a Member State court, namely an English court, of domestic rules, materially consisting of the doctrine of *forum non conveniens*, in order to grant a stay of proceedings based on a ground of jurisdiction provided by the Brussels Convention in favour of a third country court. See, among others, B. AUDIT/ G.A. BERMANN, The Application of Private International Norms to "Third Countries": The Jurisdiction and Judgments Example, in A. NUYTS/ N. WATTÉ (eds), *International Civil Litigation in Europe and Relations With Third States*, Brussels 2005, p. 55 *et seq.*, esp. p. 78 *et seq.*; R. FENTIMAN, National Law and the European Jurisdiction Regime, *ibidem*, p. 83 *et seq.*, esp. p. 101 *et seq.*; Th. KRUGER (note 2), at 265 *et seq.*; P. DE VAREILLES-SOMMIÈRES, The Mandatory Nature of Article 2 of the Brussels Convention and Derogation from the Rule It Lays Down, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland/ Oregon 2007, p. 101 *et seq.*

[39] Regarding the *effet utile* of the rules on jurisdiction as contained in the 1968 Brussels Convention, the ECJ has held in its judgment of 15 May 1990, case 365/88, *Kongress Agentur Hagen GmbH v. Zeehage BV*, *ECR* [1990] I-1845 *et seq.*, paras 17 *et seq.*, that the application of domestic rules concerning admissibility of actions, an issue which is not governed by the Convention, though remaining in principle unaffected, may not prejudice the *effet utile* of the Convention, as would be likely to occur in case the application of such rules would preclude the application of the rules of jurisdiction contained in the Convention. The same *rationale* applies currently to the Regulation and prospectively to the Recast Regulation.

[40] ECJ, *Owusu* (note 38), esp. at paras 41 *et seq.*

[41] See, particularly, R. FENTIMAN, Civil Jurisdiction and Third States: Owusu and After?, *Common Market Law Review* 2006, p. 705 *et seq.*; Th. KRUGER (note 2), at 234 *et seq.*

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Regulation itself.[42] Following the same line of reasoning, we have proposed elsewhere that the power of Member States' courts vested with jurisdiction under the Regulation to stay proceedings and, eventually, to decline jurisdiction due to proceedings pending before third country courts on the same or related actions pursuant to the domestic rules on *lis alibi pendens* or related actions before foreign courts could not be considered as barred by the position adopted by the ECJ in *Owusu.*[43] To reach that conclusion we argued that the rather inflexible solution adopted in that case was to be considered as due to the reluctance to accommodate the broad degree of flexibility and discretion inherent in the doctrine of *forum non conveniens* within the framework of the Brussels system, strictly inspired as it then appeared to certainty and predictability as concerns the establishment of jurisdiction.[44]

Inevitably, the solution adopted in the Recast Regulation represents a radical change in the perspective from which the issue had been considered, both because it expressly regulates the matter, thus absorbing any residual role which domestic rules could have maintained in this respect within the scope of application of the Brussels I Regulation, and because it addresses it by resorting to discretionary mechanisms which, as noted already, are in reality very similar to those inherent in the doctrine of *forum non conveniens* which the ECJ had not too many years earlier declared at odds with the rationale of the Brussels system of allocation of jurisdiction.[45] Leaving this second limb of the issue to some further remarks,

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[42] Court of Appeal (Civil Division), *Konkola Copper Mines v. Coromin*, [2006] 1 Lloyd's Rep. 410, confirming High Court of Justice (Queen's Bench Division), *Konkola Copper Mines v. Coromin*, [2005] EWHC 898 (Comm), summary in *Rev. crit. dr. int. pr.* 2006, p. 722 *et seq.*, note H. MUIR-WATT. Such a solution was expressly endorsed by the ECJ, prior to the *Owusu* judgment – in which the Court refrained from returning to the point, deeming it irrelevant for the disposal of the case pending before the referring court, where no choice of court agreement nor *lis alibi pendens* was at stake (see paras 47 *et seq.*) – in its earlier judgment of 9 November 2000, C-387/98, *Coreck Maritime GmbH v. Handelsveem BV*, *ECR* [2000] I-9337 *et seq.*, paras 19 *et seq.*

[43] See F. MARONGIU BUONAIUTI (note 14), at 496 *et seq.*, esp. p. 503 *et seq.*, and previously, *idem* (note 23), at 150 *et seq.*

[44] *Ibidem*. See, similarly, G. CUNIBERTI/ M. WINKLER, Note on Cour de justice des Communautés européennes, 1er mars 2005, *Clunet* 2005, p. 1183 *et seq.*, esp. p. 1188 *et seq.*; *idem*, *Forum non conveniens* e convenzione di Bruxelles: il caso *Owusu* dinanzi alla Corte di giustizia, *Diritto del commercio internazionale* 2006, p. 3 *et seq.*, esp. p. 19 *et seq.*; P. FRANZINA, Le condizioni di applicabilità del regolamento (CE) n. 44/2001 alla luce del parere 1/03 della Corte di giustizia, *Riv. dir. int.* 2006, p. 948 *et seq.*, esp. p. 975 *et seq.*; a more prudent approach was adopted by P. DE VAREILLES-SOMMIÈRES (note 38), at 113 *et seq.*, who proposed a discretionary evaluation of the opportunity of staying an action due to proceedings pending before a third country court in order to prevent an incentive to *forum shopping*; to the contrary, Th. KRUGER (note 2), at 266 *et seq.*, who prospected the introduction of an amendment to the Brussels I Regulation in order to expressly provide for the applicability of domestic provisions on *lis pendens* abroad in such cases.

[45] The rationale of the system embodied in the Brussels Convention and subsequently in the Brussels I Regulation being indeed that of ensuring certainty and predictability as concerns the establishment of jurisdiction, as clearly stressed by the ECJ in its judgment in the *Owusu* case (note 38), esp. at paras 38 *et seq*. See on this point, among others,

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which we shall make later on, it is to be observed that domestic rules concerning *lis alibi pendens* or related actions pending before foreign courts will see their scope of application inevitably narrowed down to those sole cases which are not subject to the Recast Regulation since, within the scope of application of the latter, the matter will be entirely dealt with by either Article 33 or 34 of the Regulation.[46]

As noted already,[47] the rules as introduced by the Recast Regulation in respect of *lis alibi pendens* and related actions pending before third country courts leave one aspect of the application of the new rules for the Member States to regulate: the relevant regime of applicability. In fact, both rules, though providing for a default regime applicable in the absence of any domestic rule in the sense of allowing the applicability of either rule *ex parte* only, leave it open for the Member States to provide in their domestic law for the same rules to be applicable *ex officio*. The rule as formulated in the same terms under Articles 33(4) and 34(4) of the Recast Regulation actually leaves open the question of whether Member States are considered as expected to adopt, in case they wish to provide for the said rules to be applicable *ex officio*, specific implementing provisions or whether reference may be made, by analogy, to the regime of applicability of the corresponding rules existing in the domestic law of the Member States on *lis alibi pendens* or related actions pending before a foreign court. In this respect, the Recast Regulation contains no provision vesting the Member States with the responsibility to adopt specific provisions implementing the Recast Regulation for this specific purpose.

A. DICKINSON, Legal certainty and the Brussels Convention: Too Much of a Good Thing?, in P. DE VAREILLES-SOMMIÈRES (ed.), *Forum Shopping in the European Judicial Area*, Oxford-Portland/ Oregon 2007, p. 115 *et seq.*; P. MAYER, *Forum non conveniens* et application uniforme des règles de competence, *ibidem*, p. 137 *et seq.*; G.P. ROMANO, Principe de sécurité juridique, système de Bruxelles I/Lugano et quelques arrêts récents de la CJCE, in A. BONOMI/ E. CASHIN RITAINE/ G.P. ROMANO (eds), *La Convention de Lugano. Passé, présent et dévenir*, Zürich 2007, p. 165 *et seq.*, esp. p. 182 *et seq.*; *idem*, Le principe de sécurité juridique, à l'épreuve des arrêts *Gasser* et *Owusu*, *Cahiers de droit européen* 2008, p. 175 *et seq.*, esp. p. 185 *et seq.*; lastly, C.M. MARIOTTINI, The Proposed Recast of the Brussels I Regulation and *Forum non conveniens* in the European Union Judicial Area, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Padua 2012, p. 285 *et seq.*, esp. p. 287 *et seq.*

[46] Indeed, with regard to actions not falling within the scope of application *ratione materiae* of the Recast Regulation, the issue of compatibility of the recourse to the domestic rules concerning *lis alibi pendens* or related actions pending abroad will not even come for consideration, since those actions are entirely subject to the domestic rules of jurisdiction. The problem addressed above (note 37 *et seq.*) could still be posed as concerns the applicability of domestic provisions on *lis pendens* and related actions pending abroad with respect to an action pending before a third country court whenever the action falls within the scope of application of other regulations bearing uniform rules on jurisdiction without expressly regulating the issue of *lis pendens* or related actions pending before a third country court, as in cases falling within the scope of application of the Brussels II-*bis* Regulation, No. 2201/2003, or the Maintenance Regulation, No. 4/2009, or, lastly, of the Succession Regulation, No. 650/2012, unless provisions comparable to Arts 33 and 34 of the Recast Regulation are introduced in those regulations as well, as might be advisable in order to ensure uniformity within the European jurisdiction regime.

[47] *Supra* III., note 19.

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Therefore, an interpretation of the rule as referring to the solutions ordinarily contemplated in respect of the corresponding domestic rules would present the advantage of simplicity and of uniformity as concerns the attitude adopted within the same Member State regarding actions pending before a third country court. This would imply a corresponding treatment in this regard for situations falling under the new rules contained in the Recast Regulation and cases subject to the residually applicable domestic rules. Furthermore, such a solution would preserve an albeit limited scope of application for the relevant domestic rules within the scope of application of the Regulation, which would otherwise be excluded altogether. Such a consequence would likely appear disproportionate with respect to the fact that domestic rules continue to regulate, instead, the recognition of the judgments to be delivered by the third country courts seized of the concurrent actions. It is nonetheless to be conceded that, within the currently broad and diversified context of the Member States, it may not always prove easy for subjects located in a third country to identify the relevant domestic rules to be applied by analogy, and these, furthermore, may not expressly regulate the matter, leaving it to case law which may not always appear consistent.[48]

VII. Final Remarks: The New Rules as a Revival of the Long-Standing Opposition between Certainty and Flexibility in the Allocation of Jurisdiction

The solution as embodied in Articles 33 and 34 of the Recast Regulation, although not devoid of difficulties and uncertainties regarding its prospective application, is to be considered as a significant innovation within the Brussels system of allocation of jurisdiction, in a twofold perspective.

From the one side, it represents a welcome, though incomplete, overcoming of the traditional, rigid *inter partes* approach which had inspired that system from the very moment when the Brussels Convention of 1968 had been conceived, and when the limits of a system artificially tending to isolate the relationships between the Member States from those with the rest of the world were probably less

[48] For example, under Italian law, Art. 7(1) of law No. 218/1995, providing for the reform of the Italian system of private international law, apparently provides for the rule on *lis alibi pendens* in respect of proceedings pending before a foreign court to be applied *ex parte*, as should be clear from the wording of the provision ("Quando, (…), sia eccepita…") and as was confirmed by the earlier case law: see C. CONSOLO (note 23), esp. at 51 *et seq.*; R. MARENGO (note 23), at 165 *et seq.*; F. MARONGIU BUONAIUTI (note 23), at 222 *et seq.* Recently, however, the Italian Court of Cassation (sez. un. civ.), 28 November 2012, No. 21108, *Riv. dir. int. priv. proc.* 2013, p. 762 *et seq.*, critically commented by S.A. VILLATA, Sulla nozione e sulla rilevabilità d'ufficio della litispendenza internazionale nella l. 218/1995, *Rivista di diritto processuale* 2013, p. 1574 *et seq.*, esp. p. 1583 *et seq.*, has unpersuasively changed its initial position, admitting the application of the rule *ex officio*, though posing on the interested party, pursuant to a general rule, the burden of allegation of the relevant circumstances of fact.

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resented. As noted already, the fact of taking into account the event of proceedings pending before a third country court on either the same or on related actions overcomes to a certain extent such a limit and reflects realistically the perspective of judgments to be delivered by third country courts in such actions to be recognised and enforced in the Member States, albeit still pursuant to their respective domestic rules.[49]

From the other side, the solution adopted, in providing a different and less automatic treatment of the situation of parallel actions pending before third country courts than that provided for in respect of actions pending before other Member States' courts, inevitably reflects the underlined differences in the relevant contexts and perspectives from which the two sets of rules are deemed to operate. What inevitably appears striking in the solution adopted by the Recast Regulation is that, in addressing the said difference, the Regulation has not simply chosen to provide for additional requirements for the granting of a stay of proceedings and eventually for declining jurisdiction in presence of parallel proceedings on either the same or related actions pending before a third country court. In reality, the Recast Regulation conveys the impression of having adopted a different technique in addressing such situations, based to a large extent on the exercise by the Member States' courts of the same sort of discretion which the ECJ had expressly declared to be alien to the Brussels system of allocation of jurisdiction.[50]

Ultimately, it is just as if the EU legislator had overcome the position adopted by the ECJ in its case law. The Court, in fact, had found in *Owusu* the discretion inherent in the doctrine of *forum non conveniens* incompatible with the basic principles of legal certainty and predictability in the exercise of jurisdiction by the courts of the Member States, as distinctive of the system enshrined in the Brussels Convention first and then in the Brussels I Regulation. In substance, discretion appears to have been officially accepted, after some breakthroughs in other EU acts adopted in the field of judicial cooperation in civil matters, among the tools of which the Member States' courts may avail themselves in applying the rules embodied in the system. This, nonetheless, happens so far only in respect of situations connected with third countries.[51] Inevitably, although the conceptual

[49] As expressly admitted by Article 34(4) Brussels I Regulation, and, accordingly, by Article 45(1)(d), of the Recast Regulation, which provide that an earlier judgment on the same cause of action and between the same parties delivered in a third country and enforceable in the Member State requested constitutes a ground for refusal of recognition of a judgment delivered by another Member State's courts: *supra* II. See on the desirability of introducing uniform rules concerning the recognition of third country judgments in the Member States in order to prevent the risk of diverging outcomes and the incentive to *forum* shopping inherent in the coexistence of different national standards, S.M. CARBONE, (note 21), p. 301 *et seq.*

[50] ECJ, *Owusu* (note 38), at paras 41 *et seq*. See also *supra* VI., note 38 *et seq.*

[51] Actually, some earlier examples of a reception of a discretionary method of regulating the relationships among competing jurisdictions which could be considered as inspired by the *forum non conveniens* model are to be found, even though in the distinct sphere of the relationships among courts sitting in different Member States only, in Article 15 of EC Regulation No. 2201/2003, s. c. Brussels II-*bis*, providing for the referral of actions in matters of parental responsibility to the courts of another Member State presenting a close connection with the minor, provided such a transfer is suitable for the superior

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obstacles which have made difficult the reception of legal institutions deriving from the common law world in a system strictly inspired to the civil law tradition are apparently removed, the practical difficulties remain. In fact, one thing is to allow courts belonging to the common law tradition to apply the instruments to which they are familiar, another matter is to provide that also other Member States' courts are to embark in exercises to which they are not acquainted. Even if reasonable preoccupations may lie behind the requirements concerning proceedings pending before third country courts, uncertainty and vagueness remains in the wording of some of the requirements for the granting of a stay due to *lis alibi pendens* or a related action pending before a third country court. In particular, it may prove difficult to identify the grounds on which the Member State court seized is to decide that the granting of stay is necessary for the correct administration of justice. One may wonder whether merely procedural considerations may come into account in that respect, or whether substantial ones, pertaining for example to the material result which is likely to be achieved in the proceedings pending before the third country court may also come into account in the balance which the court seized is expected to strike among the relevant circumstances of the case. In this respect, it is inevitable to observe that the taking into consideration of aspects pertaining to the substance of the case would imply attributing relevance also to the law to be applied by the third country court in the adjudication of the case. Such law will inevitably be determined pursuant to the private international law rules applicable in the third country concerned, which, as such, is not involved in the process of unification of such rules ongoing at EU level. In these terms, the application of the rules on *lis pendens* and related actions in respect of proceedings pending before third country courts as introduced by the Recast Regulation might operate as an instrument of coordination, albeit unilateral, between the evolving European system of private international law and third countries' conflict of laws systems.[52]

Nonetheless, the Recast Regulation, no different from a practice which appears frequently followed by recent EU legislation in the field concerned,[53] pro-

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interest of the latter; as well as, more recently, in Article 6 of Regulation (EU) No. 650/2012 in matters of succession, which, in case of choice of law, allows the court seized pursuant to the rules of jurisdiction contained in the Regulation to decline jurisdiction in favour of the courts of the Member State of the chosen law, if it deems that those courts are in a better position to rule on the succession taking account of the circumstances of the case. Cf., with regard to the former, F. Marongiu Buonaiuti (note 23), at 476 *et seq.*; *idem* (note 9), at 359, in note; J. Weber (note 1), at 636 *et seq.*; C.M. Mariottini (note 45), at 294 *et seq.*; concerning the latter, A. Davì/ A. Zanobetti (note 8), at 118 *et seq.*; C.M. Mariottini, *ibidem.*

[52] For some considerations regarding *lis alibi pendens*, conceived as a means of opening to a coordination among different systems of private international law, see F. Marongiu Buonaiuti (note 23), at 44 *et seq.*; *idem* (note 14), at 500; previously, among others, P. Picone, Les méthodes de coordination entre ordres juridiques en droit international privé, *Recueil des Cours* vol. 276 (1999), p. 9 *et seq.*, esp. p. 259 *et seq.*; A. Nuyts, *L'exception de forum non conveniens* (note 25), at 850 *et seq.*

[53] See, for some remarks concerning the massive and probably inappropriate recourse to statements contained in the recitals of the preambles to supplement the provi-

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vides some indications in this respect within a recital in the Preamble, by itself devoid of any binding effect. In the said recital, the Preamble states that the Member State court should consider all the circumstances of the case pending before it. Such a statement, suggesting an inclusive rather than an exclusive approach, is followed by some indications, all of which are actually pertaining to the procedural sphere, such as the connections existing between the facts of the case and the parties and the third country concerned, the state of progress of the proceedings in the third country court when the issue comes for consideration, and the likelihood of the proceedings before the latter court to be concluded in a timely manner.[54]

Inevitably, there is a risk that such broad discretion conferred upon the Member States courts by the Recast Regulation is actually exercised differently by courts sitting in different Member States belonging to heterogeneous legal traditions, and therefore threatens the Regulation's objective of uniformity. The debate which the ECJ in *Owusu* seemed to have closed is thus revived by the Recast Regulation. Certainty vs. flexibility as the prevailing aim of a system of allocation of jurisdiction was the crucial issue raised by the earlier works commenting on the effects which the application of traditional institutions of the common law, such as the doctrine of *forum non conveniens*, could have on the system of distribution of jurisdiction among the courts of different Member States contained in the Brussels Convention.[55] The same issue is indeed still present behind the competing needs to preserve the integrity and continuity of the Brussels system of jurisdiction and to provide for its prudent opening to the outer world.[56]

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sions contained in the text of EU Regulations adopted in the field of private international law, A. Davì/ A. Zanobetti (note 8), at 17, in note.

[54] Preamble, Recital No. 24.

[55] See comments by H. Duintjer Tebbens (note 37), at 47 *et seq.* and H. Gaudemet-Tallon (note 37), at 491 *et seq.* on the English Court of Appeal judgment in the case of *In Re Harrods (Buenos Aires) Ltd*, cit. (*supra*, note 37) which had admitted the possibility of the English courts vested with jurisdiction under the Brussels Convention to decline jurisdiction in favour of a third country court on *forum non conveniens* grounds.

[56] See, among other more recent comments on the said issue following the ECJ judgment in the *Owusu* case, from different perspectives, A. Dickinson (note 45), at 115 *et seq.*; P. Mayer (note 45), at 137 *et seq.*; G.P. Romano (note 45), at 182 *et seq.*; *idem* (note 45), at 185 *et seq.*; C.M. Mariottini (note 45), at 287 *et seq.*

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CHOICE OF COURT AGREEMENTS IN THE NEW BRUSSELS I-*BIS* REGULATION: A CRITICAL APPRAISAL

Ilaria QUEIROLO[*]

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I. Foreword: The *ratio* of the New Legal Framework and its Scope of Application

The new wording of Article 25 of the Brussels I-*bis* Regulation[1] marks a decisive turning point[2] in the definition of jurisdictional prorogation agreements at the level

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[1] *OJ* L 351 of 2012, p. 1.

[2] For a first study on the proposals of the new Regulation, see *ex multis* in the legal literature B. HESS, The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission's Proposed Recast, *Common Market Law Review* 2012, p. 1075 *et seq.*; Ch. KOHLER, Agreements Conferring Jurisdiction on courts of Third States, in F. POCAR/

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of EU law. In the past, the ultimate goal of the legislator was to affirm the principle according to which the autonomy of the parties to determine the competent court should have been conceived in wide terms.[3]

I. VIARENGO/ F.C VILLATA (eds), *Recasting Brussels I*, Milano 2012, p. 199; U. MAGNUS, Choice of Court Agreements in the Review Proposal for the Brussels I Regulation, in E. LEIN (eds), *The Brussels I Review Proposal Uncovered*, London 2012, p. 83 *et seq.*; L. PENASA, Clausole di *electio fori* e riforma del Reg. Bruxelles I, *Int'l Lis* 2013, p. 117; I. QUEIROLO, Articolo 23. Proroga di competenza, T. SIMONS/ R. HAUSMANN/ I. QUEIROLO (eds) *Regolamento "Bruxelles I". Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, München 2012, p. 532 *et seq.*; *idem*, Prorogation of Jurisdiction in the Proposal for a Recast of the Brussels I Regulation, in F. POCAR/ I. VIARENGO/ F.C. VILLATA (eds), *Recasting Brussels I*, Milano 2012, p. 183 *et seq.*; P. ROGERSON, *Lis Pendens and Third States: the Commission's Proposed Changes to the Brussels I Regulation*, in E. LEIN (eds), *The Brussels I Review Proposal Uncovered*, London 2012, p. 103 *et seq.* and F.C. VILLATA, Choice-of-Court Agreements in Favour of Third States's Jurisdiction in Light of the Suggestions by Members of the European Parliament, in F. POCAR/ I. VIARENGO/ F.C VILLATA (eds), *Recasting Brussels I*, Milano 2012, p. 219 *et seq*. On the new text of the Brussels I-*bis* Regulation see *ex multis* H. GAUDEMET-TALLON/ C. KESSEDJIAN, La refonte du règlement Bruxelles I, *Révue trimestrelle de droit européen* 2013, p. 435; P.A. NIELSEN, The New Brussels I Regulation, *Common Market Law Review* 2013, p. 503; S.M. CARBONE, Gli accordi di proroga della giurisdizione e le convenzioni arbitrali nella nuova disciplina del Regolamento (UE) 1215/2012, *Diritto del commercio internazionale* 2013, p. 651 and A. NUYTS, La refonte du règlement Bruxelles I, *Rev. crit. dr. int. pr*. 2013, p. 1.

[3] It seems unnecessary if not impossible in this paper to study the evolution of the principle of party autonomy in the choice of the competent forum. Some brief remarks can be made in order to fully understand this right of the parties and to fully appreciate the extent to which the parties to a contract can choose the competent fora. This possibility for the parties originated in a drastic change in the understanding of jurisdiction itself. In the past, jurisdiction was strictly tied to the idea that courts had a duty to enforce State interests in claims of private citizens. Thus, jurisdiction was intimately tied to the idea of State sovereignty. With the growth of international trade and the interdependence between States, the idea that jurisdiction was a means for the State to affirm its effectiveness was partially revisited and jurisdiction began to be conceived as an instrument of private parties to enforce their rights and protect their interests. Having lost part of the public interest in the exercise of jurisdiction, States began to allow individuals and companies to derogate, in some matters, from the jurisdiction of the State in favour of other courts. In line with this tendency and the idea that jurisdiction, even if naturally endowed with a mixture of public and private functions, is no longer to be primarily subordinated to enforcing public policy. Rather, it must be understood as an appropriate instrument for resolving disputes between private parties. The legal literature, also having regard to the role of party autonomy in international conventions and European instruments, asserted that the right to self-determination in private relationships has to be considered as a fundamental right of the individual and, as such, has to be recognised and protected. Following this theory, the State is not free to decide whether or not to recognise the role of party autonomy in the choice of the applicable law or the competent court. On the contrary, due to its qualification as an inalienable right of the individual, party autonomy must be protected by States and violations thereof must be avoided or sanctioned. In the legal literature, see E. JAYME, Cours general de droit international privé, *Recueil des Cours* vol. 47 (1995), p. 54 *et seq.*; *idem*, L'autonomie de la volonté des parties dans les contrats internationaux entre personnes

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This purpose was at first pursued through a gradual extension[4] of the formal requirements on which the validity of the agreement depended and the extension of the substantial ways through which the parties were allowed to determine the content of the prorogation agreement itself.

In the first version of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,[5] an agreement conferring jurisdiction had to be *(a)* "in writing" or *(b)* "an oral agreement evidenced in writing". To these first formal requirements, others were added: with the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the 1968 Convention,[6] a third formal requirement was included in order to ensure that in contracts of international trade and commerce, choice of court agreements could have been concluded "in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware".

Such a provision has also been subsequently modified by the 1988 Lugano Convention, the wording of which was transposed in the new conventions on the accession of new Member States, setting the final version of Article 17 of the 1968 Brussels Convention. Since this amendment came into force, jurisdictional agreements can also be *(c)* "in a form which accords with practices which the parties have established between themselves", or *(d)* "in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or

privées, rapport définitif, *Annuaire de l'institut de droit international*, session de Bâle, 1991, vol. 64-I, p. 62 *et seq.*; A. VON OVERBECK, L'irrésistible extension de l'autonomie en droit international privé, *Nouveaux itinéraires en droit – Hommage à François Rigaux*, Bruxelles 1993, p. 619 *et seq.*; I. QUEIROLO, Private International Law and Submission in a Recent Decision of the German Bundesarbeitsgericht, *The European Legal Forum* 2013, p. 9 *et seq.; idem*, Articoli 23-24. Sezione 7. Proroga di competenza. Osservazioni preliminari, in T. SIMONS/ R. HAUSMANN/ I. QUEIROLO (eds), *Regolamento "Bruxelles I". Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, München 2012, p. 447; S.M. CARBONE/ I. QUEIROLO, Art. 4 – Accettazione e deroga della gurisdizione, in F. PREITE/ A. GAZZANTI PUGLIESE DI COTRONE (eds), *Atti notarili di diritto comunitario e internazionale. Vol. I. Diritto internazionale privato*, Milano 2011, p. 482 and F.C. VILLATA, *L'attuazione degli accordi di scelta del foro nel regolamento Bruxelles I*, Milano 2012, p. 3 *et seq*. In addition, it must be noted that the role of party autonomy in choosing the competent court can either be manifested by the parties through an explicit externalisation of the will or inferred from the procedural behaviour of the parties themselves during the proceedings.

[4] S.M. CARBONE, La disciplina comunitaria della "proroga della giurisdizione" in materia civile e commerciale, *JuS* 1990, p. 23 *et seq*.

[5] *OJ* L 299 of 1972, p. 32 *et seq.*

[6] Council Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed on 9 October 1978) (78/884/EEC).

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commerce concerned".[7] Furthermore, in the Brussels I Regulation the text was again amended in order to clearly state that *(e)* "communication by electronic means which provides a durable record of the agreement shall be equivalent to writing".

It is also settled that the agreement can either prorogate the jurisdiction of a territorial court or the jurisdiction of a Member State. Furthermore, two or more courts of different Member States can be prorogated by the parties; thus, it is always possible to characterise the jurisdiction of the chosen court(s) as exclusive or concurring. Moreover, another well-established principle set by the European Court of Justice in relation to prorogation agreements, is that the chosen jurisdiction does not necessarily need to have a significant connection with the case.[8]

Once the aforementioned goals were achieved – *i.e.*, assuring the right of the parties to determine the competent court to settle their private disputes – it became necessary to go further in order to ensure not only the formal and substantial validity of prorogation agreements, but also to grant throughout Europe a uniform assessment of such validity.

This aim represents a decisive turning point in the evolution of the legal framework of prorogation agreements tackled by the Brussels I-*bis* Regulation which is fully consistent with the Hague Choice of Court Convention (even though it must immediately be noted that the Regulation adopts a different methodology).

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[7] Article 17 of the first draft of the 1968 Brussels Convention states: "if the Parties, one or more of whom is domiciled in a Contracting State, have, by agreement in writing or by an oral agreement evidenced in writing, agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction". In the 1978 Convention on the accession of Denmark, Ireland and the United Kingdom to the Convention, Article 17 states that "if the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware".

[8] It is a founding principle of procedural international law that a court must show a significant connection that justifies the exercise of its jurisdiction over a case. The Brussels I Regulation clearly states this at its 11th Recital: "the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile", which is the criterion that usually shows this connection, along with others in cases of contractual and non-contractual liability, or in cases involving immovable property. The jurisdiction criterion of the Regulation is meant to safeguard this proximity (between the court and the case) principle in order to promote and enhance a better and more cost-effective judicial system and administration of justice (see, *e.g.*, G. BIAGIONI, Alcuni caratteri generali del *forum necessitatis* nello spazio giudiziario europeo, *Cuadernos de Derecho Transnacional* 2012, p. 20 *et seq*, p. 28). This said, the European Court of Justice stressed, already when interpreting the 1968 Brussels Convention, that the goal of the choice of court agreement is to grant jurisdiction to a Court that would not otherwise be competent (ECJ, 24 June 1981, case 150/80, *Elefanten Schuh GmbH*, *ECR* [1981] I-1671, para. 28). See also Recital 11 and Article 23 of the Brussels I Regulation.

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The new Regulation reaffirms the need to enhance the role of party autonomy in choosing the competent court by (i) expanding the personal scope of application of the EU provisions related to the validity and effectiveness of prorogation agreements. Moreover, the goal to safeguard the effectiveness of such agreements is also pursued by (ii) setting uniform rules regarding the law regulating the substantive validity of the agreements and by (iii) recognising the preliminary nature of the validity issue, the assessment of which is conferred with priority to the prorogated court.

II. The New Extended Scope of Application of the Rules Concerning Choice of Court Agreements

With regard to the widened personal scope of application of the EU instrument (point i), it must be recalled that, under the Brussels I Regulation, the provisions related to prorogation agreements can only be applied if at least one of the parties has his/her domicile in a Member State, regardless of whether this party is the plaintiff or the defendant. On the contrary, if none of the parties has his/her own domicile in a Member State, Article 23 of the Brussels I Regulation cannot be applied; thus, in this context the national seized court has to decide on the validity of the prorogation clause according to the procedural and private international law rules of the forum.

The new Article 25 of the Brussels I-*bis* Regulation represents a significant change to the text of the previous provision where now, no reference can be found to the domicile of the parties as a requirement for the application of the Regulation itself: this means that if the parties have agreed that a court of a Member State has jurisdiction, that court shall have jurisdiction "regardless of parties' domicile". The EU provisions are, thus, applicable even when no party has his/her domicile within the territory of a Member State as long as a Member State court is prorogated. As mentioned, this possibility was not explicitly foreseen by the Brussels I Regulation, leaving it to the prorogated or seized court to determine whether the agreement was valid, whilst the new Article 25 of the Brussels I-*bis* Regulation requires that formal and substantial conditions be met for choice of court clauses when: (*a*) both parties are domiciled in the EU; (*b*) one party is domiciled within the EU and (*c*) no party to the agreement is domiciled in the EU.

This new legal framework enhances and strengthens the role of party autonomy: the validity of the agreements under point (*c*) are no longer a matter of domestic legislation since the conditions for their validity have now been largely unified in the European judicial space. This should preclude the same prorogation agreement from being considered valid in one jurisdiction and null and void in another.[9]

[9] On this problem see B. HESS/ T. PFEIFFER/ P. SCHLOSSER, Report on the Application of the Regulation Brussels I in the Member States, available at <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf>, at para. 377.

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The other two solutions mentioned at points (ii) and (iii) are of particular interest. They can be considered a breaking point in the tradition of transposing into law the decisions of the European Court of Justice on prorogation agreements. The new provisions clearly go against the rulings of the Court.[10]

III. A Uniform Rule for Nullity or Voidness of a Jurisdiction Agreement

Article 23 of the Brussels I Regulation does not contain a comprehensive rule for prorogation agreements. This Article sets a few uniform indications concerning the substantial and formal elements characterising the prorogation clause,[11] while leaving the regulation of many other relevant aspects to national laws.[12] While formally, Article 23 seems to be complete and exhaustive and bears a list of the requirements to be met, the same is not true with regard to the substantial conditions of the choice of court agreements. The substantive validity is to be addressed in light of the provisions of the Regulation, the law applicable to the agreement and

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[10] For a first comment to the amendments regarding prorogation of jurisdiction, see I. QUEIROLO/ M.E. DE MAESTRI, The effects of the Proposal for a recast of Brussels I Regulation on rules concerning prorogation of jurisdiction, *The European Legal Forum* 2011, p. 61 *et seq.*

[11] With reference to the substantive requirements set up by the Regulation, the validity and even the existence of the clause is subordinated to the consensus between the parties, which must be clearly and precisely demonstrated (ECJ, 14 December 1976, 24/76, *Estasis Salotti*, *ECR* [1976] I-1831; ECJ, 14th December 1976, case 25/76, *Segoura*, *ECR* [1976] I-1851). Secondly, the clause must relate to disputes which have arisen or which may arise in connection with a particular legal relationship, therefore impeding the conclusion of an agreement generally concerning all disputes that may arise between the parties, but allowing the prior consensus on the competent judge before an actual claim arises. The third requirement makes reference to the necessity of respecting exclusive jurisdiction. Paragraph 4 of Article 23 of the Brussels I Regulation states: "agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22". Turning our attention to the formal requirements listed by the Brussels I Regulation, the agreement conferring jurisdiction shall be either i) in writing, or ii) evidenced in writing, or iii) in a form which accords with practices which the parties have established between themselves, or iv) in a form which accords with a usage of international trade or commerce that the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. Moreover, when the prorogation clause is contained in a contract relating to insurance or consumer law, the need for protection of contractually weak parties has led to the drafting of special rules, which depart from those laid down by Article 23 of the Brussels I Regulation.

[12] See I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale. Tra diritto comunitario e diritto interno*, Padova 2000, p. 147 *et seq.*

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the *lex contractus* (which sometimes may overlap). It is in particular on the issue of the law applicable to the agreements themselves that, as we shall see, the new Regulation sets a rule that marks a turning point in the discipline.

A. Requirements for Validity of Prorogation Agreements under the Uniform Rules

Other than the formal requirements set for the validity of prorogation agreements, the European Court of Justice reserved the role of determining the substantive validity of agreements to the EU provisions, in particular with regard to the following issues: (i) respect for the rules on exclusive jurisdiction provided by the Regulation; (ii) consensus between the parties; and, (iii) the existence of a specific relationship between the parties. These elements were not changed by the new text of the Regulation; thus, it seems sufficient here to briefly recall these aspects, confirming their existence and status also under the new Brussels I-*bis* Regulation.

As far as the first issue is concerned, it must be recalled that a prorogation agreement can be made in any civil and commercial matter, whether contractual or non-contractual, as this is defined by the Regulation itself, and subject to exclusive jurisdiction under Article 24.[13] Indeed, according to Article 27, where a court of a Member State is seized of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, the court first seized shall declare of its own motion that it has no jurisdiction.

Having regard to consensus, it must be noted that any prorogation has to be sustained by an agreement[14] by which the parties regulate their procedural

[13] H. GAUDEMET-TALLON, *Les Conventions de Bruxelles et de Lugano*, Paris 1996, p. 75 *et seq*.

[14] On the necessity of the existence of an actual consensus between the parties to prorogate the Italian jurisdiction, see G. MORELLI, *Diritto processuale civile internazionale,* Padova 1954, 2[a] ed., p. 182 *et seq.*; G. BARILE, *Lex fori* e deroga alla giurisdizione italiana*, Rivista di diritto internazionale* 1960, p. 658 *et seq.*; U.M. IACCARINO, *Il cd. atto di "deroga" alla giurisdizione italiana,* Napoli 1960, p. 171 *et seq*.; V. STARACE, voce "Limiti della giurisdizione (diritto internazionale)", *Enciclopedia del Diritto,* XIX, Milano 1970, p. 449 *et seq.* and G. GAJA, *La deroga alla giurisdizione italiana*, Milano 1970, p. 44 *et seq.* The expression of the will of the parties can take different forms: in the Italian system, as well as in the uniform legal framework, the parties have the right to choose a foreign court or a specific court (G. FRANCHI, Determinazione convenzionale della competenza internazionale del giudice straniero e delibazione*, Giurisprudenza italiana* 1966, p. 415) and can determine whether the prorogated court shall enjoy exclusive jurisdiction or not. Thus, it is for the interpreter to determine what the parties intended when they agreed on the choice of court clause. This is also confirmed by the wording of Article 4 of the Italian law 218/1995 on the Italian system of private international law, where the reference to the exclusivity of the competence of the prorogated court has been dropped. In cases of non-exclusive choice of court agreements, it seems that an agreement that derogates from the jurisdiction of the Italian courts and does not indicate another court as prorogated, is acceptable. The only relevant element is then the will of the parties.

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relationship.[15] Already under the Brussels I Regulation, if the parties have so agreed, the prorogated court shall have exclusive jurisdiction over the matters related to the contract. As highlighted by the European Court of Justice:

> "the purpose of the requirement of a writing under article 17 serves to ensure that the consensus between the parties, who, by a prorogation of competence, depart from the general rules for determining jurisdiction laid down in articles 2, 5 and 6 of the convention, is clearly and precisely demonstrated and has actually been reached."[16]

In this sense, the European Court of Justice[17] explicitly affirmed the need for an autonomous interpretation of the term "prorogation agreement": such interpretation has to be made in light of the aims and objective of the EU law itself and not according to domestic legislation and qualifications. Any other solution would compromise the uniform application of EU law.

Starting from this statement, the Court found that, in order to have a choice of court agreement within the meaning of the Regulation, the will of the parties must not necessarily address only the issue of the competent court. Prorogation agreements found in accessory clauses are valid under EU law because even if these were not the primary object of negotiation, they are still a product of the parties' will. Moreover,[18] the prorogation agreement can be inferred by way of interpretation even in the absence of an explicit consensus. This results from the case law of the European Court of Justice according to which the will of the parties

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[15] J. HILL, *The Law Relating to International Commercial Disputes,* London 1998, p. 95; J. KROPHOLLER, *Europäisches Zivilprozessrecht. Kommentar zu EuGVÜ und Lugano-Übereinkommen,* Heidelberg 1996, p. 212 *et seq.*

[16] ECJ, *Estasis Salotti* (note 11)*;* ECJ, *Segoura* (note 11). See also ECJ, 6 May 1980, case 784/79, *Porta Leasing*, *ECR* [1980] I-1517; ECJ, 14 July 1983, case 201/82, *Gerling*, *ECR* [1983] I-2503; ECJ, 19 June 1984, case 71/83, *Tilly Russ*, *ECR* [1984] I-2417; ECJ, 11 July 1985, case 221/84, *Berghoefer, ECR* [1985] I-2699 and ECJ, 20 February 1997, case C-106/95, *MSG*, *ECR* [1997] I-911. Similar statements are also to be found in the case law of several Member States, where the formal requirements have also been interpreted in order to protect the contractually weaker parties from fraud and abuse. Under this lense, the formal requirements reduce the risks of hidden clauses in contracts where no consensus can be found.

[17] ECJ, 10 March 1992, case C-214/89, *Powell Duffryn*, *ECR* [1992] I-1796. For a first reading on this decision see M.V. POLAK, Case C-214/89, Powell Duffryn PLC v. Wolfgang Petereit, Judgment of 10 March 1992, *Common Market Law Review* 1993, p. 406; H. GAUDEMET-TALLON, *Rev. crit. dr. int. pr.* 1992, p. 535; I. QUEIROLO, Art. 17 della Convenzione di Bruxelles e clausola attributiva di competenza contenuta in uno statuto societario, *Riv. dir. int. priv. proc.* 1993, p. 69 and A. PIETROBON, Clausola statutaria attributiva della giurisdizione e art. 17 della convenzione di Bruxelles*, Diritto del commercio internazionale* 1993, p. 708.

[18] P. GOTHOT/ D. HOLLEAUX, *La Convention de Bruxelles du 27 septembre 1968,* Paris 1985, p. 101 *et seq.*

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can be presumed[19] in light of their behaviour[20] or in those cases where one of the parties should reasonably have known[21] of the existence of clauses granting jurisdiction. In other words, there is a tendency to infer the existence of an agreement on choice of court regardless of the way the parties expressed their intentions.

According to the uniform provisions, competence clauses not only have to respect exclusive jurisdiction fora and reflect the expression of the parties' will, but they must also be related to a "particular legal relationship".[22] On one hand, this specification precludes parties from entering a prorogation agreement that might cover an undefined number of cases; on the other, it clarifies that – as long as an agreement is related to a specific legal relationship[23] – the parties are allowed to enter into *pro futuro* agreements[24] for claims that are only hypothetical. The EU legislator could not have adopted any other solution, given that the pre-emptive choice of court agreements are a necessity of international trade and commerce: businesses need to foresee the competent fora for possible future claims.[25]

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[19] ECJ, *Gerling* (note 16), related to an insurance contract containing a prorogation agreement in favour of the beneficiary; the Court stated that the third party can rely upon a prorogation agreement even though this party does not express any consensus, given that the clause was only to favour this party.

[20] ECJ, 11 November 1986, case 313/85, *Iveco Fiat*, *ECR* [1986] I-3353.

[21] ECJ, *Tilly Russ* (note 16), where the Court states: "as regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by Article 17 of the convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations".

[22] S. PIERI, La disciplina della proroga della competenza nella Convenzione di Bruxelles nella giurisprudenza della Corte di giustizia della CEE, *L'unificazione del diritto internazionale privato e processuale, Studi in memoria di Mario Giuliano*, Padova 1989, p. 743 *et seq.*; S. O'MALLEY/ A. LAYTON, *European Civil Practice,* London 1989, p. 574, who believes the provision is aimed to protect the contractually weaker party against the "stronger trading partner"; D. LASOK/ P.A. STONE, *Conflict of Laws in the European Community*, Abingon 1987, p. 262, highlighting that the definition of the predetermined legal relationship could prove to be difficult, and some help to resolve the problem could be given by Article 6 No. 3 and Article 22 No. 3.

[23] On this last point see S.M. CARBONE, *Lo spazio giudiziario europeo in materia civile e commericiale. Da Bruxelles I al regolamento CE n. 805/2004,* Torino 2009, p. 158 *et seq.*; S. O'MALLEY/ A. LAYTON (note 22), at 574 *et seq.*

[24] Trib. comm. Bruxelles, 15th January 1976, *Journal trib.* 1976, p. 210; French Court de Cassation, 25 January 1983, *Rev. crit. dr. int. pr.* 1983, p. 517.

[25] From the aforementioned principles, it seems clear that two parties could agree on a choice of court clause even before they agree upon the rest of the contract. If the contract is then concluded, any claim that is related to it will be adjudicated by the prorogated court. If the contract is not concluded, the question on whether or not claims on pre-contractual liability have to be adjudicated by the prorogated court is not always settled: only when the parties clearly decided to include pre-contractual liability within the scope of application of the prorogation will the answer be sure. In any other case, different elements point to different solutions. It could be argued that the parties wanted to include these issues when making a choice of court agreement before the conclusion of the contract. On the other hand, the fact

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B. Requirements Regulated by the *lex causae* of the Contract Containing the Choice of Court Clause

Some choice of forum clauses are included in contracts or related documents. In these cases, if there are no doubts that the jurisdiction clause is independent from the terms of the contract, it is also true that the "life" of the contract necessarily affects the "life" of the choice of forum clause. For example: the tacit prorogation of the contract under the applicable law also bears consequences on the jurisdiction clause itself.[26] In fact, a jurisdiction clause included into a contract, not renewed in writing as prescribed in the contractual terms, satisfies the requirements of validity if, *under the law applicable to the contract*, the parties could renew the agreement otherwise than in writing. This means that some requirements set for the substantial validity of the prorogation clause are governed by the law applicable to the contract containing that clause.

More complex is the question of the enforceability of the choice of court agreement against third parties, which is only sometimes assessed by the *lex contractus*. As a general principle, the jurisdiction clause incorporated into a contract may produce effects only between the parties who have agreed to enter into that contract, such that a third party invoking the clause must prove to have given his consent to that effect. But the conditions under which a third party to the contract may be regarded as having given his consent to a jurisdiction clause may vary in accordance with the nature of the initial contract.[27]

The European Court of Justice was called to rule on particular cases, thus elaborating specific rules that must not be confused with the aforementioned general principle according to which agreements only have effects between the parties of the contract. For example, when assessing the effect of prorogation agreements toward third parties, the Court stated:

> "the shareholder who subscribes to the statutes of a company is deemed to give his consent to a jurisdiction clause therein, on the ground that subscribing creates a relationship between the

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that no final agreement was found by the parties seems to impair the validity of a clause related to a non-existing contract. In this case, the solution can only be found through a case-by-case approach in view of the parties' will.

[26] ECJ, *Iveco Fiat* (note 20), where it can be read that "where a written agreement containing a jurisdiction clause and stipulating that the agreement can be renewed only in writing has expired but has continued to serve as the legal basis for the contractual relations between the parties, the jurisdiction clause satisfies the formal requirements in article 17 if, under the law applicable, the parties could validly renew the original agreement otherwise than in writing, or if, conversely, one of the parties has confirmed in writing either the jurisdiction clause or the set of terms which has been tacitly renewed and of which the jurisdiction clause forms part, without any objection from the other party to whom such confirmation has been notified".

[27] ECJ, 7 February 2013, case C-543/10, *Refcomp Spa*, not yet published, but available at <www.curia.europa.eu>.

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> shareholder and the company and between the shareholders themselves which must be regarded as contractual."[28]

As usual, the conclusion of the European Court of Justice rests upon the autonomous evaluation of the facts, regardless of any qualification operated by domestic legislation and by the applicable law. At the same time, the European Court of Justice also made clear that:

> "in matters relating to maritime transport contracts, a jurisdiction clause incorporated in a bill of lading may be relied on against a third party to that contract if that clause has been adjudged valid between the carrier and the shipper and provided that, by virtue of the relevant national law, the third party, on acquiring the bill of lading, succeeded to the shipper's rights and obligations."[29]

This is because the bill of lading has a peculiar nature as an instrument of international commerce that is negotiable in nature,

> "[and] intended to govern a relationship involving at least three persons, namely the maritime carrier, the consigner of the goods or shipper, and the recipient of the goods."[30]

It is in light of the substitution between the holder and the shipper that it is possible to consider that the holder is bound by the agreement on jurisdiction due to the effect of the acquisition of the bill of lading.

Still, as a matter of general principle where these peculiar cases are not involved, there is no doubt that the national judge has to ascertain whether the third party has accepted the jurisdiction clause. This is also true in chains of contracts, where the enforceability of jurisdiction agreements against a sub-buyer should still be assessed under the law applicable to the initial contract, given that any other solution would have the effect of introducing "an element of uncertainty incompatible with the concern to ensure the predictability of jurisdiction which is stated in the Regulation".[31]

C. Requirements of Choice of Court Agreements Determined by the Law Applicable to this Agreement

Given the absence of a comprehensive regulation on the substantive validity requirements of a choice of court provision, the uniform legal framework has many different gaps. Indeed, even though some national courts have held that a valid

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[28] *Ibidem*, at para. 31.

[29] *Ibidem*, at para. 34. See also ECJ, 19 June 1984, case 71/83, *Russ, ECR* [1984] I-2417, para. 24 and ECJ, 9 November 2000, case C-387/98, *Coreck*, *ECR* [2000] I-9337, paras 23 *et seq*.

[30] ECJ, *Refcomp Spa* (note 27), at para. 35.

[31] *Ibidem*.

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agreement must respect *only* the requirements laid down by the Brussels I Regulation,[32] in reality the Regulation only imposes a duty on the national judge to scrutinise the validity of the prorogation clause and to conduct an investigation in order to determine that the agreement was, on the one hand, entered into by the parties and, on the other, not inconsistent with the provisions of the Regulation on exclusive jurisdiction. All other questions related to the validity of the agreement – including the question of the parties' legal capacity – are left to national laws; thus, Member States are called on to fill these gaps, and the possible different solutions on the law applicable to the validity of the clause give rise to a wide debate.

Given that domestic courts are called upon to determine the validity of these agreements, the following question must be addressed: which law should be applied by the court? In other words, which law regulates the substantive validity of the choice of court agreement (subject to the requirements imposed by the EU Regulation)?

In this context, it has been argued that the court seized should determine the validity of the clause based on (i) the *lex fori*; or (ii) the law of the chosen forum, or (iii) the *lex causae, i.e.* the law specifically applicable to the jurisdiction agreement, which must be determined in accordance with the pertinent conflict of law rules of the seized court.[33]

The answer to this question depends strictly on the qualification of the choice of court agreement: if we assume that the latter is a pre-condition of the proceeding, then we would have to conclude that it is for the *lex fori* to determine the formal and substantial requirements. Some Member States seem to follow this approach,[34] whilst others, recognising that the choice of court agreement is contractual in nature (despite its procedural effects), apply the *lex causae*.[35] Following this view, it is important to point out that the *lex causae* should be identified through the conflict of law rules of the *lex fori*, and not through the rules of private international law of the prorogated jurisdiction. On the other hand, the reference sub (ii) to the law of the chosen court seems consistent with the 2005 Hague Convention on Choice of Court Agreements[36] and with the qualification of the clauses as having procedural effects.

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[32] See *Deutsche Bank AG & Ors v Asia Pacific Broadband Wireless Communications Inc & Anor* [2008] 2 CLC 520; [2009] ILPr 36; [2008] 2 Lloyd's Rep 619; [2009] 2 All ER (Comm) 129; [2008] EWCA Civ 1091, where the Court of Appeals presumed the material validity of the agreement in light of the respected formal requirements laid down by the Brussels I Regulation. On this point see M. Harding, *Conflict of Laws*, New York 2014, p. 47.

[33] I. Queirolo (note 12), at 200 *et seq*.

[34] See B. Hess/ T. Pfeiffer/ P. Schlosser (note 9), at para. 377.

[35] *Ibidem*.

[36] Hereinafter the Hague Choice of Court Convention. According to its Article 6(a) it can be read that "a court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless – a) the agreement is null and void under the law of the State of the chosen court". The text of the Hague Convention is available at <http://www.hcch.net/upload/conventions/txt37en.pdf>. See also Article 5(1).

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Though it seems that the majority of scholars, as well as the European Court of Justice in several decisions, consider prorogation agreements as substantive in nature with procedural effects, the idea that the *lex causae* determines the requirements of a choice of court agreement is common.

This said, a problem still remains: the substantial validity of choice of court clauses is determined according to domestic legislation, rules of private international law included (even though some aspects of the clauses – such as the existence of a consensus between the parties – have to be determined according to the uniform provisions) whilst the procedural effects of the clauses are regulated by the domestic legislation of the seized court.[37]

In addition, another specification has been elaborated, according to which the validity of this clause of the contract has to be "autonomously and independently" assessed and does not depend on the validity of the contract itself.[38] It becomes so impossible to deprive the prorogation clause of its effectiveness only because the contract has been claimed by one party to be null and void according to its own *lex causae*.

Having regard to the law applicable to assess the substantial validity of the prorogation agreement, the new Article 25 contains a sort of uniform conflict of law rule, specifying that such a law shall be the one of the Member State whose court has been chosen by the parties. This new provision is consistent with the Hague Choice of Court Convention, whose Article 5(1), asserts that the court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.[39]

The Brussels I-*bis* Regulation takes a different stand from the case law of the European Court of Justice with regard to the law applicable to prorogation agreements to determine their substantial validity. It confirms the Court's view that these agreements are substantial in nature and their validity has to be determined by the law applicable through the forum court's rules of private international law. Such validity is not assessed by applying the substantive law rules of the prorogated court, which would have been the case if prorogation agreements were to be considered to have procedural effects.

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[37] ECJ, 13 November 1979, case 25/79, *Sanicentral*, *ECR* [1979] I-3423 and ECJ, *Iveco Fiat,* (note 20).

[38] ECJ, 3 July 1997, C-269/95, *Benincasa*, *ECR* [1997] I-3767, where it can be read that "a distinction must first be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated. A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction".

[39] This choice is confirmed by the fact that in April 2009, the European Union signed the Hague Convention.

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Moreover, the Regulation confirms the independence of the prorogation clause from the contract itself with regard to substantial validity. Article 25 indeed states that:

> "An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid."

By setting common and uniform rules on the law applicable to prorogation agreements, the European legislator tried to develop the state of the art where the answer regarding the substantial validity of the agreement can be different in different jurisdictions where the clause is challenged by one party.

But, from a critical point-of-view, some doubts have been raised regarding the effectiveness of such a rule to foster a uniform application of Article 25. Firstly, the reference to the law of the State of the chosen court also includes the national conflict of law rules of the Member States and these are not unified in the EU context by the Rome I Regulation.

On this point, part of the legal literature assumes that it is not clear whether the reference to the law of the chosen forum intends to cover only substantive law or whether it also includes private international law rules. That issue seems, however, to be settled by Recital 20, which expressly states that when a question arises as to whether a choice of court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, "including the conflict-of-laws rules of that Member State". Therefore, the new rule of the Brussels I-*bis* Regulation is not entirely uniform, even if an important element of uniformity is granted by the application of the same national law to prorogation clauses by different courts.[40]

As highlighted, this problem is left unresolved even by uniform private international law instruments since the Rome I Regulation on the law applicable to contractual obligations and the 1980 Rome Convention explicitly exclude prorogation agreements from their scope of application.[41] This leads to an undesirable result: uncertainty regarding the law applicable to prorogation agreements.

The question becomes even more complex if one considers that Article 25, in identifying the law (and the rules of PIL) applicable does not explicitly limit the application of *renvoi.* Uncertainty regarding the application of Article 25 of the Brussels I-*bis* Regulation also arises regarding the scope of the new rule: what does it mean that the agreement is declared 'null and void' under the law of the State of the chosen court?

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[40] Ch. HEINZE, Choice of Court Agreements, Coordination of Proceedings and Provisional Measures in the Reform of the Brussels I Regulation, *RabelsZ* 2011, p. 581 *et seq*.

[41] Article 1: "The following shall be excluded from the scope of this Regulation: […] (e) arbitration agreements and agreements on the choice of court".

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Usually, such formulations are only able to cover hypotheses of substantive invalidity relating to the absence of an agreement between the parties. The effects of a party's lack of legal capacity do not seem to fall within the provision's scope of the application.

Given the importance of the matter, it can be predicted that eventually the European Court of Justice will have to define the scope of Article 25. The legal reasoning that the Court will adopt is a completely different question, and the conclusions that the Court will reach are not precisely foreseeable.

In this sense, it is undisputed that the legal capacity of the parties can affect the validity of the prorogation agreement and that it is essential to have a uniform approach to the matter. But it should be noted that the issue of the legal capacity of the parties does not fall within the scope of application of the EU Regulations (see Art. 1(2)(a) Brussels I Regulation; Rome I Regulation).

IV. Prorogation Agreements and *lis pendens*

It has already been highlighted that even though the Brussels I-*bis* Regulation fosters and recognises party autonomy in the selection of the fora, it also sets some limits within which such autonomy can be exercised by the parties. In particular, Article 25 sets the scope of application of the prorogation agreements themselves and the requirements from which the substantial and formal validity depends.

When assessing the validity of the agreement, domestic courts are not authorised to make any discretionary evaluation. They are bound to decide strictly in accordance with Article 25 of the Brussels I-*bis* Regulation. Domestic courts of the Member States have to determine *ex officio* whether there has been consensus between the parties, particularly when the defendant does not appear in the proceedings. The courts have an obligation to either decline jurisdiction if no agreement has been found on the prorogation clause, or to refer the parties to the prorogated court if the agreement exists, but is in favour of another court.

In this framework, it becomes essential to determine the relationship between prorogation agreements and other rules and mechanisms of procedural international law, which are meant to foster procedural economy and avoid the circulation of conflicting judgments: the *lis pendens* rule.[42]

A. Choice of Forum Clause and *lis pendens* in the ECJ Case-Law

With respect to the 1968 Brussels Convention and now the application of the Brussels I Regulation, scholars generally consider that a prorogated court is under an obligation to stay the proceedings even when it is seized second. The underlying rationale is that a prorogated court enjoys – according to the EU legal framework –

[42] P. Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments Civil Jurisdiction and Enforcement of Foreign Judgment*, Abingdon 1987, p. 1083 *et seq*.

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a "unique" jurisdiction that is similar to the one enjoyed by courts with exclusive jurisdiction.[43]

Other scholars oppose this view, pointing out that in several cases the proceedings can be, and have been, decided by a court that was not the one selected by the parties in the agreement:[44] it should be recalled that an uncontested appearance of the defendant before the seized but not the prorogated court, confers jurisdiction on that court, which can then adjudicate the case. Moreover, the prorogation agreement itself can establish that a certain court shall have non-exclusive jurisdiction over the disputes between the parties.

The European Court of Justice made clear that: "[t]he court seized should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention". Therefore, this court should also be allowed to judge the validity of a jurisdiction agreement conferring exclusive jurisdiction to another court.[45] In other words, the seized court will recognise the jurisdiction of the prorogated court; however, the parties can also change such an agreement by way of an uncontested appearance. In such cases, according to the rulings of the European Court of Justice, it is for the seized court to determine whether or not the requirements for a valid forum selection agreement have been fulfilled.[46]

Consequently, some concerns have been raised about the possibility that the Regulation would not sufficiently protect exclusive choice of court agreements. The possibility that one party to such an agreement may seize the courts of a Member State in violation of the choice of court agreement could obstruct proceedings before the chosen court where such proceedings are brought subsequently to the first proceedings.

Notwithstanding the potential of abuse of such a scenario, in the *Gasser* case, the European Court of Justice confirmed that the mere fact that the second seized court has jurisdiction under Article 23 (of the Brussels I Regulation) does not call into question the application of the procedural rule contained in Article 27, which is based clearly and solely on the chronological order in which the courts involved are seized. In fact, the second seized court is never in a better position than the first seized court to determine whether the latter has jurisdiction.

Thus it is noted that when there is a prorogation clause, the parties have the discretionary power to invoke it when a non-prorogated jurisdiction has been seized by the counterparty. Moreover, it is up to the first seized court to investigate the existence of the agreement and to eventually decline jurisdiction in favour of the second seized court when this is found to be the prorogated one with exclusive jurisdiction.[47]

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[43] P. KAYE (note 42), at 1083 *et seq.* When the first seized court is competent because it is the one prorogated by the parties, the uniform provision on international *lis pendens* will be applicable and, thus, the second court where the claim is brought shall stay proceedings.

[44] I. QUEIROLO (note 12), at 259 *et seq.*

[45] ECJ, 9 December 2003, C-116/02, *Erich Gasser GmbH*, *ECR* [2003] I-14693.

[46] *Ibidem.*

[47] *Ibidem.*

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The other case of the European Court of Justice that should be mentioned is the *Turner* case, where the Court confirmed that procedural devices which exist under national law, which aim to protect choice of court agreements (such as anti-suit injunctions), are incompatible with the Regulation if they unduly interfere with the right of another Member State's courts to rule on their jurisdiction under the Regulation.[48]

As mentioned in the report on the application of the Brussels I Regulation, the possibility to have parallel proceedings may clearly lead to delays, which are detrimental to the proper functioning of the internal market. In fact, in some cases, a party may take advantage of such delays in order to effectively frustrate a valid choice of court agreement, thereby gaining an unfair commercial advantage. Moreover, parallel proceedings create additional costs and uncertainty.[49]

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[48] ECJ, 27 April 2004, case C-159/02, *Turner*, *ECR* [2004] I-3565 *et seq*.

[49] The Commission, in the Green Paper, proposed that one solution might be to release the court designated in an exclusive choice of court agreement from its obligation to stay proceedings under the *lis pendens* rule, but a drawback of this solution is that parallel proceedings leading to irreconcilable judgments would be possible within the European judicial area. Another solution might be to reverse the priority rule insofar as exclusive choice of court agreements are concerned. Here, the court designated by the agreement would have priority to determine its jurisdiction and any other seized court would have to stay proceedings until the jurisdiction of the chosen court is established. Such a solution would not be inconsistent with the general provisions of the Regulation in light of the fact that it is already applied in the context of the Regulation with respect to parties none of whom is domiciled in a Member State. Such a solution would align, to a large extent, the internal EU rules with the international rules. Still, it must be remarked that the possible drawback of this solution could be that if the agreement is invalid, a party would have to first seek to establish the invalidity before the court designated in the agreement before being able to seize other competent jurisdictions. Alternatively, the existing *lis pendens* rule may be maintained. In such a scenario, an obligation upon the different judges to communicate could be envisaged and, in order to assure a speedy trial, a deadline for the first seized court, to decide the question of jurisdiction, could also be imposed. Still, if this option is followed, the claimant must be reassured that she/he does not lose a legitimate forum for reasons outside his/her own control. The efficiency of jurisdiction agreements could also be strengthened through a right for compensation in cases of damages suffered from a breach of the agreement itself. A further solution might be to exclude the application of the *lis pendens* rule both in the case that the proceedings cover the merits of the claim and in the case a negative declaratory relief is sought. Moreover, in such cases, the party should not bear prejudice from the limitation periods with respect to the claim on the merits in case the declaratory relief fails. Finally, it could also be noted that the uncertainty surrounding the validity of the agreement could be addressed by prescribing a standard choice of court clause, which could also expedite the decision on the jurisdiction claim by the courts. This option could be combined with some of the solutions suggested: the acceptance of parallel proceedings or the reversal of the priority rule could be limited to those situations where the choice of court agreement takes the standard form prescribed by the Regulation.

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B. Choice of Forum Clause and *lis pendens* in the Brussels I-*bis* Regulation

Article 31(2) of the Brussels I-*bis* Regulation takes a different approach to the relationship between the choice of court agreements and *lis pendens.* It states that the chronological criteria shall not be applied in the same terms when an exclusive jurisdiction agreement is made by the parties. In this case, any other court in the European judicial system has to suspend the case and wait for the prorogated court to rule on its jurisdiction.

The Brussels I-*bis* Regulation addresses this issue in its preamble. In order to avoid a strategic use of choice of court agreements, namely "Torpedo claims", the new Recital 22 states that it is necessary to provide for an exception to the general *lis pendens* rule in order to give full effect to the will of the parties and to avoid abusive litigation tactics. Such exception to the general rules on *lis pendens* should enhance the effectiveness of exclusive choice of court agreements.

Thus, according to Recital 22, the Regulation should grant priority to the prorogated court to decide on its jurisdiction, regardless of whether it is seized first or second. For this purpose,[50] one amendment to the *lis pendens* rule mechanism found its way into the final version of the regulation. The amendment deals with the issue of prorogation agreements and parallel proceedings and states in the second paragraph of the new Article 31 that:[51]

> "[w]here a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another Member State shall stay the proceedings until such a time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement."

Thus no evaluation of the validity of the prorogation agreement can be made by the non-prorogated court, even when this is the first court seized by one of the parties. Though, this is only true when different conditions are met:

> (i) Prorogation agreements conferring jurisdiction shall have no legal effect if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24;
>
> (ii) The prorogation clause must confer exclusive jurisdiction upon the agreed court;

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[50] See F. MARONGIU BUONAIUTI, Litispendenza e connessione nella proposta di revisione del regolamento 44/2001, available at *Sidi Blog* <http://www.sidi-isil.org>; see also Ch. HEINZE (note 40).

[51] In the Proposal, there was also another amendment concerning a time limit-up within which the first seized court would have delivered the first ruling, *i.e.*: six months. Contrary to this clear time frame, the Brussels I-*bis* Regulation, according to its Article 29.3, states that "upon request by a court seized of the dispute, any other court seized shall without delay inform the former court of the date when it was seized in accordance with Article 32". Thus, any reference to clear and explicit time limits has been lost.

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(iii) The parties must not have concluded two or more inconsistent agreements;

(iv) The parties must not have concluded a subsequent jurisdiction agreement that grants exclusive jurisdiction upon a different court;

(v) The defendant has not made an appearance without contesting the jurisdiction of the non-agreed court;

(vi) A proceeding in front of the agreed court must already be pending;

(vii) In proceedings where a contractually weaker party is involved, only when the policyholder, the insured, the beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant, Article 31 is not applicable if the agreement is not valid under a provision contained within the specific sections of the Regulation aimed at protecting such parties (on which see *infra*).

When the aforementioned conditions are fulfilled, only then shall the prorogated court be able to rule on the validity of the agreement, even if this is not the first seized court.

In case (i) above, the first seized court has to declare its jurisdiction according to Article 24, as it has exclusive jurisdiction under a provision of the Brussels I-*bis* Regulation from which the parties cannot derogate. Moreover, the provision's application must always be ensured *ex officio* by the court.

Furthermore, it cannot be said that the first seized court has to stay the proceeding in cases (iv) and (v), given that in those cases, the choice of court agreement has to be considered overruled by the subsequent (explicit or implied) will of the parties in favour of the seized court. Consequently, an assessment regarding the validity of the first agreement does not bear any relevance, subject to the case where the second agreement is found to be invalid, or the appearance in court which does not respect the rules concerning the uncontested appearance. The application of Article 31(2) will thus be revived only in these two situations.

In the absence of an exclusive choice of court agreement as required in case (ii), the application of the rule on the chronological order enshrined in the provisions on *lis pendens* is justified by the non-exclusive jurisdiction of the prorogated court, whose jurisdiction is consistent with the Brussels I-*bis* Regulation under its general rules and under some of its specific provisions.

Case (iii) does not seem to raise particular problems, given that Recital 22 itself states that the chronological priority rule in favour of the prorogated court should not cover situations where the parties have entered into conflicting exclusive choice of court agreements. In such cases, the validity of both clauses will be assessed by the first seized court in order to preclude different judges in different Member States from ruling on the validity of such agreements. Both courts might consider that they have jurisdiction and may simultaneously adjudicate different proceedings relating to the same claim.

The most problematic condition is (vi), according to which it is for the prorogated court to assess the validity of the choice of court agreement when a proceeding before the agreed court is already pending. Imposing an obligation on

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the second seized court to suspend the proceeding in order to give the first court the chance to rule on its jurisdiction fosters the principle of certainty in law by reserving jurisdiction to rule on such an agreement to a single court.

The wording of the provision leaves room for two different interpretations. A first possible interpretation is that the new Article 31(2) only provides for the reversion of the priority rule insofar as exclusive choice of court agreements are concerned. Such interpretation finds support in the explanatory report to the Proposal:

> "[w]here the parties have designated a particular court or courts to resolve their dispute, the proposal gives priority to the chosen court to decide on its jurisdiction, regardless of whether it is first or second seized. Any other court has to stay proceedings until the chosen court has established or – in case the agreement is invalid – declined jurisdiction."

Secondly it can be interpreted that, Article 31(2) does not provide for a mere reversion of the *lis pendens* mechanism, but has a stronger effect: the first seized court has no jurisdiction over the dispute until the court designated by the agreement has declined its jurisdiction.[52] Following this interpretation, it could be concluded that any court that is seized, other than the prorogated one, will have not only to stay the proceedings *proprio motu*, but also to decline its jurisdiction.

In such a scenario, a problem arises: if the first seized court is not the one chosen by the parties, then that court will have to decline jurisdiction on its own motion. Hence, if the second seized court tries to establish the voidness or nullity of the prorogation clause, the plaintiff would be forced to initiate new proceedings before the first court.

It is clear that such an interpretation would entail heavy consequences. In the first place, it seems that the principle of procedural economy could be jeopardised in a scenario such as the one just described; moreover, the right of the parties could be substantially impaired. In this sense, the plaintiff will have to bear additional costs given the need to institute two separate proceedings before the same court if the chosen judge declares the clause null and void. On the other hand, the parties' agreement to confer exclusive jurisdiction on a Member State judge cannot have the same procedural value as the exclusive fora set up by the Regulation: here the possibility for the parties to determine the competent court is limited under a presumption that, in the exercise of their autonomy, they would deprive the most suited court of its inherent jurisdiction.

Moreover, the Regulation clearly suggests that Article 31(2) is related to the *lis pendens* mechanism. It states that where a court not designated in an exclusive choice of court agreement has been seized and the designated court is subsequently seized in a proceeding involving the same action, the first seized court is required to stay its proceedings as soon as the designated court has been seized and until such time as the latter court has declared that it has no jurisdiction under the exclusive choice of court agreement: "this is to ensure that, in such a situation, the

[52] See F. MARONGIU BUONAIUTI (note 50).

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designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it".[53]

With these new set of rules it should become impossible to bring "Italian Torpedo claims" before a non-prorogated court. Nevertheless, such a new legislative framework does not prevent other abusive and dilatory legal actions by the party who believes he may lose at trial and seizes another court, claiming that this is the only one with jurisdiction under an alleged choice of court agreement.

Still, this risk seems mitigated by the following considerations. Firstly, such a possibility has to be excluded if the defendant does not contest the jurisdiction of the first seized court in his first defence: otherwise the procedural behaviour of the defendant will grant competence to the first judge, prevailing on any previous prorogation clause.

Secondly, it has to be clarified that two different hypotheses co-exist: either (i) a prorogation clause, even if null or void, exists, and therefore it is correct that the elected court rules on its validity, or (ii) a prorogation clause does not exist, is fictitious or is related to another dispute. In this case, it seems that the Brussels I-*bis* Regulation does not impose an obligation on the first seized court to stay or dismiss the case. Indeed, the criticised Article 31 reverses the application of the rules on the *lis pendens* mechanism only in those cases where the nullity or voidness of a prorogation clause is discussed, and if the existence or its scope of application is challenged.

One final issue remains open: if the prorogated court has not been seized and the matter of the validity of the agreement has already been addressed by the court first seized, there seems to be no instruments or mechanisms to challenge the ruling of this court. It is still not clear as to how long the first seized non-prorogated court – after having addressed the preliminary issue with a non-definitive ruling while the prorogated court had not yet been seized – has to "wait" for a future and only hypothetical ruling on the validity of the exclusive choice of court agreement by the prorogated court. In other words, it is still unclear as to what effects a subsequent decision of the competent court will have on the ruling of the first court.

V. The Protection of the So-called "Weaker Parties"

It is the founding principle of procedural and private international law that contractually weak parties deserve special protection in light of the fact that they enjoy less legal knowledge, economic resources and bargaining power as opposed to their counterparties.[54] To fulfil the aim of protecting the contractually weaker

[53] Brussels I-*bis*, Recital 22.

[54] See ECJ, 14 March 2013, case C-419/11, *Česká spořitelna, a.s.*, not yet published; ECJ, 7 December 2010, Joined cases C-585/08 and C-44/09, *Peter Pammer, ECR* [2010] I-12527; ECJ, 26 May 2005, case C-77/04, *Groupement d'intérêt économique (GIE) Réunion*

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party, the Brussels I-*bis* Regulations set different rules related to insurance, consumer and employment contracts.

In the first place, (i) choice of court agreements can only be entered into within the limits set by the specific provisions of the Regulation. The goal here is to protect the weaker party by expanding the fora where she/he can bring an action against the "stronger party", while limiting the fora where the former can be sued by the latter.[55]

In the second place, (ii) the mechanism previously described, according to which it is for the prorogated court to rule on the validity of the choice of court agreement, does not apply when a weaker party is sued in a court other than the court with jurisdiction under the rules of the specific section dedicated to the specific type of contract.[56] In fact, in such cases, the prorogation clause constitutes an infringement of a fundamental principle of EU law: the protection of the contractually weaker party through rules on jurisdiction more favourable to their interests.

In addition, (iii) a third mechanism for the protection of the contractually weaker party is now provided for in the Brussels I-*bis* Regulation in order to address a problem that was recently highlighted by the case law of the European Court of Justice in relation to the uncontested appearance of the weaker party.

It is a known fact that, the Brussels I-*bis* Regulation not only provides for rules concerning prorogation agreements, but also confirms, in its Articles 26 and 24 that a court shall have jurisdiction when no party to the proceeding challenges its jurisdiction. In this case, a new implied agreement that is able to overrule any previous written agreement is inferred from the procedural behaviour of the parties.

Here, in contrast to a jurisdiction agreement under Article 25 of the Brussels I-*bis* Regulation, which, due to its contractual character, must be based on an agreement between the parties, the implied acceptance of jurisdiction according to Article 26 is not based on an expression of intent by the defendant, but solely on his procedural behaviour, namely an uncontested appearance, which is normatively qualified as an implied acceptance of the jurisdiction of the seized court.

It must be noted that the entire section regarding the protection of a contractually weaker party states that subject-matter jurisdiction is regulated only by the provisions of the specific section.[57] Traditionally, these sections have been regarded as autonomous, meaning that the jurisdictional rules contained outside the specific sections could only be applicable if the section itself made some reference to this "external" provision.[58]

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européenne, ECR [2005] I-4509 and ECJ, 11 July 2002, case C-96/00, *Rudolf Gabriel*, *ECR* [2002] I-6367.

[55] See Article 25(4) Brussels I-*bis* Regulation.

[56] *Ibidem*, Article 31(4).

[57] For insurance contracts, see Article 10; for consumer contracts, see Article 17 and for individual contracts of employment, see Article 20.

[58] Opinion of the Advocate General A. Tizzano, 16 December 2004, C-112/03, *Société financière et industrielle du Peloux, ECR* [2004] I-3709. See also F. POCAR, Relazione sulla convenzione concernente la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale conclusa a Lugano il 30 ottobre

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The European Court of Justice corroborated this idea by stating that the jurisdiction criteria laid down by Article 6 of the Brussels I Regulation cannot be invoked in proceedings relating to employment contracts, the jurisdiction of Article 6 not being included in this specific and autonomous section.[59]

Though recently, in the field of insurance contracts, the Court tempered the "autonomous nature" of these sections by stating that Article 24 of the Brussels I Regulation (now Article 26) can also find application for cases falling within these sections, even though no specific provision on the protection of the weaker party makes reference to the uncontested appearance.[60]

With the proposal for a new Regulation, in pursuing one of its main goals, *i.e.* the further development of the European area of justice, even through the simplification of recognition and enforcement procedures for EU judgments, the Commission noted that in cases regarding the old Article 24, the application of the rules on tacit prorogation of jurisdiction could infringe the procedural rights of weaker parties.Thus the Brussels I-*bis* Regulation developed a system in which a weaker party could avoid waiving the protection afforded by the Regulation by acceptance under Article 24 (now Article 26) without a full understanding of the consequences related to the uncontested appearance.

In cases referred to in Sections 3, 4, and 5 of Chapter II, the new Article 26(2) of the Brussels I-*bis* Regulation states:

> "where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the

2007*, OJ* C 319 of 2009, p.18, para. 73 and P. FRANZINA, Sul carattere "esaustivo" della disciplina comunitaria della giurisdizione in materia di contratti individuali di lavoro, *Nuova giurisprudenza civile commentata* 2008, p. 1093 *et seq.*

[59] ECJ, 22 May 2008, case C-462/06, *Glaxosmithkline*, *ECR* [2008] I-3965. In the summary of the decision, it can be read that "the rule of special jurisdiction provided for in Article 6(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment. It is apparent from Article 18(1) of that regulation and, moreover, from a literal interpretation of Section 5, supported by the «travaux préparatoires» relating to the regulation, that the court having jurisdiction in proceedings concerning an individual contract of employment must be designated in accordance with the jurisdiction rules laid down in that section, rules which, on account of their specific and exhaustive nature, cannot be amended or supplemented by other rules of jurisdiction laid down in that regulation unless specific reference is made thereto in Section 5. As regards the possibility that only an employee may rely on Article 6(1) of the regulation that would run counter to the wording of both that provision and Section 5 of Chapter II of that regulation. The transformation by the Community courts of the rules of special jurisdiction, aimed at facilitating sound administration of justice, into rules of unilateral jurisdiction protecting the party deemed to be weaker would go beyond the balance of interests which the Community legislature has established in the law as it currently stands. Furthermore, such an interpretation would be difficult to reconcile with the principle of legal certainty, which is one of the objectives of the regulation and which requires, in particular, that rules of jurisdiction be interpreted in such a way as to be highly predictable".

[60] ECJ, 20 May 2010, case C-111/09, *Bilas*, [2010] I-4545.

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> defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance."

Initially, it is noted that the text is quite clear in stating that the provision only applies when the weaker party is the defendant. Conversely, when the procedure is started by the policyholder, the consumer or the employee against the "strong party", such a provision shall not be applicable and the judge will not have an obligation to ensure that the defendant is aware of his/her right to contest the jurisdiction of the court.

Notwithstanding the laudable aim of this amendment, some doubts on its effectiveness should be mentioned. The new rule, in fact, only imposes a formal duty on the judge to check whether or not the defendant is a weaker party and is informed of his/her right to contest the jurisdiction of the seized court. In such a situation, the judge is not given the power to point out that tacit acceptance is unfair in the case at hand because the weaker defendant, who has not contested the competence of the court, is not assisted by a barrister.[61]

Moreover, with regard to Article 26 of the Brussels I-*bis* Regulation and the protection of the contractually weaker party, it must also be noted that another problem could arise at the time of the recognition of a foreign judgment delivered by a court of a Member State: even though recognition is automatic, and the *exequatur* procedure has been abolished, the Brussels I-*bis* Regulation confirms the possibility for the interested party, to challenge the recognition and the enforcement of a foreign decision. Even though Article 45 of the Brussels I-*bis* Regulation states that a decision shall not be recognised when the jurisdictional rules provided for the protection of weaker parties have been infringed, it says nothing about a possible violation of Article 26(2), which is not contained in the specific sections relating to the protection of the weaker party, but is mentioned in a general section of the Regulation.

VI. The Critical Issues: Choice of Court Agreement in Favour of a Non Member State Jurisdiction and the Reflected Effect of Exclusive Competences

A. Choice of Court Agreements in Favour of Non European Jurisdictions

The new Article 25 does not set any particular requirement for the validity and effectiveness of a prorogation agreement in favour of a third State jurisdiction. This is probably due to the fact that the Hague Choice of Court Convention

[61] See P. FRANZINA, La garanzia dell'osservanza delle regole sulla competenza giurisdizionale nella proposta di revisione del regolamento "Bruxelles I", available at *Sidi Blog* <http://www.sidi-isil.org>.

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addresses this issue through a complete framework that was supposed to be integrated within the European rules. Such interaction between the Regulation and the Hague Convention could create a system without flaws.[62] The ratification of the Convention would not ensure an effective solution: firstly, the material scope of application of the two instruments does not seem to be congruent and, secondly, the application of the Convention is subject to the fact that the prorogated court is that of a State Party to the Convention. This means that the EU lost an opportunity to offer a complete and flawless legal framework, at least among the Member States, on the issues related to the validity and effectiveness of choice of court agreements in favour of third States' jurisdictions.

To date, these elements must still be assessed in light of the traditional principles, bearing in mind that the European Court of Justice already stated that the European legal framework:

> "does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules."[63]

The regime of choice of court agreements in favour of third States rests upon the legislation of the States, the jurisdiction of which has been prorogated (third State) or derogated (EU State) by the parties, even in cases where the parties have their domiciles within the EU.[64]

However, choice of court agreements in favour of non-Member States may become relevant under the rule of parallel proceedings. The Brussels I-*bis* Regulation not only imposes a *lis pendens* rule for intra-European cases, but also provides for a new rule for "pure" international proceedings in civil and commercial matters.

In particular, according to the new Article 33, the Member States' courts whose jurisdiction is based on Article 4 or on Articles 7, 8 or 9 of the Regulation, may stay the proceedings when the foreign court was seized first if: (a) it is expected that the court of the third State will give a judgment capable of being recognised and, where applicable, of enforced in that Member State; and (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. It must be stressed that in assessing the needs of the proper administration of justice, the court should evaluate all the subjective and

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[62] Ch. KOHLER (note 2), at 202.

[63] ECJ, *Coreck,* (note 29).

[64] On this point, in the legal literature see J. HILL (note 15), p. 96 *et seq.*, where the author argues that no provision of the Convention seems to adopt such a solution in those cases where the defendant has his/her own domicile in a non-State party. Regardless, the proposed solution should be followed in light of the fact that the drafters of the Report took this view: see Schlosser Report on the Convention of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention, *OJ* C 59 of 1979, p. 117; in the legal literature, see J. KROPHOLLER (note 15), at 220 *et seq.*

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objective elements linking the claim to the third country. It must, *inter alia,* take into account those elements which, if they were to be in favour of a Member State, would be grounds for exclusive jurisdiction of that Member State.

In light of the above, it is now settled that if a third State court is granted jurisdiction by a prorogation agreement, a court of a Member State having jurisdiction under the Regulation can stay the proceeding and apply the rules on *lis pendens* provided that the other conditions of Article 33(a) and (b) are met. Thus, even though choice of court agreements in favour of third States do not fall within the scope of application of the Brussels I-*bis* Regulation, they are now recognised as agreements that are at least able to derogate from the general, as well as the special jurisdiction provided by the Regulation, *i.e.* capable of influencing the resolution of disputes before courts in the Member States.[65] However, the enquiry on the validity of the choice of court agreement has to be carried out based on the national legislation of the interested State (including its provisions of private international law), EU rules having no relevance on this point.

A different conclusion applies when the prorogation agreement is in violation of the EU rules on exclusive jurisdiction. As highlighted above, agreements in favour of third States' courts, while not falling within the scope of application of the Brussels I-*bis* Regulation, might influence the competence of EU jurisdictions by way of the *lis pendens* rule. In case the choice of court agreement is in violation of EU rules on exclusive jurisdiction, Article 33 of the Brussels I-*bis* Regulations states:

> "where jurisdiction (of the Member State) is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State […], the court of the Member State may stay the proceedings if […]."

Since the provision makes no reference to Article 24, it excludes the possibility for the EU court to stay its proceedings when an agreement in favour of the court in a non-Member State derogates from its exclusive jurisdiction.

This missing reference to Article 24 does not seem to be a drafting error. The majority of legal writers, who have commented on the Brussels I Regulation, have highlighted that these agreements, even though concluded in favour of third States, must be considered void, as they are in breach of mandatory jurisdictional rules set by the uniform law from which parties cannot derogate: not even in favour of another EU jurisdiction. *A fortiori*, such prorogation has to be considered invalid when the prorogated jurisdiction is a non EU State.[66]

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[65] See A. McClellan, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters in the European Communities. A Résumé of Recent Developments, *Common Market Law Review* 1979, p. 274 *et seq*.

[66] S. O'Malley/ A. Layton (note 22), at 557. Here the authors state that the application of the 1968 Brussels Convention is not always excluded when there is a choice of a third State jurisdiction "because certain jurisdictional rules take precedence over Article 17 and also take precedence over a jurisdiction agreement prorogating the jurisdiction of the Courts of a non-Contracting State". In the same terms, see G.A.L. Droz, *Compétence judiciaire et effets des jugements dans le Marché commun Etude de la Convention de*

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Indeed, it is clear from Article 33 that a court of a Member State may stay the proceedings in favour of a court of a non-Member State only if its jurisdiction is based on Article 4 or on Articles 7, 8 or 9. This possibility will not exist if its jurisdiction is based on Article 24 because all agreements must respect this provision, which identifies the only competent court to deliver a ruling on particular claims, even in those cases where none of the parties to the proceeding is domiciled in the EU.[67]

B. Choice of Court Agreements in Favour of a Member State and Exclusive Competences in Favour of a Third State's Jurisdiction

A brief remark has to be made with respect to the opposite scenario, where an EU jurisdiction is prorogated by the parties' agreement but the elements of Article 24 point to the exclusive jurisdiction of a third State (and the same remarks can be made with regard to the case of jurisdiction laid down for the protection of the contractually weaker party).

Notwithstanding some opposition in the legal literature,[68] it does not seem that Article 24 of the Brussels I-*bis* Regulation would be able to create a so called "mirror effect", or *effet reflex,*[69] by virtue of which exclusive jurisdiction would also be granted to non EU jurisdictions under this specific provision. Indeed, as it was noted, "when the connecting factor employed by the rule of exclusive legal

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Bruxelles du 27 septembre 1968, Paris 1972, p. 134 *et seq.*; M. WESER, *Convention communautaire sur la competence judiciaire et I'execution des decisions*, Paris 1975, p. 317 *et seq.*; H. SCHACK, *Internationales Zivilverfahrensrecht*, München 1996, p. 176 *et seq.*; D. LASOK/ P.A. STONE (note 22), at 268 and M. DESANTES REAL, *La competencia judicial en la Comunidad europea*, Barcelona 1986, p. 232.

[67] It must be recalled that the 1978 Convention on the Accession to the Brussels Convention takes a different position on this point. Under the 1978 Convention, agreements that are inconsistent with Article 16 are null and void if the prorogation is in favour of a State Party, though nothing is indicated as to whether choice of court agreements in favour of third States must also be considered null and void. The Brussels Convention does not apply to such agreements; thus, these should be considered as not falling within the scope of Articles 16 and 17 of the Convention. In this regard, it is true that the Convention sets uniform rules on jurisdiction in order to facilitate the free circulation of judgments within the European judicial space; according to this assumption, when the European judicial space is not concerned, the application of the Convention is not justified if jurisdiction is granted to a third State, even though some connections to the domicile of the defendants in the European territory still exist. The problem regarding the application of the Convention, and *mutatis mutandis* of the Regulations, arises when the third State does not recognise the prorogation of jurisdiction in its favour: in these cases, the application of the uniform European provision is revived.

[68] See *ex multis* G.A.L. DROZ (note 66), at 108 *et seq.*; P. GOTHOT/ D. HOLLEAUX (note 18), at 84 and H. GAUDEMET-TALLON (note 13), at 60.

[69] A. BORRÁS/ I. QUEIROLO, Art. 22. Osservazioni preliminari capo II sezione 6, in T. SIMONS/ R. HAUSMANN/ I. QUEIROLO (eds) *Regolamento "Bruxelles I". Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, München 2012, p. 425.

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jurisdiction points to a third State", the jurisdiction is governed by the domestic law.[70]

Part of the literature proposed to recognise a general mirror effect of (now) Article 24. Although this provision is not applicable to the jurisdiction of third States' courts, a Member State court seized for claims that would fall under the exclusive jurisdiction of a third State according to that provision would have to stay the proceedings in favour of the non-EU court. The European Group for Private International Law, in its consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen 2008, Padua 2009, Copenhagen 2010),[71] proposed to add, to the Brussels I Regulation, a new Article 22*bis* on exclusive jurisdiction, which reads as follow:

> "1. Where no court of a Member State has exclusive jurisdiction under Article 22, a court of a Member State before which proceedings are brought concerning a matter to which that Article applies and which has jurisdiction under another provision of this Regulation shall stay its proceedings if it is established that the courts of a non-Member State have exclusive jurisdiction under the law of that State on the basis of provisions analogous to those in Article 22.
>
> It shall decline jurisdiction once the court of the non-member State has given a judgment that is entitled to recognition under the law of the Member State of the court seised. It may hear the proceedings before it, if it appears that the court of the non-Member State will not give judgment within a reasonable time.
>
> 2. By way of exception to paragraph 1, when the validity of the rights referred to in paragraph 4 of Article 22 is raised as an incidental question in proceedings brought before the courts of a Member State, those courts shall have jurisdiction to decide that question even if, according to the law of a non-Member State, it falls within the exclusive jurisdiction of the courts of that State. Such a decision shall have no effect with regard to the rights of third parties."[72]

Such a provision would recognise a "mirror effect" of exclusive jurisdiction in favour of third States, making it impossible for the parties to derogate from foreign exclusive fora. The new Article 24 of the Brussels I-*bis* Regulation does not take such a stand. It is consistent with the Report to the Lugano Convention, where it can be read that the jurisdiction criteria laid down by Article 16 (Article 24 of the Regulation) come into effect only when they grant jurisdiction to the courts of a State Party to the Convention and not when they grant jurisdiction to a third State.

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[70] In these terms, L. DE LIMA PINHEIRO, Art. 22, U. MAGNUS/ P. MANKOWSKI (eds), *Brussels I Regulation*, München 2012, p. 416.

[71] Available at <http://www.gedip-egpil.eu/documents/gedip-documents-20vce.htm>.

[72] See A. BORRÁS/ I. QUEIROLO (note 69), at 426.

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In such a case, the other jurisdiction criteria set by the uniform rules of the Regulation must be applied.[73]

Consequently, and *mutatis mutandis*, such criteria, in the framework of the Brussels I-*bis* Regulation would not have any relevance when they would confer jurisdiction on non EU Member States.

The conclusion of the Report seems to be acceptable at least in its first part, which points to the non-applicability of the jurisdictional criterion in favour of a non-Member State. In fact, the aim of the Lugano Convention and of the EU rules on jurisdiction in commercial matters is to create an integrated judicial system in the European area within which the decisions of the courts of the Member States are allowed to freely circulate. Therefore they only regulate the jurisdiction of Member States' courts.

More perplexities are raised by the second statement of the Report, *i.e*. the existence of an obligation in these cases to use the other jurisdictional criteria set by EU law granting jurisdiction to a Member State's court within the European jurisdictional system. Following this interpretation, a prorogation agreement concluded in favour of a Member State for claims related to immovable property situated in a third State would be valid, as long as the agreements respect the formal requirements set by Article 25 of the Brussels I-*bis* Regulation. This conclusion does not seem acceptable.

A compromise would be, on the one hand, to reject the idea of the mirror effect of Article 25, which would have the effect of granting exclusive jurisdiction in favour of a third State's courts even if it is impossible to foresee whether or not those foreign courts will accept jurisdiction, not being bound by the provisions of the EU Regulation. At the same time, an obligation could be imposed on the parties to respect not only the formal requirements for choice of court agreements laid down by the Brussels I-*bis* Regulation, but also the substantial requirements set by the *lex fori* in order to ensure that the prorogated court will find itself competent to hear the case. Otherwise, the parties could enter into a choice of court agreement that is invalid both under the EU framework and the domestic legislation because it is taken from the operability of the rules concerning jurisdiction agreements.

VII. Conclusions

It was previously stated that one of the goals of the new Regulation is to reaffirm the role of party autonomy in the determination of the competent court, not by expanding the formal requirements, as it was done in the past, but rather by trying to give full effect to choice of court agreements.

These goals were pursued mainly by (i) expanding the personal scope of application of the provisions related to choice of court agreements; (ii) setting

[73] See JENARD-MÖLLER, Report on the Lugano Convention, in *OJ* C 189 of 1990, p. 57 *et seq.* and DE ALMEIDA CRUZ, DESANTES REAL and JENARD, Report on the Third Accession Convention, in *OJ* C 189 of 1990, p. 35.

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uniform rules regarding the substantive law regulating the agreements; and, (iii) reshaping the rules on *lis pendens* in order to grant to the prorogated court a priority in assessing such validity.

Whilst with regard to the first modification, no particular issue arises, the other provisions raise so many questions that the goals of the Regulation are partly frustrated. In particular, we mention the lack of uniformity of the rules determining the substantive law regulating the agreement due to the reference to domestic PIL, and the fact that the priority of the prorogated court in assessing the validity of the agreement is only provided for in case of *lis pendens*. Due to these and the other problems analysed herein, it is still possible that the will of the parties to select the competent court is not given full effect. In this sense, even though the Brussels I-*bis* Regulation includes some welcome novelties, it cannot be said that in the specific subject matter of choice of court agreements the new text will be able to fully reach its goals.

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ENFORCEMENT AND THE ABOLITION OF EXEQUATUR UNDER THE 2012 BRUSSELS I REGULATION

Dorothee SCHRAMM*

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I. Introduction

The true value of a commercial claim lies in whether it can be enforced. A court judgment has less value for the judgment-creditor if it can be enforced only with difficulty and delays, and it has no value if it cannot be enforced at all. Against this background, the facilitation of cross-border enforcement of commercial claims and judgments significantly impacts companies conducting their business globally.

Within the EU, certain improvements for judgment-creditors will come with the revised Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("2012 Brussels I Regulation").[1] For judgments handed down in legal proceedings instituted on or after 10 January 2015,[2] the new regulation abolishes the requirement of exequatur. This is an intermediate court procedure that aims to declare a foreign judgment enforceable before the actual enforcement and in 93% of cases is a formality.[3] The abolition of exequatur had been on the EU's agenda since the European Council of Tampere in 1999[4] and has been implemented in a number of EU regulations issued since 2004.[5] As a result, exequatur proceedings are no longer required today for claims up to EUR 2,000, uncontested claims and claims for family maintenance. However, exequatur is still required under the current Council Regulation (EC) No 44/2001 on jurisdiction

[1] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* L 351/1, 20 December 2012.

[2] Article 66 of the 2012 Brussels I Regulation.

[3] European Commission, Impact Assessment – Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Commission Staff Working Paper, 14 December 2010, SEC(2010) 1547 final ("2010 Commission Impact Assessment"), p. 12.

[4] See Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, available at <http://www.europarl.europa.eu/summits/tam_en.htm>, note 34; Council Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, *OJ* C 12, 15 January 2001, p. 5, Proposals A. 2. a) i) and A. 2. b); The Stockholm Programme – An open and secure Europe serving and protecting citizens, *OJ* C 115, 4 May 2010, p. 1, Section 3.1.2.

[5] See Art. 5 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims ("2004 European Enforcement Order Regulation"); Art. 19 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure ("2006 Payment Order Regulation"); Art. 20(1) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure ("2007 Small Claims Regulation"); Art. 17(2) Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("2009 Maintenance Regulation") for decisions given in a Member State bound by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations ("2007 Hague Protocol").

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and the recognition and enforcement of judgments in civil and commercial matters ("2001 Brussels I Regulation").

The abolition of the exequatur procedure was the European Commission's main objective in revising the 2001 Brussels I Regulation.[6] After a consultation process based on a 2009 Green Paper,[7] the Commission presented on 14 December 2010 its proposal for revision ("2010 Brussels I Proposal").[8] The Commission proposed partially[9] abolishing exequatur, while maintaining safeguards in the form of extraordinary remedies that allowed for a limited review of the foreign judgment.[10] Regarding these safeguards, the Commission proposed limiting the grounds for review by abolishing the review of substantive public policy and of certain provisions on jurisdiction.[11] Another important novelty of the 2010 Brussels I Proposal was that it introduced a special review of default judgments in the state of origin,[12] which was to replace the review in the enforcement state. The 2010 Brussels I Proposal also contained other important practical changes.

After two years of negotiating a compromise, the European Parliament and the Council amended the proposal of the Commission and adopted the 2012 Brussels I Regulation. This regulation goes further than the proposal of the Commission because it abolishes exequatur entirely: "A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required."[13] However, it falls far short of the proposal of the Commission and stays closer to the 2001 Brussels I Regulation regarding the review of the foreign judgment and other changes proposed by the Commission.

This paper outlines the basic mechanism of enforcing a foreign judgment under the 2001 and the 2012 Brussels Regulation (Section II. below) and the reasons for exequatur and its abolition, together with some empirical data (Section III. below). It then addresses in more detail the practicalities of enforcing a judgment under the 2001 and the 2012 Brussels Regulation and how much will actually

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[6] Report from the European Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM(2009) 174 final ("2009 Brussels I Commission Report"), p. 4.

[7] Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 21 April 2009, COM(2009) 175 final.

[8] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 14 December 2010, COM(2010) 748 final ("2010 Brussels I Proposal").

[9] "Partially" because the Commission suggested maintaining exequatur in collective redress and defamation cases, Article 37(3) 2010 Brussels I Proposal (note 8).

[10] Articles 38(2), 43, 45, 46 of the 2010 Brussels I Proposal (note 8).

[11] See Articles 43, 45, 46 of the 2010 Brussels I Proposal (note 8).

[12] Article 45 of the 2010 Brussels I Proposal (note 8).

[13] Article 39 of the 2012 Brussels I Regulation.

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change for the judgment-creditors and judgment-debtors under the revised Regulation (Section IV. below).

This paper does not deal with the free movement of authentic instruments or court settlements.[14] It also does not address in detail the recognition and enforcement of foreign provisional measures.[15] Regarding the latter, it is important to note that the European Parliament and Council did not follow the Commission's proposal to allow the enforcement of provisional measures that were ordered *ex parte* and not served on the debtor prior to enforcement.[16]

II. Mechanisms of Enforcing a Foreign Judgment under the 2001 and the 2012 Brussels I Regulation

The 2001 and 2012 Brussels I Regulations distinguish between recognition and enforcement of a foreign judgment. The mechanisms of recognizing a judgment have remained unchanged under the 2012 Brussels I Regulation: For judgments that the creditor does not seek to enforce, no application for recognition is necessary, even though such an application is possible.[17] Foreign court judgments that dismiss a claim or grant declaratory relief, for example, are therefore recognized automatically.

For judgments that the creditor seeks to enforce, the 2001 Brussels I Regulation requires a declaration of enforceability (exequatur) before enforcement measures can proceed.[18] The court or authority grants exequatur *ex parte*, *i.e.*, without prior notice to the debtor, and without reviewing the grounds for refusing recognition and enforcement.[19] The judgment-debtor can then appeal against the exequatur and have the grounds for refusing recognition and enforcement examined.[20] The judgment-creditor can proceed to enforcement measures only if and when the judgment-debtor does not appeal or the appeal is dismissed.[21] In the meantime, the judgment-creditor is limited to protective measures.[22]

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[14] Articles 57-58 of the 2001 Brussels I Regulation and Articles 58-60 of the 2012 Brussels I Regulation.

[15] See ECJ, 21 May 1980, *Denilauler v. SNC Couchet Frères*, case 125/79 for the 2001 Brussels I Regulation, Articles 2(a), 42(2), 43(3) and Recitals 25 and 33 of the 2012 Brussels I Regulation, and Articles 2(a), 42(2), 44(3) of the 2010 Brussels I Proposal (note 8).

[16] See Articles 2(a), 42(2)(b)(ii), 44(3) of the 2010 Brussels I Proposal (note 8) and Articles 2(a) and 42(2)(c) and Recital 33 of the 2012 Brussels I Regulation.

[17] Article 33 of the 2001 Brussels I Regulation and Article 36 of the 2012 Brussels I Regulation.

[18] Article 38(1) of the 2001 Brussels I Regulation.

[19] See Sections IV.B.1., IV.C. and IV.F. below.

[20] See Section IV.F. below.

[21] See Section IV.E. below.

[22] See Section IV.D. below.

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Under the 2012 Brussels I Regulation, the judgment-creditor can directly apply for enforcement as if the judgment had been given in the enforcement state. However, no enforcement measures will be taken before the judgment-debtor is informed of the request for enforcement.[23] The judgment-debtor may apply to a court for the refusal of enforcement,[24] in which case the competent court has discretion to limit the enforcement pending a final decision on the application. In any case, the judgment-creditor is entitled to protective measures.[25]

III. Reasons for Exequatur and its Abolition under the 2012 Brussels I Regulation

A. Main Purposes of Exequatur

Exequatur has three main purposes:

(1) to authorize the enforcement authorities to act,

(2) to instruct the enforcement authorities how to act, and

(3) to review the foreign judgment.

The first purpose of exequatur is to authorize the enforcement authorities to act ("title import"). This function is not particularly important in the present European framework[26] and does not justify keeping exequatur proceedings. Where the national enforcement law provides that a court must authorize all enforcement acts (such as in Germany), such requirement can be maintained provided that it applies equally to domestic and foreign judgments.[27]

The second purpose of exequatur is to clarify how the enforcement authorities should act. This purpose is relevant primarily in two situations. First, foreign judgment might contain insufficient information that needs to be supplemented ("title supplementation"). Some common examples are judgments ordering the defendant to pay money plus interest at the statutory rate that is unknown to the foreign enforcement authorities,[28] or judgments ordering the defendant to make

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[23] See Section IV.C. below.

[24] See Section IV.F. below.

[25] See Section IV.D. below.

[26] See in detail P. OBERHAMMER, The Abolition of Exequatur, *IPRax* 2010, p. 197-199. See also Recital 26 of the 2012 Brussels I Regulation.

[27] P. OBERHAMMER (note 26), at 199. According to Article 41(1) of the 2012 Brussels I Regulation, the enforcement procedure remains national law.

[28] See P. SCHLOSSER, The Abolition of Exequatur Proceedings – Including Public Policy Review?, *IPRax* 2010, p. 104, who states in favor of keeping exequatur that "[s]omebody must tell [the enforcement officials], for example, what the term «legal interest» exactly means".

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payments in installments without specifying the number and time of installments.[29] Problems in such situations can be solved by requiring the court of origin to provide more information in the Certificate under the Brussels I Regulation.[30] Consequently, the 2012 Brussels I Regulation includes an extended Certificate with detailed information.[31] This extended Certificate gives the enforcement authorities sufficient support and information, whereas a declaration of enforceability does not add anything.[32]

The second situation occurs when the foreign judgment contains an order or a measure unknown to the enforcement state; this order or measure needs to be transformed into a title that can be enforced with the available enforcement measures ("title transformation"). Some examples are the concept of usufruct,[33] or interim measures in the form of world-wide freezing orders or search orders that do not exist in all Member States.

With regard to this second situation, the 2012 Brussels I Regulation introduced an explicit obligation for the competent authority of the enforcement state to adapt, "to the extent possible, […] the measure or order to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests."[34] Enforcement authorities may have difficulty adapting the foreign judgment,[35] which could indicate the benefit of maintaining exequatur. However, for cases of difficulties and disagreements, the 2012 Brussels I Regulation provides that any party may challenge the adaptation before a court.[36] This provides sufficient protection to both parties. Even if the enforcement authorities may have difficulty adapting foreign measures in certain cases, this does not command exequatur for all cases. In any case, even without exequatur, title transformation is not problematic in countries such as Germany, where courts must authorize all enforcement acts for all judgments (domestic and foreign). In this framework, courts can at the same time adapt the judgment where necessary.

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[29] See B. HESS, in B. HESS/ Th. PFEIFFER/ P. SCHLOSSER, *The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)*, München 2008, p. 129 para. 449 who states that courts currently handle these issues differently.

[30] Also B. HESS, in *Heidelberg Report* (note 29), at 129-130 paras 451-452.

[31] See the detailed information contained in Annex I of the 2012 Brussels I Regulation, compared to Annex V of the 2001 Brussels I Regulation. See also Section IV.B.2. below.

[32] P. OBERHAMMER (note 26), at 198.

[33] F. CADET, Main features of the revised Brussels I Regulation, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2013, p. 222.

[34] Article 54(1) and Recital 28 of the 2012 Brussels I Regulation.

[35] See the concern in the Stellungnahme des Bundesministeriums der Justiz (Deutschland) zum Grünbuch Überprüfung der Verordnung (EG) Nr. 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/germany_de.pdf>, p. 3.

[36] Article 54(2) of the 2012 Brussels I Regulation.

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The third purpose of exequatur is to review, at least to a certain extent, the foreign judgment ("title inspection"). This review serves the protection of the debtor. However, exequatur itself is not needed for the foreign judgment to be reviewed. In fact, the court of first instance declaring exequatur does not examine the grounds for review under the 2001 Brussels I Regulation either; such grounds are examined only upon the debtor's appeal against the exequatur decision. In other words, the existing exequatur proceedings fulfill the purpose of title inspection only upon appeal. Therefore, one can keep the remedy and do away with the first instance procedure[37] without any loss, and this is what the 2012 Brussels I Regulation has done.[38]

In summary, none of the purposes of exequatur justify maintaining the procedure. These purposes are achieved through other means.

B. Reasons for Abolishing Exequatur

The themes in the abolition of exequatur are mutual trust and free movement of judgments within the EU.[39] All Member States and a large majority of stakeholders supported the objective of free movement of judgments during the consultation process, and there was also general support for abolishing exequatur as a means to achieve this objective, provided that certain safeguards for the judgment-debtor existed.[40] While support exists on the principle of free movement of judgments, divergent views exist on its importance. Some are of the opinion that "it would […] be a contradiction in itself if in an internal market and in a single area of law judgments could not circulate as freely as within one single state."[41] However, the situation in the USA and Canada (both of which are integrated markets with distinct jurisdictions) leads others to conclude that the idea of exequatur and of some form of review of non-domestic judgments is not alien to such markets.[42]

Leaving such questions of principle aside, the best reasons for abolishing exequatur were practical and based on a cost-benefit analysis.[43] The idea behind

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[37] P. OBERHAMMER (note 26), at 199.

[38] See Article 46 of the 2012 Brussels I Regulation, which provides for review of the foreign judgment upon application of the judgment-debtor.

[39] See, *e.g.*, Recitals 6, 26 and 27 of the 2012 Brussels I Regulation.

[40] 2010 Brussels I Proposal (note 8), at 5-6; 2010 Commission Impact Assessment (note 3), at 48.

[41] U. MAGNUS/ P. MANKOWSKI, Joint Response to the Green Paper on the Review of the Brussels I Regulation, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/prof_magnus_and_prof_mankowski_university_of_hamburg_en.pdf>, p. 2; see also 2010 Brussels I Proposal (note 8), at 3.

[42] P. SCHLOSSER (note 28), at 102-103.

[43] See, *e.g.*, the cost-benefit analysis in Centre for Strategy & Evaluation Services (CSES), Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I"), Final Report dated 17 December

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abolishing exequatur was to eliminate the 95-99%[44] of all applications (and associated delays and costs) for which the first-instance exequatur decision is not being appealed,[45] while at the same time maintaining the necessary protection of the judgment-debtor.[46] According to a survey of the Centre for Strategy & Evaluation Services (CSES), two-thirds of businesses and consumer organizations said that they would be "a lot more inclined" (39.4%) or "slightly more inclined" (26.7%) to engage in (more) cross-border commercial activity if, in the event of a dispute, a judgment obtained in one Member State was enforceable in another Member State without additional procedures.[47] Thus, abolishing exequatur can strengthen cross-border trade and promote more extensive use of the internal market.

The most fundamental requirement for abolishing exequatur is the existence of mutual trust between the Member States. When making its proposals for revision, the Commission took the view that "the level of trust among Member States has reached a degree of maturity," which in general would permit abolishing exequatur.[48] By contrast, the Commission did not assume the required level of trust in collective redress and defamation cases. This was due to the lack of harmonized rules, large differences in the resolution of these questions and the underlying conflict between the various fundamental rights at stake.[49] Therefore, the Commission suggested maintaining exequatur in these two areas.[50] In the end, however, the European Parliament and Council did not adopt this exception to the general abolition of exequatur, for reasons that include legal certainty.[51]

C. Duration, Success Rate and Costs of Exequatur under the 2001 Brussels I Regulation

Two studies have collected empirical data on exequatur under the 2001 Brussels I Regulation. Based on these studies, two reports were published estimating the actual duration, cost and success rate of exequatur[52] and were considered for the

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2010, available at <http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf> (cited as "2010 CSES Impact Analysis"), p. 58-67.

[44] 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 127 para. 447.

[45] See Recital 26 of the 2012 Brussels I Regulation.

[46] See Recital 29 of the 2012 Brussels I Regulation.

[47] 2010 CSES Impact Analysis (note 43), at 63; 2010 Commission Impact Assessment (note 3), Annex VI, Figure 2, at 59-60.

[48] 2010 Brussels I Proposal (note 8), at 7.

[49] 2010 Brussels I Proposal (note 8), at 7-8 and Recital 23.

[50] Article 37(3) of the 2010 Brussels I Proposal (note 8).

[51] See Committee of Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 15 October 2012, 2010/0383 (COD) ("2012 Committee of Legal Affairs Report"), Explanatory Statement, paragraph 1.

[52] 2010 CSES Impact Analysis (note 43) and *Heidelberg Report* (note 29).

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Commission's 2010 Impact Assessment.[53] The estimations must be treated carefully, however. Nineteen of the twenty seven Member States, including Germany and the United Kingdom, do not collect data on the number of exequatur applications at the national level.[54] In seven Member States, not even the courts keep a record of the number of exequatur cases.[55]

The length of first instance of exequatur proceedings under the 2001 Brussels I Regulation differs significantly among the Member States. Factors influencing the duration include the level of sophistication of the courts concerned and their existing workload. Sometimes these factors also differ considerably within a Member State. According to the statistics, first instance exequatur proceedings can last between one to two hours (Hungary) or three to six months (Estonia), provided the submitted documentation is complete.[56] Between one-third and two-thirds of the Member States render the exequatur decision within less than 30 days following the submission of the application.[57]

Ninety to one hundred percent of the applications are successful in the first instance.[58] Only one to five percent of the exequatur decisions are appealed.[59] The appeal proceedings can last between one to two months (United Kingdom) or as long as three years (Malta: first hearing after two years, decision three to twelve months later).[60] Between one-third and two-thirds of the Member States render the appeal decision in less than six months.[61]

CSES estimates that in 2009 just over 9,900 exequatur applications were made across the Member States and that an average of 93% were successful. In all Member States except Bulgaria (56%), more than three-quarters of the applications were successful, and in two-thirds of the Member States the success rate was 85% or higher.[62] CSES estimates that most applications were submitted in Germany (1,638 cases with a success rate of 88%), the United Kingdom (1,202 with an average success rate of 93%), France (1,176 with a success rate of 99%) and Italy

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[53] 2010 Commission Impact Assessment (note 3), at 6, 7.

[54] 2010 CSES Impact Analysis (note 43), at 37-38, 145-146.

[55] 2010 CSES Impact Analysis (note 43), at 37-38, 145-146.

[56] 2010 Commission Impact Assessment (note 3), Annex V, at 56-57; B. HESS, in *Heidelberg Report* (note 29), at 130-131 para. 454; 2010 CSES Impact Analysis (note 43), at 35-36; 2009 Brussels I Commission Report (note 6), at 4.

[57] 2010 CSES Impact Analysis (note 43), at 35-36; 2010 Commission Impact Assessment (note 3), Annex V, at 56-57.

[58] 2009 Brussels I Commission Report (note 6), at 4.

[59] 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 127 para. 447.

[60] 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 150 para. 506; 2010 Commission Impact Assessment (note 3), Annex V, at 57-58.

[61] 2010 CSES Impact Analysis (note 43), at 35; 2010 Commission Impact Assessment (note 3), Annex V, at 57-58.

[62] 2010 CSES Impact Analysis (note 43), at 37-38; 2010 Commission Impact Assessment (note 3), Annex IVA, Table 1, at 52.

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(1,156 with an average success rate of 93%).[63] CSES concludes that the number of exequatur cases remains modest but that it is generally increasing.[64]

CSES estimates that the average costs of exequatur proceedings in a simple case in 2009 were EUR 2,208. This consists of court fees (EUR 53), legal fees (5h = EUR 1,205), and other fees (*e.g.* cost of serving documents, translations = EUR 850).[65] For complex cases, the average costs are EUR 12,791.[66] Based on the average costs, the number of cases and the overall success rate, CSES estimates the total costs of exequatur proceedings in the EU in 2009 to be approximately EUR 48 million.[67] CSES concludes that the estimated direct cost-saving for small and medium-sized enterprises amounts to EUR 6.16 million if exequatur is abolished (not including indirect savings such as management time).[68]

IV. Practical Aspects of Enforcing a Foreign Judgment under the 2001 and the 2012 Brussels I Regulations

While much attention has been paid to the principle of abolishing exequatur, it is not always obvious what practical difference it will make for the judgment-creditor and debtor. To some extent, the practical differences between enforcement under the 2001 Brussels I Regulations and enforcement under the 2012 Brussels I Regulation will depend on the national law of the enforcement state. This law governs the exequatur procedure under the 2001 Brussels I Regulation and the enforcement procedure under the 2012 Brussels I Regulation.[69] However, the 2001 and 2012 Brussels I Regulations set the legal framework and contain a number of procedural rules and requirements. The following sections address some important practical aspects governed by the 2001 and 2012 Brussels I Regulations and the practical changes caused by the revision.

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[63] 2010 CSES Impact Analysis (note 43), at 37; 2010 Commission Impact Assessment (note 3), Annex IVA, Table 1, at 52.

[64] 2010 CSES Impact Analysis (note 43), at 40-41. In the different Member States, the estimated costs ranged from EUR 1,048 (Spain) to EUR 3,955 (United Kingdom).

[65] 2010 CSES Impact Analysis (note 43), at 43-44, 146-148.

[66] 2010 CSES Impact Analysis (note 43), at 45; 2010 Commission Impact Assessment (note 3), at 13.

[67] 2010 CSES Impact Analysis (note 43), at 45; 2010 Commission Impact Assessment (note 3), at 13 and Annex IVA, Table 3, at 54.

[68] 2010 CSES Impact Analysis (note 43), at 66.

[69] Article 40(1) of the 2001 Brussels I Regulation and Article 41(1) of the 2012 Brussels I Regulation.

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A. The Judgment-Creditor's Exequatur or Enforcement Application

1. Content of the Application

Under the 2001 Brussels I Regulation, the judgment-creditor must request exequatur before proceeding to the actual enforcement. The application must set out the requirements that the competent court or authority examines *ex officio*.[70] In practice, it is recommended that the enforcement-creditor requests that protective measures be taken, either immediately or when granting exequatur.[71]

Under the 2012 Brussels I Regulation, the judgment-creditor can directly request enforcement measures without any declaration of enforceability. The application must set out the requirements that the competent court or authority examines *ex officio*.[72] In practice, the judgment-creditor should request that protective measures be taken immediately and *ex parte*, before the Certificate and the judgment (if not previously served) are served on the judgment-debtor.[73]

2. Documents and Translations to Be Submitted with the Application

The extent to which a judgment-creditor must collect and translate documents in order to apply for exequatur or cross-border enforcement considerably impacts the duration and costs of preparing the application. The 2012 Brussels I Regulation introduces some changes that aim to protect the judgment-debtor.

Under the 2001 and 2012 Brussels I Regulations, the judgment-creditor must submit two documents to the court in support of his exequatur or enforcement application:

(1) a copy of the judgment satisfying the conditions necessary to establish its authenticity; and

(2) a certificate issued by the court of origin using the standard form annexed to the Brussels I Regulation (the "Brussels I Certificate").[74]

The Brussels I Certificate contains considerably more information under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation.[75] While the 2001 Brussels I Regulation allows the exequatur court to dispense with the production of the Certificate,[76] this possibility no longer exists under the 2012 Brussels I

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[70] See Section IV.B.1. below.

[71] See Section IV.D. below.

[72] See Section IV.B.1. below.

[73] See Section IV.D. below.

[74] Articles 53-54 and Annex V of the 2001 Brussels I Regulation and Article 42(1) and Annex I of the 2012 Brussels I Regulation.

[75] See Section IV.B.2. below.

[76] Article 55(1) of the 2001 Brussels I Regulation. The court may accept an equivalent document or dispense with the production of the Certificate or an equivalent altogether if it considers that it has sufficient information before it.

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Regulation. To the contrary, the 2012 Brussels I Certificate must be served on the judgment-debtor prior to the first enforcement measure.[77]

The 2012 Brussels I Regulation increases the protection for the judgment-debtor regarding translations. Under the 2001 Brussels I Regulation, the judgment-creditor must submit a translation of both the judgment and the Certificate only if required by the court or authority of the enforcement state.[78] While no translation is required as a rule, the *Heidelberg Report* criticizes the fact that most Member State courts regularly request a translation of the judgment.[79] The 2001 Brussels I Regulation contains no right of the judgment-debtor to request a translation of the judgment.

Under the 2012 Brussels I Regulation, the enforcement authority may request a transliteration or translation of the Certificate, but it may require a translation of the judgment only if it is unable to proceed without such a translation.[80] However, the 2012 Brussels I Regulation entitles a judgment-debtor domiciled in a Member State other than the state of origin to request a translation of the judgment if it is written in a language that he does not understand and that is not an official language at the place of his domicile.[81] Until the judgment-debtor receives the requested translation, only protective measures may be taken, not enforcement measures.[82] This amendment constitutes an important protection of the judgment-debtor at the expense of the judgment-creditor.

3. *Requirement of a Service Address in the Member State of Enforcement*

The 2001 Brussels I Regulation requires the judgment-creditor either to provide a service address within the area of jurisdiction of the exequatur court or to appoint a representative *ad litem*.[83] This *de facto* requirement of a local lawyer for exequatur proceedings has met with objections,[84] as most national laws do not require legal representation in this type of proceedings.[85] The 2012 Brussels I Regulation abolishes the requirement of a postal address or authorized representative in the

[77] Article 43(1) of the 2001 Brussels I Regulation.

[78] Article 55(2) of the 2001 Brussels I Regulation.

[79] B. HESS, in *Heidelberg Report* (note 29), at 131 para. 455, based on the information obtained from lawyers.

[80] Article 42(3)-(4) of the 2012 Brussels I Regulation.

[81] Article 43(2) of the 2012 Brussels I Regulation. Exceptions apply if the judgment-debtor has already received a translation (Article 43(2) of the 2012 Brussels I Regulation, see in this regard Section 4.5.1.1 of the Certificate) or if the creditor seeks the enforcement or the issuing of protective measures (Article 43(3) of the 2012 Brussels I Regulation).

[82] Article 43(2) of the 2012 Brussels I Regulation.

[83] Article 40(2) of the 2001 Brussels I Regulation.

[84] B. HESS, in *Heidelberg Report* (note 29), at 132 para. 457.

[85] According to the 2010 CSES Impact Analysis (note 43), at 35-36, only Belgium requires legal representation in the exequatur proceedings and five Member States require legal representation in the appeal proceedings (Belgium, Greece, Hungary, Italy and Portugal).

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enforcement state.[86] It thereby helps to reduce costs. The Member States are free, however, to require an authorized representative if this requirement applies irrespective of the nationality or the domicile of the parties,[87] *i.e.*, if this requirement applies also in enforcement proceedings for domestic court decisions.[88]

B. Examination by the Seized Court or Authority

1. Scope of Examination by the Seized Court or Authority

The 2012 Brussels I Regulation contains no substantive changes to the scope of what the competent court or authority examines *ex officio*. Upon the judgment-creditor's exequatur application (2001 Brussels I Regulation) or enforcement application (2012 Brussels I Regulation), the court or authority seized with the application examines the following requirements *ex officio*:

(a) Local and subject-matter competence of the court or authority;

(b) Submission of an authentic copy of the judgment and of the Brussels I Certificate;

(c) Judgment falling under the Brussels I Regulation, in particular: (i) decision is a judgment in the sense of the Brussels I Regulation,[89] (ii) judgment is rendered in a Member State, and (iii) judgment is rendered in a civil or commercial matter (certified in the Brussels I Certificate[90]);

(d) Enforceability of the judgment in the state of origin (as certified in the Brussels I Certificate[91]);

(e) Other requirements under national law that apply to all judgments regardless of their origin, to the extent that they are not incompatible with the grounds of refusing enforcement under the 2012 Brussels I Regulation.[92]

Under the 2012 Brussels I Regulation, any enforcement authority should be able to examine these requirements without much difficulty. Most requirements are either clearly visible on the (new) Brussels I Certificate, seem easy to examine, or must be examined also in case of domestic judgments. For this reason, some Member States provide under the 2001 Brussels I Regulation for a simple registration of the

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[86] Article 41(3) of the 2012 Brussels I Regulation.

[87] Article 41(3) of the 2012 Brussels I Regulation.

[88] H. GAUDEMET-TALLON/ C. KESSEDJIAN, La refonte du règlement Bruxelles I, *Revue trimestrielle de droit européen* 2013, p. 452 para. 58.

[89] See Article 32 of the 2001 Brussels I Regulation and Article 2(a) of the 2012 Brussels I Regulation.

[90] See the heading of the Certificate under the 2012 Brussels I Regulation.

[91] See the statement at the bottom of the Certificate under the 2001 Brussels I Regulation and Section 4.4 of the Certificate under the 2012 Brussels I Regulation.

[92] See Article 41(1)-(2) 2012 Brussels I Regulation.

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foreign judgment and assign the competence for exequatur to a master or registrar.[93]

If the requirements listed above are fulfilled, the competent court or authority will do the following:

– Under the 2001 Brussels I Regulation, the competent court declares the foreign judgment enforceable.[94] The grounds for refusing recognition and enforcement are examined only if and when the judgment-debtor files an appeal against the exequatur.[95] If so requested, the competent court will proceed to protective measures,[96] and finally to enforcement measures once an appeal against exequatur is no longer possible or has been dismissed.[97]

– Under the 2012 Brussels I Regulation, the competent court or authority will, as the case may be, proceed to protective measures (if requested) and/or serve the Certificate and the judgment (if not previously served) on the judgment-debtor prior to the first enforcement measure.[98] The grounds for refusing enforcement are examined only if and when the judgment-debtor files an application for refusing enforcement.[99]

2. *Content and Adaptation of the Foreign Judgment*

The content of the foreign judgment determines what protective and/or enforcement measures the seized court or authority will take. The 2012 Brussels I Certificate provides detailed information about the content of the judgment, unlike the 2001 Brussels I Certificate.[100] The 2012 Brussels I Regulation thereby makes it easier for the enforcement court or authority to take the appropriate protective and/or enforcement measures, while putting an additional burden on the court of origin.

In case of monetary claims, the 2012 Brussels I Certificate sets out the following information:[101]

(a) A short description of the subject-matter of the case;[102]

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[93] According to B. HESS, in *Heidelberg Report* (note 29), at 128 para. 448, this is the case in England and Wales, Ireland, Scotland, Cyprus and France.

[94] See Article 41 of the 2001 Brussels I Regulation.

[95] See Article 45 of the 2001 Brussels I Regulation.

[96] See Article 47(2) of the 2001 Brussels I Regulation and Section IV.D. below.

[97] See Article 47(3) of the 2001 Brussels I Regulation and Section IV.E. below.

[98] See Articles 40 and 43(1) and Recital 32 of the 2012 Brussels I Regulation. Section 4.5 of the 2012 Brussels I Certificate indicates whether the judgment has already been served on the judgment-debtor.

[99] Article 46 of the 2012 Brussels I Regulation.

[100] See Annex I of the 2012 Brussels I Regulation and Annex V of the 2001 Brussels I Regulation.

[101] Annex I of the 2012 Brussels I Regulation, Section 4.6.1.

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(b) The debtor and creditor of the payment and, in case of several debtors, whether the whole amount may be collected from any one of them;

(c) The currency of the payment;

(d) The principal amount to be paid, and whether it must be paid in one sum, in installments (together with information about the amount and due date of each installment) or regularly (together with information about the frequency of payments);

(e) The contractual and/or statutory interest to be paid, including the amount, interest rate or statutory basis, the start and end date/event, and whether and how interest is to be capitalized.

For judgments other than monetary judgments, the 2012 Brussels I Certificate sets out a short description of the subject-matter of the case and of the court's ruling.[103] In case of provisional measures, the 2012 Brussels I Certificate also sets out whether the measure was ordered by a court having jurisdiction for the substance of the matter.[104]

For judgments or orders other than monetary judgments, it may become necessary to adapt the foreign decision if the order or measure is not known to the law of the enforcement state.[105] The competence and procedure for adapting the foreign decision is subject to national law.[106]

C. Time of Service of the Application on the Judgment-Debtor

An essential feature of exequatur under the 2001 Brussels I Regulation is the surprise effect because the judgment-debtor obtains knowledge of the creditor's exequatur application only when receiving the decision on exequatur.[107] This shall prevent the judgment-debtor from thwarting the future enforcement before the judgment-creditor can effectively obtain protective measures (see Section D.).

Under the 2012 Brussels I Regulation, the Certificate and the foreign judgment (if not previously served) shall be served on the judgment-debtor in reasonable time before the first enforcement measure.[108] It will be for the courts (including the ECJ) to determine what constitutes a reasonable time period. Subject to this requirement, the 2012 Brussels I Regulation leaves it to the national law to

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[102] This task can be particularly burdensome if the judgment-creditor requests the Certificate a long time after the judgment has been rendered, as there are no time limits for requesting a Certificate, see J.-P. BERAUDO, Regards sur le nouveau règlement *Bruxelles I* sur la compétence judiciare, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Clunet* 2013, p. 758.

[103] Annex I of the 2012 Brussels I Regulation, Section 4.6.3.

[104] Annex I of the 2012 Brussels I Regulation, Section 4.6.2.

[105] See Article 54 of the 2012 Brussels I Regulation and Section III.A. above.

[106] Recital 28 2nd sentence of the 2012 Brussels I Regulation.

[107] Articles 41, 42(2) of the 2001 Brussels I Regulation.

[108] Article 43(1) and Recital 32 of the 2012 Brussels I Regulation.

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determine when the enforcement application is served on the judgment-debtor.[109] In any case, protective measures are available as soon as the judgment is enforceable in the state of origin, and without the need for serving the 2012 Brussels I Certificate and the foreign judgment prior to obtaining such measures (see the following Section D.).

D. Time of Obtaining Protective Measures

Provisional (protective) measures serve to balance the interests of the judgment-creditor and those of the judgment-debtor. The judgment-creditor has an interest in securing the effective enforcement of the judgment by, for example, freezing assets necessary for the enforcement. The judgment-debtor, on the other hand, has an interest in not being definitely deprived of his assets in case he has grounds to refuse enforcement of the judgment.

The time when protective measures are effectively available is important. Under the 2001 Brussels I Regulation, the competent authorities must grant a request for protective measures when exequatur is granted in first instance.[110] Prior to this time, and even without any exequatur proceedings, the judgment-creditor is entitled to apply for protective measures under the national law of the Member States.[111] However, the Heidelberg Report observes that this provision of the 2001 Brussels I Regulation is not often applied, and that its interpretation and implementation in the national laws of the Member States is an area of unsettled law.[112]

Under the 2012 Brussels I Regulation, the situation is more defined. As soon as the judgment is enforceable in the state of origin, the competent authorities in the other Member States must proceed, if and when requested, to any protective measures that exist under their national law.[113] This excludes any national requirements such as urgency or plausibility that the enforcement is in danger. The 2012 Brussels I Regulation thus effectively reinforces the position of the judgment-creditor. The protective measure will be ordered without serving the 2012 Brussels I Certificate on the judgment-debtor.[114] This means that the protective measure must be ordered *ex parte* (*i.e.*, without any prior notification to the judgment-debtor) even if national law were to generally provide for notice of the application to the debtor. The surprise effect under the 2001 Brussels I Regulation, which explicitly provides for notice to the judgment-debtor only when exequatur is granted,[115] should be maintained also under the 2012 Brussels I Regulation. It is not

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[109] See Article 41(1) of the 2012 Brussels I Regulation, according to which the enforcement procedure is governed by the law of the Member State where enforcement is sought, subject to the provisions of Articles 39 *et seq.* of the 2012 Brussels I Regulation.

[110] Article 47(2) and (3) of the 2001 Brussels I Regulation.

[111] Article 47(1) of the 2001 Brussels I Regulation.

[112] B. HESS, in *Heidelberg Report* (note 29), at 153-154 paras 522-523.

[113] Article 40 of the 2012 Brussels I Regulation.

[114] Article 43(3) of the 2012 Brussels I Regulation.

[115] Article 42(1) of the 2001 Brussels I Regulation

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required that the judgment-creditor submit an application for enforcement prior to or together with her application for protective measures.

E. Time of Obtaining Enforcement Measures

Under the 2001 Brussels I Regulation, the judgment-creditor can obtain effective enforcement only after the period for appealing the exequatur decision has lapsed or, in case of an appeal, after the appeal has been dismissed.[116] The judgment-creditor can thus obtain enforcement at the earliest one month after service of the exequatur decision if the debtor is domiciled in the enforcement state, and two months after service of the exequatur decision if the debtor is domiciled elsewhere.[117] The 2001 Brussels I Regulation thus grants the judgment-debtor an automatic "grace period."

Under the 2012 Brussels I Regulation, there is no such automatic "grace period." The judgment-debtor must – and can – take active steps to delay enforcement. Prior to the first enforcement measure, the 2012 Brussels I Certificate and the judgment (if not previously served) must be served on the judgment-debtor.[118] A judgment-debtor domiciled in a Member State other than the state of origin may then request a translation of the judgment if it is not written in or accompanied by a translation into a language that she understands or that is an official language of the place where she is domiciled.[119] If the judgment-debtor requests such a translation, no enforcement measures may be taken other than protective measures until she has received the translation.[120]

Enforcement measures are not automatically excluded if the judgment-debtor applies for refusal of enforcement.[121] However, upon request of the judgment-debtor, the competent court has discretion to limit enforcement to protective measures, make enforcement conditional on the provision of a security, or suspend enforcement either wholly or in part.[122] When exercising its discretion, the competent court will consider the seriousness of the judgment-debtor's objections to the enforcement. The enforcement court or authority has no such discretion if the enforceability of the judgment is suspended in the Member State of origin: In that case, the enforcement court or authority must suspend the enforcement proceedings upon request of the judgment-debtor.[123]

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[116] Article 47(3) of the 2001 Brussels I Regulation.

[117] See Article 43(5) of the 2001 Brussels I Regulation.

[118] Article 43(1) of the 2012 Brussels I Regulation.

[119] Article 43(2) first subparagraph of the 2012 Brussels I Regulation. Section 4.5 of the 2012 Brussels I Certificate indicates whether and in what language the judgment has already been served on the judgment-debtor.

[120] Article 43(2) second subparagraph of the 2012 Brussels I Regulation.

[121] See Section IV.F. below.

[122] Article 44(1) and Recital 31 of the 2012 Brussels I Regulation.

[123] Article 44(2) of the 2012 Brussels I Regulation.

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F. Review of the Foreign Judgment upon Application by the Judgment-Debtor

One of the main purposes of exequatur was originally the inspection of the foreign judgment, *i.e.*, the examination of certain grounds for review. This review is part of weighing the respective interests of the judgment-creditor and the judgment-debtor. While a speedy, inexpensive and effective Europe-wide enforcement of the judgment serves the judgment-creditor's interest, the judgment-debtor has a legitimate interest in maintaining safeguards against violation of his fundamental rights.

Compared to the 1968 Brussels Convention, the 2001 Brussels I Regulation shifted the balance towards the judgment-creditor's interest by postponing the examination of the grounds for review until the appeal proceedings against the exequatur decision. The abolition of exequatur under the 2012 Brussels I Regulation maintains this balance, and it does not shift it any further towards the judgment-creditor's interest. Only few changes were made to the grounds for reviewing the foreign judgment (Section 1 below) and to the review procedure (Section 2 below) compared to the 2001 Brussels I Regulation. This is despite the fact that the 2010 Brussels I Proposal of the Commission contained significant changes.[124]

1. Grounds for Review

The 2001 Brussels I Regulation provides for the following grounds for review: violation of procedural and substantive public policy, insufficient service of the documents initiating the proceedings in case of default judgments, incompatibility with other judgments and violation of certain provisions on jurisdiction.[125] According to the Commission, judgment-debtors most often invoke the lack of due service in case of default judgments, although they rarely succeed.[126] Procedural public policy is also frequently invoked, but rarely accepted, and a defense based on substantive public policy is extremely rare.[127] The other grounds for refusing recognition and enforcement are rarely invoked (and equally rarely accepted).[128]

The grounds for review were much debated during the revision of the 2001 Brussels I Regulation. The views of the stakeholders differed on whether and to what extent the grounds for review should be maintained.[129] Most stakeholders proposed neither an increase nor a reduction of the number of grounds for review.[130] OBERHAMMER expressed this view by citing the adage "if it ain't broke,

[124] See D. SCHRAMM, Abolition of Exequatur, in A. BONOMI/ Ch. SCHMID (eds), *La revision du Règlement 44/2001 (Bruxelles I)*, Genève/ Zurich/ Bâle 2011, p. 71-89.

[125] Articles 34-35 of the 2001 Brussels I Regulation.

[126] 2009 Brussels I Commission Report (note 6), at 4.

[127] 2009 Brussels I Commission Report (note 6), at 4.

[128] 2009 Brussels I Commission Report (note 6), at 4.

[129] 2010 Brussels I Proposal (note 8), at 6.

[130] B. HESS, in *Heidelberg Report* (note 29), at 138 para. 473.

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don't fix it."[131] Nevertheless, the 2010 Brussels I Proposal suggested abolishing the limited jurisdictional review and the examination of substantive public policy, and it made changes to other grounds for review. The European Parliament and Council did not follow these suggestions. Most grounds for review under the 2012 Brussels I Regulation have remained unchanged compared to the 2001 Brussels I Regulation, as briefly outlined in the following.

In addition to the grounds for review under the Brussels I Regulation, the judgment-debtor can invoke grounds for refusing enforcement available under national law, to the extent that they are not incompatible with the grounds for review under the Brussels I Regulation.[132] One typical example is the objection that the claim has been satisfied after the judgment was rendered.[133] The judgment-debtor can – and according to certain legal commentators, must[134] – invoke such additional national grounds for refusing enforcement with the grounds referred to in Article 45 of the 2012 Brussels I Regulation.[135]

a) Violation of Procedural Public Policy

The 2001 Brussels I Regulation provides that a foreign judgment shall not be recognized if such recognition is manifestly contrary to the public policy of the enforcement state.[136] This ground for review has remained unchanged under the 2012 Brussels I Regulation. It is commonplace that the notion of public policy encompasses procedural public policy as well as substantive public policy. Procedural public policy includes in particular the defendant's right to be heard. In practice, procedural public policy is frequently invoked in cases of corruption, procedural fraud or other severe breaches of procedural fairness in the course of the proceedings.[137]

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[131] P. OBERHAMMER (note 26), at 201.

[132] Article 41(2) and Recital 30 of the 2012 Brussels I Regulation.

[133] See in more detail J. VON HEIN, Die Neufassung der Europäischen Gerichtsstands- und Vollstreckungsverordnung (EuGVVO), *RIW* 2013, p. 110.

[134] See J. VON HEIN (note 133), at 110.

[135] See Recital 30 of the 2012 Brussels I Regulation. According to M. POHL, Die Neufassung der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle, *IPRax* 2013, p. 114, it is open to the national legislators whether national grounds for refusing enforcement such as the payment of the debt can be considered in the same proceedings as the grounds for refusal under the 2012 Brussels I Regulation.

[136] Article 34(1) of the 2001 Brussels I Regulation and Article 45(1)(a) of the 2012 Brussels I Regulation. The requirement of a „manifest" violation of public policy was explicitly introduced in the 2001 Brussels I Regulation, but it already applied under the 1968 Brussels Convention; see ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, para. 37.

[137] P. OBERHAMMER (note 26), at 202. See also B. HESS, in *Heidelberg Report* (note 29), at 141-143 paras 481-486, who lists the reported case law relating to procedural fraud.

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While the 2010 Brussels I Proposal of the Commission suggested introducing a uniform European standard for procedural public policy,[138] these changes were not adopted in the 2012 Brussels I Regulation. Thus, the courts of the enforcement state will still be entitled to apply their own national concept of public policy. However, they can do so only within specified European limits,[139] which are inspired by Article 6(1) of the European Convention on Human Rights ("ECHR").[140] This means that the courts are entitled to refuse enforcement only if the violated principle of national public policy has sufficient weight under European standards, in particular under the standards of the ECHR. The European Court of Justice ("ECJ") has accepted the refusal of enforcement in cases where the court of origin refused to hear the defendant's representative when the defendant did not appear personally,[141] and where the court of origin excluded the defendant from further participating in the proceedings and thereby manifestly and disproportionately infringed his right to be heard.[142] However, if a procedural right

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[138] See D. SCHRAMM (note 124), at 74-77.

[139] See ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, paras 22-23: "while the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State."

[140] See ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, paras 24-27. Article 6(1) ECHR reads: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[141] See ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98: The German doctor Krombach was charged in France with manslaughter of a French girl. The girl's father raised a civil claim in the criminal proceedings. The French court refused to hear Krombach's representative as Krombach did not appear personally. In his absence, Krombach was sentenced to 15 years of imprisonment and found liable for damages. Krombach then (successfully) opposed enforcement in Germany of the damages portion of the judgment on the basis of a violation of procedural public policy, in particular the violation of his right of defense, which is part of the right to a fair trial.

[142] ECJ, 2 April 2009, *Marco Gambazzi v. Danieli*, C-394/07: An English court held the defendant Gambazzi to be in contempt of court for violating a disclosure order issued earlier in the proceedings and excluded him from further participating in the proceedings. Gambazzi objected to the recognition of the English judgment in Italy, and the ECJ found that the Italian court was entitled to refuse recognition and enforcement of the English decision "if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard." In this context, it is interesting that Gambazzi had applied to the ECtHR in the early 2000s and that his

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granted by Article 6(1) ECHR does not belong to the national procedural public policy of the enforcement state, the enforcement state is not obliged to refuse recognition and enforcement on this ground.[143] Thus, the ECJ examines under the 2001 and the 2012 Brussels I Regulation only whether a national court *may* refuse enforcement on a particular procedural ground, not whether the national court *must* refuse enforcement.

b) Violation of Substantive Public Policy

Under the 2001 Brussels I Regulation, recognition of a foreign judgment can be refused if such recognition is manifestly contrary to the substantive public policy of the enforcement state.[144] This ground for review has remained unchanged in the 2012 Brussels I Regulation, despite the fact that the 2010 Brussels I Proposal of the Commission suggested abolishing the review of substantive public policy, as other EU regulations issued since 2004 did.[145]

Judgment-debtors have only very rarely invoked substantive public policy successfully.[146] For example, the German Federal Supreme Court ("BGH") applied substantive public policy in its famous *Sonntag*-decision,[147] which has often been criticized. The Heidelberg Report sees two main factors leading to the rare application of substantive public policy:[148] First, there are no fundamental differences between the legal systems of the Member States in civil and commercial matters that could trigger the application of substantive public policy. And second, the

application was held to be manifestly ill-founded; see G. CUNIBERTI/ I. RUEDA, Abolition of Exequatur – Addressing the Commission's Concerns, University of Luxembourg Law Working Paper No. 2010-03, available at <http://ssrn.com/abstract=1691001>, p. 9, also published in *RabelsZ* 2011, p. 286 *et seq*. Also the Swiss Federal Supreme Court refused recognition and enforcement of the English decision, on the ground that Gambazzi would have subjected himself to criminal sanctions in Switzerland by complying with the disclosure order; ATF, 9 November 2004, 4P.82/2004, reason 3.3.

[143] See the formulation of the ECJ in Footnote 139 above.

[144] Article 34(1) 2001 Brussels I Regulation; also Article 27(1) 1968 Brussels Convention.

[145] See the 2004 European Enforcement Order Regulation, the 2006 Payment Order Regulation, the 2007 Small Claims Regulation and the 2009 Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol.

[146] 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 144 para. 491.

[147] BGH, 16 September 1993, BGHZ 123, 268: Sonntag was a school teacher at a German school. During a school trip to Italy, a schoolboy died in an accident. An Italian criminal court ordered the teacher to pay damages to the boy's parents. The BGH refused enforcement of the decision. This was because, under German law, the social security system replaces the personal liability of a teacher at a public school for injuries suffered by the students, and therefore only the state employing the teacher can be sued for compensation.

[148] B. HESS, in *Heidelberg Report* (note 29), at 144 para. 491.

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substance of the foreign judgment may not be reviewed.[149] It is therefore difficult to argue that the content of a judgment violates substantive public policy. In fact, according to the ECJ decision in *Renault v. Maxicar*, the court of enforcement may not refuse recognition and enforcement of a foreign judgment even if it considers that Community law was misapplied.[150] However, the European Parliament and Council finally sided with those concerned about giving up a tool that could still be needed in some rare and extreme situations and that could act as an "emergency brake for cases in which something went terribly wrong."[151]

c) *Lack of Due Service in Case of Default Judgments*

In case of default judgments, parties most often resist enforcement based on defects in the service of the document instituting the proceedings.[152] This ground for review was subject to change during the transition from the 1968 Brussels Convention to the 2001 Brussels I Regulation. Under the 1968 Brussels Convention, the debtor of a default judgment could refuse enforcement if the document instituting the proceedings "was not duly served […] in sufficient time to enable [the defendant] to arrange for his defence."[153] The 2001 Brussels I Regulation abandoned the notion of "duly served" and provided the judgment-debtor with a ground for refusing enforcement if service was not made "in sufficient time and in such a way as to enable him to arrange for his defence."[154] This language has remained unchanged in the 2012 Brussels I Regulation.[155] The wording makes clear that compliance with the applicable provisions on proper service is not examined. The only issue examined is whether the service effectively enabled the defendant to take note of the action and prepare his defense.[156] The date of service is indicated on the 2001 and the 2012 Brussels I Certificate.[157]

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[149] Articles 36, 45(2) of the 2001 Brussels I Regulation and Article 52 of the 2012 Brussels I Regulation.

[150] ECJ, 11 May 2000, *Renault v. Maxicar and Formento*, C-38/98, para. 33.

[151] P. OBERHAMMER (note 26), at 201; see also, *e.g.*, B. HESS, in *Heidelberg Report* (note 29), at 144 para. 491; 2012 Committee of Legal Affairs Report (note 51), Explanatory Statement, paragraph 1. See also the assessment by D. TRÜTEN, Die neue Brüssel I-Verordnung und die Schweiz, *Zeitschrift für Europarecht (EuZ)* 2013, p. 62-63; M. POHL (note 135), at 113.

[152] 2009 Brussels I Commission Report (note 6), at 4.

[153] Article 27(2) of the 1968 Brussels Convention.

[154] Article 34(2) of the 2001 Brussels I Regulation.

[155] Article 45(1)(b) of the 2012 Brussels I Regulation.

[156] See the analysis of B. HESS, in *Heidelberg Report* (note 29), at 138 para. 474 with reference to court decisions, and the reference to the French report to the Heidelberg questionnaire, at 139 para. 476.

[157] Annex V, Section 4.4 of the 2001 Brussels I Regulation and Annex I, Section 4.3.2 of the 2012 Brussels I Regulation.

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The 2012 Brussels I Regulation also maintains the limitation introduced by the 2001 Brussels I Regulation (but not applied in Switzerland)[158] that the judgment-debtor cannot invoke the ground for refusal if "he failed to commence proceedings to challenge the judgment when it was possible for him to do so."[159] This exception requires that the judgment-debtor be acquainted with the contents of the judgment because it was served on him in sufficient time to enable him to prepare his defense.[160]

The 2010 Brussels I Proposal of the Commission suggested adding a new ground for refusing enforcement of a default judgment if the defaulting defendant "was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part,"[161] in line with other EU regulations issued since 2004.[162] However, the European Parliament and Council did not adopt this suggestion and left the ground for review unchanged.

d) Incompatibility with Other Judgments

Under the 2001 Brussels I Regulation, recognition of a foreign judgment can be refused if the foreign judgment is irreconcilable with either (a) a judgment rendered in the enforcement state in a dispute between the same parties or (b) an earlier recognizable judgment rendered in another state in a dispute between the same parties and involving the same cause of action.[163] This ground for review has remained unchanged,[164] despite criticism in legal commentaries and the fact that consistent changes were made in most other EU regulations issued since 2004 that abolished exequatur.[165]

The criticism relates mainly to two issues. The first issue is the priority of a domestic judgment over the foreign judgment even if the foreign judgment was rendered earlier.[166] This priority was abolished in the aforementioned EU regula-

[158] Switzerland has made the reservation that it will not apply this exception under the revised Lugano Convention (Article III(1) of Protocol No. 1).

[159] Article 34(2) of the 2001 Brussels I Regulation and Article 45(1)(b) of the 2012 Brussels I Regulation.

[160] ECJ, 14 December 2006, *ASML v. SEMIS*, C-283/05.

[161] Article 45(1)(b) of the 2010 Brussels I Proposal (note 8). See D. SCHRAMM (note 124), at 73.

[162] See Art. 19(1)(b) European Enforcement Order Regulation, Art. 20(1)(b) Order for Payment Regulation, Art. 18(1)(b) Small Claims Regulation and Art. 19(1)(b) Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol.

[163] Article 34(3) and (4) of the 2001 Brussels I Regulation; also Article 27(3) and (5) 1968 Brussels Convention.

[164] Article 45(1)(c) and (d) of the 2012 Brussels I Regulation.

[165] See Art. 21(1) European Enforcement Order Regulation, Art. 22(1) Order for Payment Regulation and Art. 22(1) Small Claims Regulation.

[166] P. OBERHAMMER (note 26), at 202, who considers this to be "an expression of obsolete nationalism"; B. HESS, in *Heidelberg Report* (note 29), at 146-147 paras 496-497.

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tions.[167] The second criticism relates to the priority of an earlier judgment regardless of whether it was obtained in violation of the *lis pendens* rule of the Regulation.[168] At least three different solutions were proposed to fix this problem, which could lead to different results.[169] However, the European Parliament and Council decided not to make any changes.

e) Limited Jurisdictional Review

Under the 2001 and 2012 Brussels I Regulations, the court of the enforcement state may not, in principle, review the jurisdiction of the court of origin.[170] The sole exception relates to the review of some clearly defined provisions on jurisdiction.[171] However, judgment-debtors have rarely invoked this ground for review.[172] Its practical relevance is limited because the findings of fact of the court of origin are binding on the reviewing court.[173]

The 2012 Brussels I Regulation includes two changes to the limited jurisdictional review. First, the jurisdictional review applies not only to the rules on exclusive jurisdiction and to the jurisdictional provisions for insurance and consumer contracts,[174] but now also to the jurisdictional provisions for individual employment contracts.[175] Second, the 2012 Brussels I Regulation better implements the purpose of protecting the typically weaker party in insurance, consumer and employment contract matters. While the wording of the 2001 Brussels I Regulation allows also the typically stronger party to resist recognition and enforcement,[176] the

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[167] See Art. 21(1) European Enforcement Order Regulation, Art. 22(1) Order for Payment Regulation and Art. 22(1) Small Claims Regulation.

[168] Article 27 of the 2001 Brussels I Regulation and Article 29 of the 2012 Brussels I Regulation.

[169] See D. SCHRAMM (note 124), at 79-80.

[170] Article 35(3) of the 2001 Brussels I Regulation and Article 45(3) of the 2012 Brussels I Regulation; also Article 28(3) 1968 Brussels Convention.

[171] Article 35 of the 2001 Brussels I Regulation and Article 45(1)(e) of the 2012 Brussels I Regulation; also Article 28 1968 Brussels Convention.

[172] 2009 Brussels I Commission Report (note 6), at 4.

[173] Article 35(2) of the 2001 Brussels I Regulation and Article 45(2) of the 2012 Brussels I Regulation; also Article 28(2) 1968 Brussels Convention.

[174] Article 35(1) of the 2001 Brussels I Regulation and Article 45(1)(e) of the 2012 Brussels I Regulation; also Article 28(1) 1968 Brussels Convention.

[175] Article 45(1)(e)(i) of the 2012 Brussels I Regulation; critical J.-P. BERAUDO (note 102), at 759-760.

[176] A number of legal commentators take the view that a proper interpretation of the 2001 Brussels I Regulation prevents the insurer or contract partner of the consumer from invoking Article 35 of the 2001 Brussels I Regulation, despite the broad wording of this provision. See, *e.g.*, R. GEIMER, in R. GEIMER/ R. SCHÜTZE (eds), *Europäisches Zivilverfahrensrecht*, 3rd ed., München 2010, Art. 34 paras 20, 47-48; J. KROPHOLLER/ J. VON HEIN, *Europäisches Zivilprozessrecht*, 9th ed., Frankfurt am Main 2011, Art. 35 EuGVO para. 8; all with further references.

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2012 Brussels I Regulation clarifies that the jurisdictional review only applies if the defendant was one of the following persons: the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee.[177]

In its 2010 Brussels I Proposal, the Commission proposed to abolish the limited jurisdictional review. Indeed, this review appears inconsistent with the general principle of mutual trust and the fact that all Member States are bound by uniform rules.[178] The ECJ stated repeatedly that it "is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them."[179] However, the European Parliament and Council decided to maintain – and even extend – the limited jurisdictional review, in line with those who stressed the importance and to some extent the public character of the jurisdictional rules at stake.[180]

2. Review Procedure

Under the 2001 Brussels I Regulation, the grounds for review are examined upon the judgment-debtor's appeal against the exequatur decision.[181] The 2001 Brussels I Regulation provides for two levels of appeal and thus for two instances that examine the grounds for review.[182] Even though the 2001 Brussels I Regulation stipulates that the appellate court "shall give its decision without delay,"[183] the duration of the appeal proceedings varies significantly between the Member States.[184]

Under the 2012 Brussels I Regulation, the courts examine the grounds for review upon the judgment-debtor's application for refusal of enforcement.[185] As under the 2001 Brussels I Regulation, the court shall decide "without delay."[186] Up to two levels of appeal are available against the first-instance decision on the application,[187] which may lead in some Member States to three instances that examine

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[177] Article 45(1)(e)(i) of the 2012 Brussels I Regulation.

[178] See B. HESS, in *Heidelberg Report* (note 29), at 138 para. 473.

[179] *E.g.*, ECJ, 27 April 2004, *Turner v. Grovit et al.*, C-159/02, para. 25.

[180] A. MARKUS/ R. RODRIGUEZ, Grünbuch zur Verordnung (EG) Nr. 44/2001 des Rates über die Gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen – Stellungnahme, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/university_of_bern_de.pdf>, p. 5.

[181] Articles 41, 45 of the 2001 Brussels I Regulation.

[182] Articles 43-44 of the 2001 Brussels I Regulation.

[183] Article 45(1) 2001 Brussels I Regulation.

[184] See the statistics in Section III.C. above.

[185] Article 46 of the 2012 Brussels I Regulation.

[186] Article 48 of the 2012 Brussels I Regulation.

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the grounds for review.[188] This change to the 2001 Brussels I Regulation creates the risk of longer delays to the actual enforcement, which the courts can somewhat moderate by allowing enforcement partially or against the provision of security.[189]

The 2012 Brussels I Regulation provides that only the "person against whom enforcement is sought" has standing to apply for refusal of enforcement.[190] At first sight, this seems to prevent a judgment-debtor from filing such an application as a precautionary measure before the judgment-creditor seeks enforcement. However, the 2012 Brussels I Regulation provides a broader possibility for "any interested party" to apply for refusal of *recognition* of a judgment.[191] A judgment-debtor who is domiciled or has assets within the jurisdiction of the addressed court has a legitimate interest in applying for refusal of recognition of the foreign judgment. This is because a successful application would prevent any protective measures against the judgment-debtor such as the freezing of assets. Judgment-debtors are thus free to apply for refusal of recognition and enforcement of a foreign judgment even before the judgment-creditor seeks enforcement.[192] Upon an application for refusal of recognition, the same grounds for review are examined[193] and the same procedures apply[194] as upon an application for refusal of enforcement.

Regarding the review procedure, the 2012 Brussels I Regulation deviates significantly from the Commission's 2010 Brussels I Proposal. Under the 2010 Brussels I Proposal, three different authorities were proposed competent to examine the different grounds for review: the competent (enforcement) authority was proposed competent to examine the incompatibility with other judgments; the competent court of the state of origin was proposed competent to examine the specific grounds for review against default judgments; and the competent court of the enforcement state was proposed competent to examine the compliance with the debtor's right to a fair trial.[195] The competence of different authorities for different grounds for review would have presented challenges in explaining to the debtors their rights of appeal. However, this was not a unique feature of the 2010 Brussels I Proposal. Other EU regulations issued since 2004 that have abolished exequatur provide for similar solutions, as shown in the following section.

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[187] Articles 49 and 50 of the 2012 Brussels I Regulation. While the Member States must provide for an appeal against the first instance decision (see Articles 49 and 75(b) of the 2012 Brussels I Regulation), the Member States are free to provide, or not, for a second level of appeal (see Articles 50 and 75(c) of the 2012 Brussels I Regulation).

[188] Very critical J.-P. BERAUDO (note 102), at 759.

[189] See Article 44 of the 2012 Brussels I Regulation.

[190] Article 46 of the 2012 Brussels I Regulation.

[191] Article 45(1) of the 2012 Brussels I Regulation.

[192] See also F. CADET (note 33), at 222; F. CADET, Le nouveau règlement *Bruxelles I* ou l'itinéraire d'un enfant gâté, *Clunet* 2013, p. 771.

[193] See Articles 45(1) and 46 of the 2012 Brussels I Regulation.

[194] See Article 45(4) of the 2012 Brussels I Regulation.

[195] See in more detail D. SCHRAMM (note 124), at 81-86.

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Within the framework outlined above, the review procedure is subject to the law of the enforcement state.[196] National law will therefore determine what court is competent, what time limit the judgment-debtor must respect for filing the application and what procedure applies.[197]

3. *Overview: Review of the Foreign Judgment under Different EU Instruments*

Any comparison of the review of the foreign judgment under the 2001 and 2012 Brussels I Regulation and the Commission's 2010 Brussels I Proposal should not lose sight of the context of further EU Regulations that govern the recognition and enforcement of foreign civil judgments. The following chart offers an overview of the developments regarding the grounds for review; the time of review; and the competent authority under the 1968 Brussels Convention, the 2001 Brussels I Regulation, the 2004 European Enforcement Order Regulation, the 2006 Payment Order Regulation, the 2007 Small Claims Regulation, the 2009 Maintenance Regulation (for judgments rendered in a Member State bound by the 2007 Hague Protocol), the 2010 Brussels I Proposal and the 2012 Brussels I Regulation.[198]

Instrument	Exequa-tur	Special review in state of *origin*	Review in state of *enforcement*
1968 Brussels Convention	Yes	No	- when deciding on exequatur - by court declaring exequatur + on appeal - all grounds for review - debtor is heard only in appeal proceedings
2001 Brussels I Regulation	Yes	No	- upon appeal against exequatur - by court of appeal - all grounds for review - debtor is heard only in appeal proceedings
2004 European Enforce-ment Order	No	[A judgment can only be certified as a European Enforcement Order if the law of the state of origin entitles	- upon application by debtor - by competent court - incompatibility with

[196] Article 47(2) of the 2012 Brussels I Regulation.

[197] H. GAUDEMET-TALLON/ C. KESSEDJIAN (note 88), at 453 para. 62.

[198] The "review" addressed in the chart relates only to the "traditional" grounds for refusing recognition and enforcement as contained in Articles 27-28 of the 1968 Brussels Convention / Articles 34-35 of the 2001 Brussels I Regulation and Article 45 of the 2012 Brussels I Regulation. The chart does not address the examination of the requirements for enforcement.

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Instrument	Exequa-tur	Special review in state of *origin*	Review in state of *enforcement*
Regulation [199]		the debtor to apply for a review of the judgment based on grounds similar to those of Article 45 of the 2010 Brussels I Proposal (Article 19).]	other judgments
2006 Payment Order Regulation	No	- upon application by debtor (acting promptly) - by competent court - specific grounds for review for default judgments or clearly wrong issuing of payment order	- upon application by debtor - by competent court - incompatibility with other judgments, payment of amount awarded
2007 Small Claims Regulation	No	- upon application by debtor (acting promptly) - by competent court - specific grounds for review for default judgments	- upon application by debtor - by competent court - incompatibility with other judgments
2009 Mainten-ance Regulation (Hague Protocol)[200]	No	- upon application by debtor (acting promptly, in any event within 45 days from effective acquaintance with contents of the judgment and ability to react, at the latest from time of first enforcement measure with certain effects) - by competent court - specific grounds for review for default judgments	- upon application by debtor - by competent authority - incompatibility with other judgments, extinction of the right to enforce the judgment by the effect of prescription or the limitation of action
2010 Brussels I Proposal of the Commission (NOT ADOPTED)	*No*	- *upon application by debtor (acting promptly, in any event within 45 days from effective acquaintance with contents of the judgment and ability to react, at the latest from time of first enforcement measure with certain effects)*	- *in enforcement proceedings* - *upon application by debtor* - *by competent authority* - *incompatibility with other judgments* - *Upon application by*

[199] It is important to note that the court of origin may only certify a judgment on an uncontested claim as a European Enforcement Order if certain requirements are met (Article 6), including *e.g*. compliance with the rules of the 2001 Brussels I Regulation on jurisdiction in insurance matters and on exclusive jurisdiction (Article 22 of the 2001 Brussels I Regulation).

[200] For decisions given in a Member State bound by 2007 Hague Protocol. For all other decisions, exequatur is required and the procedure is the same as under the 2001 Brussels I Regulation.

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Instrument	Exequa-tur	Special review in state of *origin*	Review in state of *enforcement*
		- *by competent court (but: request can also be filed with competent court of enforcement state, who will transfer request to state of origin)* - *specific grounds for review for default judgments*	*debtor* - *by court at debtor's domicile or at the place of enforcement* - *fundamental principles underlying the right to fair trial*
2012 Brussels I Regulation	No	No	- upon application to refuse enforcement - by competent court - all grounds for review

G. Timeline for Enforcement under the 2001 and the 2012 Brussels I Regulations

When the judgment-creditor receives a judgment in his favor, time is often of the essence for her to enforce the judgment to prevent the dissipation of assets. The following timelines compare the time when the judgment-debtor receives notice of the enforcement and the time when protective measures and enforcement measures become available under the 2001 and 2012 Brussels I Regulations. Two scenarios are examined: In the first scenario the judgment-debtor does not take any steps to have the foreign judgment reviewed, whereas in the second scenario his does take such steps.

Importantly, while the timelines show the sequence of events, they are not true to scale. The duration of a time period depends in many cases on the practice of the court concerned and on other circumstances. For example, the Certificate under the 2012 Brussels I Regulation might potentially be served on the judgment-debtor before or after the court concerned would have rendered its exequatur decision under the 2001 Brussels I Regulation. This depends on the speed and efficiency of the court concerned and on where the judgment-debtor is being served, also considering that the judgment-debtor might have his domicile outside the EU.

1. Timeline for Enforcement without Review of the Foreign Judgment

If the judgment-debtor does not take any steps to have the foreign judgment reviewed, the judgment-creditor can potentially obtain enforcement measures in certain cases more quickly under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation. This is because the judgment-creditor does not need to obtain exequatur, and there is no automatic "grace period" before enforcement can commence.[201] However, this possible time advantage will depend on how quickly the Certificate is served on the judgment-debtor under the 2012 Brussels I

[201] See Section IV.E. above.

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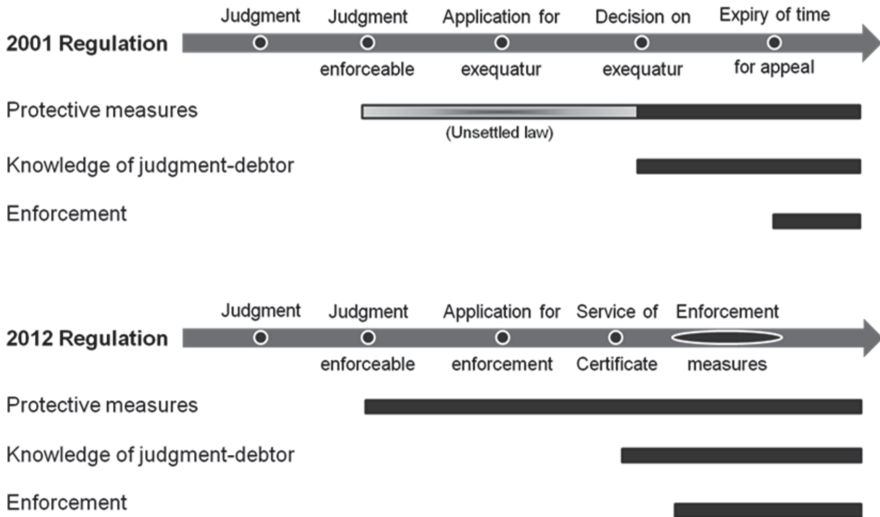
Regulation and how soon the enforcement authorities take enforcement measures after such service. In that regard, Recital 32 of the 2012 Brussels I Regulation speaks of a reasonable time period between service of the Certificate and the first enforcement measure. It will be for the courts (including the ECJ) to determine whether this reasonable time period will be shorter than the time period for appeal under the 2001 Brussels I Regulation. If it is equally long, the only time advantage under the 2012 Brussels I Regulation will lie in abolishing the exequatur proceedings. In any case, the 2012 Brussels I Regulation provides the judgment-creditor with a clearer legal basis for obtaining protective measures at an early stage.[202]



2. *Timeline for Enforcement with Review of the Foreign Judgment*

If the judgment-debtor takes the available steps to have the foreign judgment reviewed, I expect that the timing of enforcement measures will in many cases not be fundamentally different under the 2001 and the 2012 Brussels I Regulations. This will at least be the case in Member States that provide for only one level of appeal under the 2012 Brussels I Regulation. In those Member States that provide for two levels of appeal, enforcement measures might actually occur later under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation. However, in other cases an earlier enforcement is possible under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation. This might be the case, for example, if the judgment-debtor does not apply expeditiously for refusal of enforcement or if the competent court makes use of its discretion to allow limited enforcement or enforcement against provision of a security.[203] In any case, as already noted, the judg-

[202] See Section IV.D. above.

[203] See Section IV.E. above.

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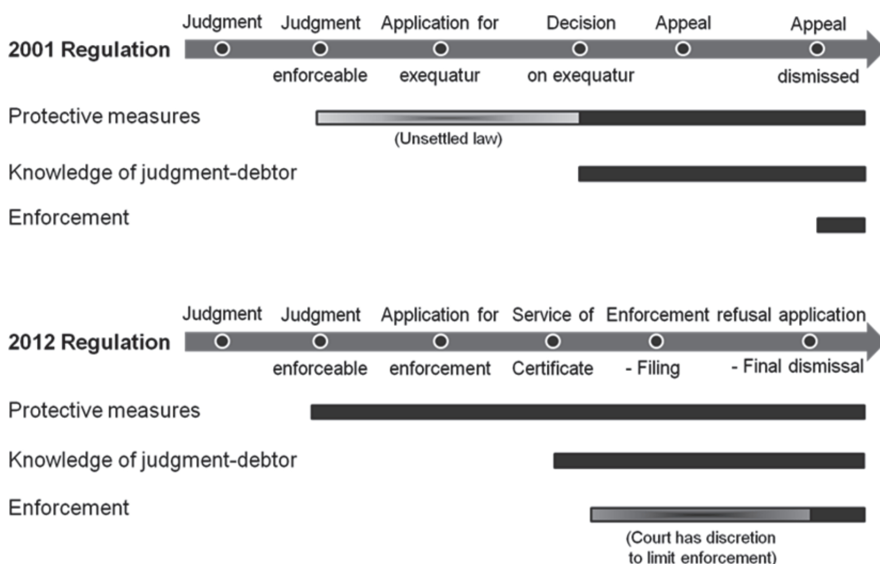
ment-creditor has a clearer legal basis under the 2012 Brussels I Regulation to obtain protective measures at an early stage.[204]



V. Conclusion

The 2012 Brussels I Regulation brings certain improvements for the judgment-creditor, but it also includes some improvements for the judgment-debtor. Overall, the amendments do not constitute a quantum leap regarding the balance between the interests of the judgment-creditor and those of the judgment-debtor.

The abolition of exequatur under the 2012 Brussels I Regulation is an important improvement for the judgment-creditor that will help saving costs. The judgment-debtor remains protected by the required service of the (more detailed) Brussels I Certificate and the foreign judgment in reasonable time before the first enforcement measure. Another important improvement for the judgment-creditor is the abolition of the automatic "grace period" prior to enforcement that existed under the 2001 Brussels I Regulation. However, the judgment-debtor can still delay enforcement, in particular by requesting a translation of the judgment (if the requirements for this request are fulfilled) and by applying for refusal of enforcement. In the latter case, however, the courts have more discretion than under the 2001 Brussels I Regulation to allow the enforcement to proceed, subject to a limitation of enforcement or to the provision of security.

[204] See Section IV.D. above.

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In practice, an important improvement for the judgment-creditor is the clear basis for obtaining *ex parte* interim measures once the foreign judgment is enforceable in the Member State of origin. By contrast, under the 2001 Brussels I Regulation, the creditor's right to protective measures is generally accepted only following the exequatur decision. This delay in obtaining protective measures is partially compensated by the fact that the judgment-debtor is notified of the enforcement request only once exequatur is granted, but the 2001 Brussels I Regulation still gives him more time to dissipates assets.

Improvements for the judgment-debtor include his entitlement to a translation of the judgment if he is domiciled in a Member State other than the state of origin, and if the judgment is written in a language that he does not understand and that is not an official language at the place of his domicile. Other improvements are the fact that Member States can provide for a total of three court instances to examine the grounds for review – which can lead to longer delays to the actual enforcement – and the availability of a limited jurisdictional review also in case of individual employment contracts.

Finally, the 2012 Brussels I Regulation contains improvements for the courts and authorities in the enforcement states, whose work will be significantly facilitated by the more detailed Certificate. However, the court of origin must carry the burden of this improvement.

While the 2012 Brussels I Regulation will enter into force on 10 January 2015, its provisions on enforcement will only apply to decisions that were rendered in legal proceedings instituted on or after 10 January 2015. It will therefore still take some time until the new provisions must pass the field test.

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A PLEA FOR CIVIL REMEDY: THE MUNICIPAL IMPLEMENTATION OF FUNDAMENTAL RIGHTS PROVISIONS IN THE FRAMEWORK OF REGULATION (EU) NO 1215/2012

Francesco SEATZU*

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I. Introduction

On 14 December 2010[1] the European Commission published its long-awaited proposals concerning the reform of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation").[2] The proposals (the "proposed Brussels

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[1] COM(2010) 748 final.

[2] Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), Council Regulation (EC) No 44/2001 of 22 December 2000.

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Regulation"), which ended in December 2012 with the adoption of Regulation No 1215/2012 (the "Brussels I Regulation Recast"),[3] seek to introduce significant changes in relation to the Brussels I Regulation,[4] especially to the grounds on which Member State courts can assert jurisdiction over non-EU defendants; the ease of enforcing judgments across the European Union; the interface between court proceedings and arbitration, the regime of *lis pendens* and related actions; and the validity of choice of law agreements. More specifically, like the Brussels I Regulation Recast the proposed Brussels I Regulation abolishes the intermediate procedure called exequatur, which is the further procedure that, under the current Brussels I Regulation regime, allows the entry into the territory of one Member State of a judgment or a judicial decision granted in another Member State.[5] The rationale behind this is clear. This is in particular if one refers to the policy to gradually eliminate the exequatur in the European Union:[6] the European Commission considers the exequatur time consuming, expensive and also a significant hindrance to the free circulation of judicial decisions and judgments within the European Union space.[7]

According to the Brussels I Regulation Recast, judicial decisions and judgments (granted in another Member State) are directly enforceable across the European Union with limited safeguarding for the judgment debtor. Moreover, in the same vein, the Brussels I Regulation Recast admits protective or provisional measures to be enforceable across the European Union. This is even when these measures have been granted by a court without substantive jurisdiction.[8]

On 6 December 2012 the Council of EU Justice Ministers finally adopted the proposed reforms to the Brussels I Regulation,[9] which had been suggested by the European Commission in December 2010 and that had already been approved with major modifications by the European Parliament and the Council.

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[3] *OJ* L 351 of 20 December 2012, p. 1. The Brussels I Regulation Recast will apply from 10 January 2015 (Art. 81).

[4] The Brussels Regulation originally applied to Belgium, France, Italy, Luxembourg, the Netherlands, Germany, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland and Sweden. Following the enlargement of the European Union (in 2004 and 2007), it now also applies to Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria and Romania. Denmark had originally opted out of the Brussels Regulation regime (meaning that the Brussels Convention continued to apply), but as of 1 July 2007, the provisions of the Brussels Regulation were extended to Denmark.

[5] *Amplius* X.E. Kramer, Abolition of Exequatur Under the Brussels I Regulation: Effecting and Protecting Rights in the European Judicial Area, *Nederlands Internationaal Privaatrecht* 2011, p. 633 *et seq*.

[6] *Ibidem*.

[7] *Ibid*.

[8] Art. 35 reads as follows: "Application may be made to the courts of a Member State for such provisional, including protective, measures as they may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter".

[9] See *supra* (note 3).

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As further explained below, the adoption of the proposed reforms to the Brussels I Regulation, that is the Brussels I Regulation Recast, has important implications for parties trying to enforce international human rights through civil lawsuits in domestic courts. Civil lawsuits initiated by victims, or possibly by the families of victims, of fundamental rights breaches most likely fall under the Brussels I Regulation Recast's notion of "civil and commercial matters". This is recognised in different ways by different sources, notably in a recent report by Amnesty International and some other international NGOs operating in the field of human rights protection. In fact, this report tersely indicates that: "the existing rules on jurisdiction under the Council Regulation (EC) No 44/2001, also known as the Brussels I Regulation (herein «the Regulation»), provide an important vehicle for victims of human rights violations to bring claims for compensation against EU domiciled companies".[10] Moreover, similar remarks can be derived from a leading commentary on the Brussels I Regulation which states that: "Insofar as the Brussels Regulation is concerned it can be said to encompass an inherent caveat that its rules apply insofar as they are compatible with the Human Rights Convention".[11] Indeed the notion of "civil and commercial matters" would encompass tortious actions against foreign companies abusing human rights,[12] or by colluding with others who breach human rights, actions brought under the Terrorism Asset Freezing Act 2010,[13] the Torture (Damages) Bill ("the Bill"),[14] and the State Immunity Act 1978 in the United Kingdom.[15] Correspondingly, the possibility for victims of fundamental rights breaches to bring claims for reparations in connection with criminal proceedings, as is allowed in several civil law jurisdictions of Member States like France, Spain and Italy, will also be affected by the

[10] See AMNESTY INTERNATIONAL, Joint Amnesty International and ECCJ submission on the Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters, June 2009, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/amnesty_international_and_european_coalition_for_corporate_justice_en.pdf> (3 March 2013). Accordingly see A.P. MORRIS/ S. ESTREICHER, *Global Labor and Employment Law for the Practicing Lawyer*, The Hague 2010, p. 113, who defines the Brussels I Regulation as a: "European «Foreign Tort Claims Act»."

[11] See U. MAGNUS/ P. MANKOWSKI/ A.L. CALVO CARAVACA (eds), *Brussels 1 Regulation*, Munich 2007, p. 623.

[12] Accordingly, see the Leuven/London Principles on Declining and Referring Jurisdiction in International Litigation, adopted by the International Law Association (ILA). For the text of the Principles and the accompanying Report of the rapporteur explaining the same, see: ILA, *Report of the 69th Conference*, London 2000, p. 137-166. For a commentary H. SCHULZE, Declining and Referring Jurisdiction in International Litigation: The Leuven/London Principles, *South African Yearbook of International Law* 2000, p. 161-180, at 164.

[13] The Terrorism Asset Freezing Act 2010 which came into force on 17 December 2010.

[14] The Torture (Damages) Bill provides an additional exception to state immunity – a state would no longer be immune in respect of civil proceedings in UK courts for acts of torture.

[15] *International Legal Materials* 1978, p. 1123.

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Brussels Regulation's reform. If such criminal cases involve an extraterritorial declaration of jurisdiction, complementary civil lawsuits can be hindered by the proposed Brussels Regulation's jurisdictional new discipline.

This paper addresses the effect the Brussels I Regulation Recast will have on these legal proceedings. It starts with a short account of the way in which such a legal suit proceeds in domestic courts; considers the recognition of jurisdiction in these circumstances with regard to the most important cases; and subsequently describes the origins of the Brussels I Regulation Recast and the influence it might have on civil fundamental rights lawsuits if its authors do not encompass expressions discharging such a lawsuit from the suggested jurisdictional discipline. The paper shows that since the Brussels I Regulation Recast was enacted without a specific provision defending the fundamental rights lawsuit, it might hinder one of the most advanced developments in international law and overly hinder current and future efforts by EU member states to conform with legal duties under international law.[16] The paper claims that the Brussels I Regulation Recast should not preclude civil cases based on fundamental rights breaches, in particular due to the relevance to victims of civil redress in national courts and the paucity of judicial bodies in which victims of fundamental rights abuses may seek civil redress from responsible subjects.[17] Finally, the paper proposes alignments to the recently approved Brussels I Regulation Recast and puts forward a proposal for explanation that will avoid these risks, leave unaltered existing ways of access to redress for victims of fundamental rights breaches, and enhance the execution of international provisions in domestic courts.

II. Fundamental Rights Proceedings in National Courts

It has been pointed out correctly that there are a number of major difficulties, most significantly the absence of binding force of international standards set out in instruments such as the Universal Declaration of Human Rights (UDHR)[18] and the non-incorporation of fundamental international legally binding instruments into internal legal orders,[19] which are normally associated with the enforcement of

[16] For analogous remarks on the proposed Hague Judgments Convention see B. VAN SCHAACK, In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Convention, (2001) *Harv. Int'l. L. J* 143. See also B. MURPHY, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, (1999) *Harvard Human Rights Journal* 47 *et seq*.

[17] See, *mutatis mutandis*, B. VAN SCHAACK (note 16), at 143.

[18] Universal Declaration of Human Rights (UDHR), UNGA Res 217 A (III) (10 December 1948).

[19] *Amplius* see A. MORAWA/ Ch. SCHREUER, The Role of Domestic Courts in the Enforcement of Human Rights – A View from Austria, in B. Conforti/ F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts*, The Hague Dordrecht 1997, p. 175 *et seq*. See also ILA, *Private International Law Aspects of Civil Litigation for Human*

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international human rights provisions in domestic courts.[20] As pointed out by Alexander MORAWA and Christoph SCHREUER, nevertheless: "Domestic courts (including civil courts)[21] remain potentially highly effective in safeguarding human rights".[22] Corresponding statements are found in the writings that have claimed the fundamental role that national courts and tribunals could play in international human rights law's enforcement.[23] Moreover and more significantly, noteworthy confirmation of this view is that, in the last three decennia, victims of human rights breaches have frequently tried to enforce international human rights provisions through legal proceedings brought before domestic courts.[24] There are, of course, several possible concurrent explanations for the increased recourse to domestic courts and tribunals for the protection of human rights. That the CESCR General Comment 9 insists on the domestic enforcement of international ESC rights is indeed a possible explanation.[25] Again, the absence of accessible and feasible enforcement disciplines at the international level is an additional element that helps to

Rights Violations – Interim Report (2010), stressing: That at present private international law does not recognize a category of "civil claims for human rights violations", instead simply characterizing these claims as either tortious or contractual, is a further obstacle posed to litigants using civil claims against human rights violations.

[20] See *inter alia* O. SCHACHTER, The Obligation to Implement the Covenant in Domestic Law, in L. HENKIN (ed.), *The International Bill of Rights: The Covenant on Civil & Political Rights*, London 1981, p. 318-319.

[21] But see B. NEUBORNE, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, (2002) *Wash. U. L. Q.* 795, who stresses that such violations are primarily sanctioned by way of criminal prosecutions in countries such as Belgium, Spain, France and Switzerland.

[22] See A. MORAWA/ Ch. SCHREUER, above n. 19, p. 175, who also observed that: "there are, however, relevant obstacles to the effective enforcement of international human rights in domestic courts".

[23] See recently A. ROBERTS, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, *I.C.L.Q.* 2011, p. 58, para. 10.

[24] For a good critical account of national practices on the enforcement of international human rights provisions in national legal systems see B. CONFORTI, National Courts and the International Law of Human Rights, in B. CONFORTI/ F. FRANCIONI (eds) (note 19), at 3 *et seq*.

[25] CESCR General Comment 9 states that: "the central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so: «by all appropriate means», the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place. (Emphasis added)".

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understand the use of national jurisdictions as enforcing tools of international human rights provisions.[26]

With all that said, it is worth stressing that the tendency of defending human rights by using traditional law trials and remedies takes different aspects in civil law and common law legal systems. In civil law countries such as Belgium, France, Italy, Spain and Switzerland actions to enforce international human rights provisions usually proceed as criminal lawsuits brought by legal agents of the state.[27] But of course this is only when the internal courts of these countries, as happened in Italy during the 1980s, do not deny any direct effects for individuals to international human rights provisions due to their incomplete or programmatic normative content.[28] In these legal systems, the victims of the crimes under consideration can either start or join these criminal actions as civil party applications.[29] This procedural specialty has been usefully applied to pursue human rights breaches civilly as well as criminally in a large number of civil law jurisdictions.[30] The main remedy achieved is the prosecution of the defendant, although victims can also seek civil reparations in connection with the criminal proceeding.[31] In contrast, in the United Kingdom, actions to enforce international human rights norms have usually taken the form of civil suits brought by the victims themselves or their legal representatives.[32] The challenged acts are generally pleaded by the

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[26] See *ex multis* W.J. ACEVES, Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation, 2000 *Harv. Int'l L. J.* 132 (who also stresses that since a network of domestic courts which can prosecute offenders is already in existence, there is no need to build further international institutions).

[27] See also Professor NEUBORNE (note 21), stressing that human rights violations are primarily sanctioned by way of criminal prosecutions in countries such as Belgium, Spain, France and Switzerland.

[28] See F. FRANCIONI, The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience, in B. CONFORTI/ F. FRANCIONI (note 19), at 15 *et seq.*

[29] On the various ways in which a private party may participate in criminal proceedings in France and Germany, see, *e.g.*, W.B. FISCH, European Analogues to the Class Action: Group Action in France and Germany, (1979) *Am. J. Comp. L.* 51, 60-65, 71-74.

[30] For example, initiation of such proceedings in Spain by various victims of abuses by the regime of General Augusto Pinochet have led to the request for extradition of General Pinochet from the United Kingdom to Spain. *Amplius* N. ROHT-ARRIAZZA, The Pinochet Precedent and Universal Jurisdiction, (2001) *New Eng. L. Rev.* 311, as quoted by S.P. BAUMGARTNER, Human Rights and Civil Litigation in United States Courts: the Holocaust-Era Cases, (2002) *Wash. U. L. Q.* 835, 841, at para. 31.

[31] *Amplius* C. MC CARTHY, *Reparations and Victim Support in the International Criminal Court*, Cambridge 2012, p. 185 *et seq.*

[32] See *inter alia* S. JOSEPH, *Corporations and Transnational Human Rights Litigation*, Oxford 2004, p. 15-16, who explains that common law countries are more likely than civil law countries to have civil suits against human rights violations committed by MNCs.

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claimants as torts, and the remedies are compensatory damages.[33] This Section gives a brief overview of the way in which cases trying to enforce international human rights provisions have proceeded in domestic courts in these two legal systems with reference to exemplary situations and the jurisdictional grounds under which such cases are processed.

A. The Enforcement of International Human Rights Provisions in Civil Law Systems

Duties to prosecute human rights atrocities such as torture, war crimes and crimes against humanity at a domestic level arise from very different and heterogeneous international legally binding instruments: notably the Geneva Conventions of 1949 and the two Additional Protocols of 1978, the UN Convention on Genocide,[34] and the UN Convention on Torture,[35] which are binding for the majority of the EU Member States as international treaties.[36] If read in combination with the growing perception of the existence of duties to prosecute also under international customary law, this can explain why there has been a "betterment" in prosecutions of international offences[37] in the whole of Europe in the last three decades.[38] Competent authorities in civil law countries are progressively prosecuting private individ-

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[33] See B. STEPHENS, Translating Fil´artiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations, (2002) *Yale J. Int'l L.* 31-53 (also for a thorough discussion of the possibility of defining human rights violations as torts to allow for civil suits). See also B. MOSTAJELEAN, The Success (or is It Failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations, (2008) *The Geo. Wash. Int'l L. Rev.* 507 *et seq.*, who stresses that the United Kingdom's legal system, however, while in numerous respects similar to that of the US, does not have an "Alien Tort Claims Act" equivalent that offers an explicit authorization for civil suits against aliens who commit torts abroad.

[34] UN GENERAL ASSEMBLY, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at <http://www.unhcr.org/refworld/docid/3ae6b3ac0.html> (26 March 2013).

[35] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment United Nations, Treaty Series, vol. 1465, p. 85 *et seq.*

[36] See generally AMNESTY INTERNATIONAL, *Universal jurisdiction: The duty of states to enact and implement universal jurisdiction* (second edition forthcoming 2008). The findings and conclusions of this study were recently confirmed with regard to war crimes by the International Committee of the Red Cross study of customary international humanitarian law. J.-M. HENKAERTS/ L. DOSWALD-BECK, *Customary International Humanitarian Law*, Cambridge 2005.

[37] See T. MERON, The International Criminalization of Internal Atrocities, (1995) *Am. J. Int. L.* 554 *et seq.*

[38] However, the Rome Statute for the International Criminal Court (ICC) *per se* does not stipulate a direct obligation of states to establish and exercise national jurisdiction for international crimes (except Art. 70 ICC Statute). See on this issue, stressing that behind the general concept of the Statute is the notion that the prosecution of international crimes is primarily a task of the individual states.

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uals for extraterritorial violations of international human rights and humanitarian law provisions.[39] Several of these cases[40] deal with the exercise of extraterritorial jurisdiction – normally on the basis of the principle of the passive personality – over the defendant.[41] Prosecutions arising out of internal and international conflicts in Europe and Latin America have often been started in countries such as Belgium, France, Italy and Switzerland against private individuals who are claimed to be responsible for international human rights offences committed in other states.[42]

Moreover, many civil law countries in Europe have adopted internal laws namely allowing the exercise of extraterritorial jurisdiction over serious international human rights violations. For instance, Belgium has adopted a statute (the anti-atrocity law) that provides for the most far-reaching exercise of universal jurisdiction over human rights atrocities of any country.[43] This statute, first adopted in 1993 and revised in 1999, enables Belgian jurisdictional authorities to prosecute offenders of the Geneva Conventions[44] and their additional Protocols.[45] It also enables Belgian courts to prosecute individuals legally responsible for acts of torture, war crimes, crimes against humanity and genocide committed by non-Belgians outside of the Belgian territory against non-Belgians, without even the presence of the accused in Belgium. Similarly, the French Code of Criminal

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[39] For a good and updated account of this practice see E. ENGLE, *Private Law Remedies for Extraterritorial Human Rights Violations* (PhD thesis, Universität Bremen). See also with specific references to the acts of torture K. PARLETT, Universal Civil Jurisdiction for Torture, European Human Rights, *European Human Rights Law Review* 2007, p. 385.

[40] For a commentary see J. FERRER LLORET, Impunity in Cases of Serious Human Rights Violations: Argentina and Chile, *Spanish Y.B. Int'l L.* 1993-94, p. 3, at 20-21.

[41] See, *e.g.*, the Spanish proceedings against Augusto Pinochet and other Latin American former officials. J.G. MC CARTHY, The Passive Personality Principle and Its Use in Combatting International Terrorism, (1989) *Fordham Int'l L.J.* 298 See also K.C. RANDALL, Universal jurisdiction under international law, 1988 *Texas Law Review* 785 *et seq.*, who states that: "[t]he universality principle remains under-utilized in the struggle to eliminate the most heinous crimes of the modern world."

[42] See E. ENGLE (note 39).

[43] See R. LEMAÎTRE, Belgium rules the world: Universal Jurisdiction over Human Rights Atrocities, *Jura Falconis* 2000-2001, p. 255-282. See also See E. DAVID, La Loi belge sur les crimes de guerre, *Revue Belge de Droit International* 1995, p. 668-671.

[44] The Geneva Conventions currently have virtually universal ratification, and serious violations of these treaties – as indicated in, among others, Article 147 of the Fourth Geneva Convention – are conceived to constitute part of customary international law (ICRC Commentary to the Fourth Geneva Conventions 1949, p. 593. Emphasis added).

[45] See 10 February 1999: Loi relative à la répression des violations graves de droit international humanitaire – Wet betreffende de bestraffing van ernstige schendingen van het internationaal humanitair recht [Act of 10 February 1999 on the Punishment of Grave Breaches of International Humanitarian Law], in Moniteur belge – Belgisch Staatsblad, 23 March 1993. For a commentary see E. BREMS, Universal criminal jurisdiction for grave breaches of international humanitarian law: the Belgian legislation, *Singapore Journal of International & Comparative Law* 2002, p. 909-952.

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Evidence embodies a type of passive personality jurisdiction by allowing for the recognition of extraterritorial jurisdiction if the victim is a French citizen.[46]

Several EU civil law countries such as Austria, France, Italy and Spain provide for victim's direct involvement in the criminal proceedings.[47] In such legal systems, the damaged party may commence a criminal trial where a public prosecutor omits to act or in some circumstances can introduce a civil party application ("action civile") alongside the criminal complaint in order to obtain compensation.[48] When the injured party is to act directly as a "partie civile", he can obtain – in some civil law countries such as Belgium and France[49] but not Italy[50] – several procedural benefits, such as the right to utilise the investigatory apparatus of the state, which would be otherwise unattainable for him in a strictly civil litigation.[51] When the victim directly introduces a civil party application alongside the criminal complaint, he may no longer be qualified as a witness and therefore may not be interrogated without being given legal assistance.

The victim that appears *in parte civile* in criminal cases may obtain relief, depending on the specific circumstances, in the form of restitution or compensation, within the framework of a criminal trial.[52] When a civil judicial decision is released, it can be enforced if the defendant's assets are found under the rules and general principles applicable to the recognition and execution of foreign decisions and judgments.[53]

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[46] Code de Procédure Pénale [C. PR. PEN.] art. 689, 1 (Dalloz 1987-88) (Fra). This amendment provides that "[a]ny foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national."

[47] *Amplius* on the operation of the *partie civile* system in various civil law countries see J.A. JOLOWICZ, Procedural Questions, in A. TUNC (ed.), *International Encyclopedia of Comparative Law*, The Hague 1986, vol. II, part II, ch. 13, p. 3-15. See also M.G. AMONETTO, Azione penale e ruolo della vittima in Italia e in Francia, *IP* 1995, p. 185 *et seq*.

[48] See M. CHIAVARIO, Private Parties: the rights of the defendant and the victims, in M. DELMAS-MARTY/ J.R. SPENCER (eds), *European Criminal Procedures*, Cambridge 2002, p. 543 *et seq.*, who also stresses that: " … *unlike in other civil law countries* in Italy however … the complaint and the constituting oneself a parte civile remain two entirely separate processes, the second having the sole purpose of pleading the civil interests involved in a prosecution which has already been instituted". (emphasis added).

[49] See *inter alia* S. GEWALTIG, *Die action civile im französischen Strafverfahren*, Frankfurt am Main 1990, p. 6.

[50] See M. CHIAVARIO (note 48), at 543, para. 3, underlying that: "the Italian system is a significant example of protection of the rights of the victim (independent of his qualifications as complainant or parte civile)".

[51] See C. VAN DEN WYNGAERT, Belgium, in C. VAN DEN WYNGAERT (ed.), *Criminal procedure systems in the European Community*, London/ Brussels/ Edinburgh 1993, p. 16-18.

[52] See M. CHIAVARIO (note 48).

[53] See *ex multis* O. LOPEZ PEGNA, *I Procedimenti Relativi all'Efficacia delle Decisioni Straniere in Materia Civile*, Padua 2009.

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Victims of human rights violations are progressively employing civil party applications to achieve legal compensation.[54] In various respects, this phenomenon is elucidated by the litigations in France against Javor for acts of torture as defined in the CAT.[55] This is though, to quote Professor Brigitte Stern, this case constitutes a good example of the reluctance of the French judicial authority to assert universal jurisdiction.[56]

In 1996 numerous individuals and groups started criminal proceedings in France arising out of the torture of the Yugoslavian claimants who also brought tort claims through civil party application.[57] The court held that according to Art. 689-1 and Art. 689-2 of the French Code of Criminal Evidence all individuals who, outside France, are responsible for acts of torture as defined in the CAT, can be prosecuted and judged by France if found in the French territory.[58] In *Javor*, nevertheless, there was no specification that the defendants were in France.[59] Since the defendant was not proven by the prosecutor to be in France claims on the basis of Art. 689-1 and Art. 689-2 could not succeed.[60] The court did recognize that:

> "all persons who are victims of a crime in breach of the New York Convention [Against Torture of 1984] have a right to bring a tort claim against the criminal tortfeasor" and that "denial of this right constitutes denial of an equitable trial as guaranteed by the European Convention on Human Rights".[61]

The claims under the CAT could not be proceeded because of jurisdiction.[62] Nevertheless, claimants also submitted claims on the ground of the Geneva conventions that entered into force in France on 28 December 1951.[63] There the court observed that contracting states agree to enact the indispensable legislative measures to eliminate through effective sanctions serious breaches of the provisions of those

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[54] See Brief of Amicus Curiae the European Commission Supporting Neither Party, *Sosa v. Alvarez-Machain*, No 03-339, U.S. Sup. Ct., 23 January 2004, p. 21, para. 48, as quoted by AMNESTY INTERNATIONAL, Universal Jurisdiction: The scope of civil universal jurisdiction, 2012, available at <http://documents.law.yale.edu/sites/default/files/Amnesty%20International%20%20Universal%20Jurisdiction_%20The%20scope%20of%20universal%20civil%20jurisdiction%20_%20Amnesty%20International.pdf> (15 January 2013).

[55] French Cour de Cassation (Chambre criminelle), 26 mars 1996, *Javor*, No 95-81527, *Bull. crim.* 1996, vol. 132, 379, available at <http://www.legifrance.gouv.fr/WAspad/ UnDocument?base=CASS&nod=CXRXAX1996X03X06X00132X000> (3 February 2013).

[56] See B. STERN, Universal Jurisdiction over Crimes Against Humanity under French Law-Grave Breaches of the Geneva Conventions of 1949-Genocide-Torture-Human Rights Violations in Bosnia and Rwanda, (1999) *Am. J. Int. L.* 529.

[57] *Ibidem.*

[58] *Ibid.*

[59] See E. ENGLE (note 39).

[60] *Javor* (note 55).

[61] *Ibidem*, as reported and translated by E. ENGLE (note 39).

[62] *Javor* (note 55).

[63] *Ibidem.*

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treaties. Nevertheless, the court also observed that: a) the obligations of those treaties only bind states, and b) the treaties are not immediately applicable in internal legal orders, and implies the reason thus is that this particular convention is only binding for states. Expressly, the court also observed that the rights embodied in the Geneva conventions are far too vague and generic to be self-executing.[64] Art. 689 of the French Code of Criminal Evidence acknowledging allowable cases of universal jurisdiction in France did not apply to the case since the Geneva conventions are not immediately applicable.[65] Therefore the claimant had no claim on the ground of the Geneva conventions.

Although no claim was possible in this case on the basis of the Geneva conventions the court interestingly did indicate that all conventions are nonetheless an essential component of French law implying that on other circumstances a lawsuit based on the Geneva conventions could succeed.[66] In particular the court maintained that:

> "An international convention which is sufficiently precise and does not therefore require particular measures prior to its application is directly applicable.
>
> Such a convention [i.e. one sufficiently precise to require no enabling legislation to have effect in domestic law] creates rights which benefit individuals".[67]

B. The Enforcement of International Human Rights Provisions in Common Law Countries

Unlike in EU civil law countries, such as Belgium and France, cases submitted in the United Kingdom in order to enforce human rights provisions are not generally pursued through criminal but through civil courts.[68] This is even though:

> "it is easy to connect human rights protection with criminal cases, especially for first-generation human rights (*i.e.* civil and political rights)".[69]

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[64] *Ibid.*

[65] *Ibid.*

[66] *Amplius* E. ENGLE (note 39).

[67] As reported and translated by E. ENGLE (note 39), at 158.

[68] For a good account of the practice on the enforcement of international human rights law provisions before UK courts see R. HIGGINGS, The role of domestic courts in the enforcement of international human rights: The United Kingdom, in B. CONFORTI/ F. FRANCIONI (eds) (note 19). For a clear exposition of the procedural requirements claimants shall meet before they can successfully bring a civil suit before the British courts see HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASSOCIATION (BRITISH BRANCH), Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad, reprinted in *European Human Rights Law Review* 2001, p. 165.

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But clearly there are at least three possible explanations for the different attitude of the UK on this issue.

The first explanation is that human rights breaches:

> "can be remedied in domestic British law through torts in of the law of nations, ordinary domestic torts and the Human Rights Act which essentially enables ECHR claims to be made in British courts".[70]

Another possible explanation is that:

> "a civil law suit also attributes responsibility but without the moral implication of blame and guilt".[71]

Indeed if compared to a criminal suit a civil suit can better guarantee a collective memory and "permit a more thorough airing of victims' stories [...] along with an expression of judicial solicitude".[72] In this regard, a criminal proceeding can be centred on the culpability of the offender at the expense of the injury suffered by the victim. Finally, if the victim seeks to obtain:

> "[...] redress from the individual perpetrator or the State which is accountable for human rights violations, the standard of proof in civil proceedings is more convenient for a victim than the one that applies to criminal proceedings".[73]

Against this general background, victims of human rights offences have normally no other better option than to submit civil tort cases as an alternative. Several such civil tort cases have been generally presented in the United Kingdom on the grounds of the ordinary domestic tort regime[74] allowing such litigations.[75] This paragraph identifies the handful of criminal proceedings started in the UK and in some other common law countries in the EU and after that it furnishes a brief account of the ways in which victims of international human rights offences have sought civil redress in the United Kingdom.

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[69] See S. GUO, Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects, *Chinese Journal of International Law* 2009, p. 161-179.

[70] See E. ENGLE (note 39), at 147.

[71] See also P. ZUMBANSEN, Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation, *German Law Journal* 2004, p. 1499 *et seq*.

[72] See J.E. ALVAREZ, Rush to Closure: Lessons of the Tadic Judgment, (1998) *Mich. L. Rev.* 2102.

[73] Accordingly, see B. MURPHY (note 16), at 47. See also HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASSOCIATION (BRITISH BRANCH) (note 68), at 133 for a discussion of the barriers to civil litigation in England for Fil´artiga-type cases.

[74] The UK's legal system, although in several respects analogous to that of the US, does not have an Alien Tort Claims Act ("ATCA") equivalent which grants an explicit authorization for civil actions against aliens who commit torts in another country. See B. MOSTAJELEAN (note 33), at 507 *et seq*.

[75] *Ibidem*, at 147.

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C. Criminal Prosecutions in Common Law

In his article published in 2004 Christoph J.M. SAFFERLING observed that: "the concept of protecting core rights and fundamental principles through penalising certain behaviour and prosecuting the offenders is a perfectly normal concept in a national society".[76] A robust confirmation of this is that the enforcement of human rights provisions have been pursued through criminal courts also in the UK and in other countries whose domestic law is based on the common law tradition.

Regarding criminal proceedings before British courts, it must first be observed that these are no longer considered as seeking exclusively to punish conduct harmful to society in general, but also to decide whether to order an offender to give compensation to the victim.[77] Moreover, in some countries such as England and Wales not only are prosecutors required to take into consideration the interests and views of the victims in their decision-making at critical stages of the procedures – *e.g.* when deciding whether to accept a plea offered – but also victims have been awarded the right to dispute certain decisions of the prosecutor, in particular the decision to discontinue a prosecution.[78]

The *Tzipi Livni* case,[79] where a British court issued an arrest warrant for Israel's former foreign minister over war crimes supposedly committed in Gaza, marks a major decision recently taken in application of the principle of universal jurisdiction in the United Kingdom.[80] In asserting jurisdiction, the Westminster magistrates' court implicitly reasoned that the power to try and punish a person for an offense is vested in every State regardless of the circumstance that the offense was committed outside its territory by a person who did not belong to it.

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[76] See C.J.M. SAFFERLING, Can Criminal Prosecution be the Answer to Massive Human Rights Violations?, *German Law Journal* 2004, p. 1473-1474, who also stresses that: "Traditionally the concept is applied to protect the right to life, to protect the economic basis of a society (individual property), and protect other fundamental values which are conceived of as being essential for community life. In modern societies the high standard of protection that is attributed to criminal law is more and more expanded to other areas, like the protection of the environment or safeguarding reliability in economic trade".

[77] See J.C. OCHOA, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Violations*, The Hague 2013, p. 138.

[78] *Ibidem*.

[79] See I. BLACK/ I. COBAIN, British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni, *The Guardian*, available at <http://www.guardian.co.uk/commentisfree/2011/mar/30/coalition-criminal-justice-universal-jurisdiction> (3 March 2013).

[80] See Section 68, in combination with section 51 of the International Criminal Court Act 2001, providing for jurisdiction in respect of crimes against humanity, genocide and war crimes over an accused person "who committed the relevant acts outside the United Kingdom at a time he was not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom", in the words of section 68 (1). For the qualification of these provisions as a manifestation of universal jurisdiction see R. CRYER, Implementation of the International. Criminal Court Statute in England and Wales, *I.C.L.Q.* 2002, p. 733, at 742.

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Since then the UK, under the concurring pressure from Israel and some sectors of the British public opinion and press which strongly criticised Tzipi Livni's arrest warrant, introduced changes in the law governing arrest warrants for war crimes (the Police Reform and Social Responsibility Act).[81] These changes were made in order to restrict the issue of arrest warrants, generally in respect of an individual on a short term visit to the UK,[82] on the application of a private prosecutor where jurisdiction is grounded on universal jurisdiction. Accordingly, these changes prevent private applications for arrest warrants in suspected war crimes cases without the consent of the Director of Public Prosecutor.[83] The crimes encompassed include serious breaches of the Geneva Conventions, torture and piracy.[84]

In contrast to some other common law jurisdictions such as Scotland,[85] there are no significant criminal cases for torture and crimes against humanity in the United Kingdom. The only relevant exception is the landmark hearings concerning the requests by Spain, Belgium, France and Switzerland for the extradition of the former Chilean President, Pinochet, with respect to charges of torture.[86] A possible explanation of this situation is that the legislation giving the United Kingdom universal jurisdiction over acts of torture seriously undermines it by providing that it is a complete defence if the conduct was lawful in the state where the acts of torture occurred. According to a report by Amnesty International,[87] such legislation might even be considered to apply when the country involved has not characterised torture as a crime or where the executive has given an authoritative legal opinion that a specific method of torture, such as waterboarding, was not torture.[88]

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[81] Police Reform and Social Responsibility Act 2011, available at <http://www.legislation.gov.uk/ukpga/2011/13/contents/enacted/data.htm>. For a short commentary see D. AKANDE, Proposed Amendments to UK's Universal Jurisdiction Laws, *Ejil Talk!*, available at <http://www.ejiltalk.org/proposed-amendments-to-uks-universal-jurisdiction-laws/>.

[82] See S. WILLIAMS, Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, *The Modern Law Review* 2012, p. 368–386.

[83] See, *e.g.,* Section 151 of this Act that is titled "Restriction on issue of arrest warrants in private prosecutions".

[84] See D. AKANDE (note 81).

[85] In Scotland, Mohammed Mahgoub, a Sudanese medical doctor, was charged with torturing detainees following the 1989 *coup d'état* in Sudan. In 1999, nevertheless, the prosecution dropped the charges without any clarification. See J. ROUGVIE, Sudan Torture Charges Dropped, *Scotsman* 28 May 1999, p. 4.

[86] References are found in G. TRIGGS, Challenges for the International Criminal Court: Terrorism, Immunity Agreements and National Trials, in U. DOLGOPOL/ J. GAIL GARDAM, *The Challenge of Conflict: International Law Responds*, The Hague 2006, p. 315 *et seq*.

[87] See AMNESTY INTERNATIONAL, Ending Impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law, available at <http://www.redress.org/downloads/publications/UJ_Paper_15%20Oct %2008%20_4_.pdf>.

[88] See, *e.g.,* Sections 134(4) and 5(b)(iii) of the Criminal Justice Act which provide that:

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However, despite these and other criticisms this legislation has not yet been amended.

D. Civil Lawsuits in Common Law Countries

Due to the growing reluctance of EU common law countries such as the UK to initiate criminal proceedings on the ground of universal jurisdiction, civil proceedings have turned into an essential instrument for victims of human rights offences to accomplish international human rights law provisions and achieve legal remedy. Especially in the United Kingdom, victims of human rights offences have pursued civil lawsuits alleging tort breaches against human rights offenders repeatedly over the last three decades.[89] To proceed, British courts shall have both jurisdiction over the defendant and substantive jurisdiction over the claim. This paragraph illustrates the legal framework which governs these suits in the United Kingdom.

In the United Kingdom, cases aiming to enforce international human rights provisions and general principles proceed under different sources of subject-matter jurisdiction.[90] The most often invoked source is the common law on torts.[91] A noteworthy application of this law to a claim involving international human rights norms is found in the *Lubbe* case,[92] in which the House of Lords found a UK company national liable in tort to anybody injured by its subsidiary company based in South Africa.[93]

Even earlier than that, in 1988, the UK adopted the Criminal Justice Act of 1988 that criminalized torture abroad[94] in order to carry out the intent of the

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> "(4) It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.
>
> (5) For the purpose of this section "lawful authority, justification or excuse" means – …(b) in relation to pain and suffering inflicted outside the United Kingdom . . . (iii) in any other case, lawful authority, justification, or excuse under the law of the place where it was inflicted."

[89] See, generally, HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASSOCIATION (BRITISH BRANCH) (note 68).

[90] *Lubbe v Cape Plc* [2000] UKHL 41.

[91] *Amplius* LORD BINGHAM OF CORNHILL, Tort and Human Rights, in P. CANE/ J. STAPLETON (eds), *The Law of Obligations, Essays in Celebration of John Fleming*, Oxford 1998, p. 1, at 2.

[92] *Lubbe v Cape Plc* (note 90). For a commentary see C.G.J. MORSE, Not in the Public Interest? Lubbe v. Cape Plc, (2002) *Texas International Law Journal* 541-557.

[93] *Lubbe v. Cape Plc* (note 90), per LORD BINGHAM. See also R. MEERAN, Liability of Multinational Corporations: A Critical Stage, available at <http://www.labournet.net/images/cape/campanal.htm> (3 March 2013); A. BOGGIO, The Global Enforcement of Human Rights: The Unintended Consequences of Transnational Litigation, *The International Journal of Human Rights* 2006, p. 325-340.

[94] Section 134 of the Criminal Justice Act 1988.

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Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the Torture Convention). The Criminal Justice Act of 1988 implicitly held the view that the Torture Convention is "enforcement-oriented" in that it obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts and that "[o]ne such obligation is to provide means of civil redress to victims of torture".[95] The legislative history makes it clear that the intent of the drafters of the Criminal Justice Act was to provide a defence to the crime of torture if the person had "lawful authority, justification or excuse" and to codify the prohibition to use as evidence any statement obtained under torture.[96] This history also stresses the significance of defending fundamental rights around the globe and of allowing access to British courts to victims of acts of torture.[97]

With the Crime and Security Act (TA) 2010,[98] the United Kingdom introduced provisions enabling the creation of a scheme to compensate direct victims of terrorism overseas (known as the Victims of Overseas Terrorism Compensation Scheme).[99] Both the drafting history and wording of this Act indicate that payments under the statutory scheme can only be made in respect of incidents that the Secretary of State (in practice, the Foreign Secretary) has decided it is appropriate to designate in accordance with section 47 of the Crime and Security Act 2010. When establishing whether it is appropriate to designate an incident, the Secretary of State will have regard to all the circumstances and especially the FCO travel advice to the area at the time of the incident.[100] As a result of this, subject to particular circumstances, incidents will not be designated for the aim of the scheme where they occur in regions of the world where the FCO has advised against all travel.[101] The same designation process will apply to the ex gratia scheme.[102]

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[95] Article 14 of the Convention, which contains no geographic restriction, requires each state party to ensure in its legal system that any victim of an act of torture, regardless of where it occurred, obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. See C.K. HALL, The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad, *EJIL* 2007, p. 921-937; J. FINKE, Sovereign Immunity: Rule, Comity or Something Else?, *EJIL* 2010, p. 853-881 (stressing that the meaning of Article 14 and thereby the scope of the obligation is however unclear) (emphasis added).

[96] See GREAT BRITAIN: PARLIAMENT: JOINT COMMITTEE ON HUMAN RIGHTS, The UN Convention Against Torture (UNCAT): Nineteenth Report of Session 2005-06, p. 172.

[97] *Amplius* C. MONGOMERY, Criminal Responsibility in the UK for International Crimes beyond Pinochet, in M. LATTIMER/ P. SANDS (eds), *Justice for Crimes against Humanity*, Oxford 2003.

[98] The Crime and Security Act 2010 received Royal assent on 8 April 2010.

[99] Section 48 of the Crime and Security Act.

[100] Section 48 of the Crime and Security Act.

[101] See MINISTRY OF JUSTICE, Victims of Terrorism Overseas Equality Impact Assessment, para. 68, available at <https://consult.justice.gov.uk/.../victims.../victimsof terrorismeia.pdf>.

[102] *Ibidem.*

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Lastly, since international human rights atrocities are generally committed by state officials,[103] victims of human rights violations can attempt to start civil proceedings directly against a responsible state (including a political subdivision, agency or instrumentality of it)[104] under the British State Immunity Act of 1978 ("BFSIA").[105] This Act, which was adopted to implement the European Convention on State Immunity of 1972 into British law, creates presumptive immunities for foreign states that can be over-ruled only in well-defined and exceptional circumstances.[106] For instance, it has been stated that a foreign state cannot claim immunity before British courts, *inter alia*, (a) if it has waived its immunity either explicitly or by implication; (b) if the action is grounded upon a commercial activity carried on in the territory of the United Kingdom by the foreign state;[107] or upon an act performed in the United Kingdom in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United Kingdom in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United Kingdom; c) if money damages are sought against a foreign state for death or personal injury, or damage to or loss of property, occurring in the United Kingdom and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his employment or office.[108] But, unlike the Foreign Sovereign Immunities Act (FSIA) as amended in 1996,[109] the BFSIA does not contain a human rights exception to sovereign immunity that allows for the exercise of jurisdiction over acts which occurred abroad.[110] Thus civil actions

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[103] See M. RAU, After Pinochet: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations – The Decision of the European Court of Human Rights in the Al-Adsani Case, *German Law Journal* 2002, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=160> (stressing that there are only a few international human rights provisions, such as the prohibitions of slavery and genocide, that also apply to private individuals).

[104] However it does not expressly include within its definition of the term "State" government officials acting in an official capacity. Nonetheless, the British House of Lords, relying on settled international law, interpreted "State" to include "servants or agents, officials or functionaries of a foreign state" acting in an official capacity. See C.A. BRADLEY/ J.L. GOLDSMITH, Individual Officials, and Human Rights Litigation, *Green Bag* 2010, p. 13.

[105] The British State Immunity Act 1978, (1983) 64 *ILR* 718.

[106] See R.K. REED, A Comparative Analysis of the British State Immunity Act of 1978, (1979) *Boston College International and Comparative Law Review* 175-222.

[107] See recently the landmark decision of the Supreme Court (*NML Capital Limited* (Appellant) *v Republic of Argentina* (Respondent) [2011] UKSC 31) confirming that states cannot claim immunity when facing enforcement in England of foreign adverse judgments in commercial cases.

[108] *Amplius* E.K. BANKAS, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts*, Heidelberg 2005, Ch. 4.

[109] See Act of 24 April 1996, Pub. L. 104-32, title II, § 221(a), 110 Star. 1241.

[110] For some criticisms see *inter alia* B. PAUST, Suing Saddam: Private Remedies for War Crimes and Hostage-Taking, (1991) *Virginia Journal of International Law* 351, 374; J.A. BLAIR/ K.E.M. PARKER, The Foreign Sovereign Immunity Act and International Human

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cannot be brought before British courts by foreigners against a state or one of its employees or officials if money damages are sought against a foreign state for personal injury or death that was caused by an act of extrajudicial killing, torture, aircraft sabotage or hostage taking where the state has been designated a state-sponsor of terrorism.[111]

III. The Significance of Civil Remedies in National Courts

Civil actions seeking remedies in domestic courts play a fundamental role in the national efforts to apply international human rights rules and general principles.[112] First and foremost, they provide a tool by which victims can commence and superintend trial court proceedings.[113] Further, civil actions promote the recovery of victims, the avoidance of future breaches, and the enunciation of norms in manners that other types of redress cannot.[114] This happens since civil cases involve the victim directly in the legal proceedings. In other words, the victim decides to commence the proceeding and then plays a pivotal role throughout. Advocates and attorneys working with victims of human rights violations have noted that this active participation within the legal system can be empowering and can restore a sense of justice within victims of grave human rights abuses for whom the courts of their countries provided no recourse. Indeed civil actions have the potential to revive the dignity of victims and satisfy a demand for justice. In this way, the pursuit of a civil suit may contribute to the satisfaction of the victim – a notion that is deemed by some to be an independent objective of the tort system.

Notwithstanding the worldwide efforts to establish systems of accountability for human rights breaches on the international/regional level,[115] few

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Rights Agreements: How they Co-exist, *USFLR*, 1982-83, p. 71; A.H.E. MORAWA/ C.H. SCHREUER, International Human Rights Enforcement – A View from Austria, in B. CONFORTI/ F. FRANCIONI (eds) (note 19), at 186 *et seq.*; P. DE SENA/ F. DE VITTOR, State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case, *EJIL* 2005, p. 89-112.

[111] On the subject see *inter alia* J. BRÖHMER, *State Immunity and the Violation of Human Rights*, The Hague 1997, Ch. 4.

[112] See, *e.g.,* P.D. MORA, *Transnational Human Rights Litigation: Obtaining a Civil Remedy Before an English Court for Acts of Torture Committed in a Foreign Jurisdiction*, Durham 2007, available at <etheses.dur.ac.uk/2780/1/2780_857.pdf> (3 February 2013).

[113] See, *inter alia,* F.J. LAROCQUE, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Litigation*, Toronto 2010, Part I.

[114] See, generally, J.M. JACOB, *Civil Justice in the Age of Human Rights*, Aldershot 2007, esp. Ch. 2.

[115] For a good resume of these efforts see S. RATNER/ J. ABRAMS, *Accountability for Human Rights Atrocities: Beyond the Nuremberg Legacy*, Oxford 2009, Part II.

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international mechanisms are effectively reachable by individual victims and their legal representatives.[116] Mainly, this is because several of these international institutions are quasi-judicial bodies which cannot make individuals responsible for the social consequences of their actions or cannot grant monetary relief to individual victims.[117] For instance, the institutions established by the U.N. Charter, international multilateral agreements, or regional agreements generally address state responsibility and norm compliance but do not assign liability to individual defendants, supply victims with a judicial arena in which to confront their offenders and bear witness or produce enforceable remedies.[118] The picture does not change if one looks at the ad hoc international tribunals and courts dealing with criminal cases against individuals established for Yugoslavia,[119] Rwanda,[120] Sierra Leone,[121] Lebanon,[122] Cambodia,[123] and East Timor.[124] Although overall they have

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[116] See, recently, N. PILLAY, Establishing Effective Accountability Mechanisms for Human Rights Violations, *UN Chronicle*, available at <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2012/deliveringjustice/establishingeffectiveaccountability mechanisms> (3 March 2013). See also A. KHALFAN, Accountability Mechanisms, in M. LANGFORD/ W. VANDENHOLE/ M. SCHEININ/ W. VAN GENUGTEN (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge 2013 (on file with the author).

[117] *Amplius* S.D. BACHMANN, *Civil Responsibility for Gross Human Rights Violations: The Need for a Global Instrument*, Cape Town 2007, Part. A.

[118] The European Court of Human Rights ("the European Court"), which operates under the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended in 1998 ("the European Convention"), is limited in the forms of redress it can offer to individuals. See, *e.g.,* Article 41, 213 U.N.T.S. 221, amended by Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, Eur. T.S. No 155, available at <http://conventions.coe.int/treary/EN/Treaties/html/005.htm>, which states that the European Court can award "just satisfaction" to the injured party if the "internal law of the High Contracting Party concerned allows only partial reparation to be made".

[119] See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/25704 (1993) (thereinafter Yugoslavia Statute).

[120] See *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States*, S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/Res/955 (1994), reprinted in *International Legal Materials* 1994, p. 1598.

[121] Security Council Resolution 1315 (2000) (deciding to establish a Special Court for Sierra Leone), may be found at <http://www.un.org/Docs/scres/2000/res1315e.pdf>.

[122] UN Security Council Resolution 1664 (29 March 2006).

[123] The Extraordinary Chambers in the Courts of Cambodia were established by an agreement between the Government of Cambodia and the United Nations in 2004, after years of negotiations. The ECCC began work in 2006 and the first case began in February 2009 (http://www.ibanet.org/Committees/WCC_Cambodia.aspx) (3 March 2013).

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been successful in articulating international legal norms,[125] since the jurisdiction of these courts and tribunals is limited substantively, temporally, and geographically, they are permitted to prosecute only a small portion of offenders.[126] As a result, internal courts can provide victims with a type of remedy which is unactionable before international fora.[127] Lastly, civil actions brought before domestic courts enhance the fulfilment of states' duties under international law to supply victims of human rights offences with civil remedies.[128] Due to the important aims satisfied by civil redress, the present restrictions on international enforcement systems, and the fundamental right of victims to reparations, it is vital that victims of human rights abuses keep the possibility to bring civil claims within internal fora.[129]

IV. The Limitations of Civil Proceedings

Clearly there are restrictions on the usefulness of civil proceedings seeking remedies on behalf of victims of human rights offences.[130] The evidence indicates that civil proceedings are of uncertain duration, generally complex and resource-intensive[131] since they involve claims for compensation. This is especially true

[124] See UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000.

[125] See, *inter alia,* C. RAGNI, *I tribunali penali internazionalizzati: fondamento, giurisdizione e diritto applicabile*, Milano 2012.

[126] *Amplius* see A. SMEULERS/ F. GRÜNFELD, *International Crimes and Other Gross Human Rights*, Leiden 2011, p. 44 *et seq.* (who also stresses that these tribunals are not allowed to supply victims with pecuniary or other material remedy). See also generally N. RODLEY, The UN Human Rights Machinery and International Criminal Law, in M. LATTIMER/ P. SANDS (note 97).

[127] See recently S.M. ALAM, Enforcement of International Human Rights by Domestic Courts in the United States, *Annual Survey of International & Comparative Law* 2003, available at http://digitalcommons.law.ggu.edu/annlsurvey/vol10/iss1/3 (3 January 20013); W.J. ACEVES (note 26), at 177 (stressing that many of the statutes and conventions governing these international mechanisms specifically detect the primary role to be played by internal courts and tribunals in bringing human rights offenders to justice).

[128] See *ex multis* B. MURPHY (note 16); F.J. LAROCQUE (note 113). See also INTERNATIONAL LAW ASSOCIATION (ILA), Resolution No 2 /2012 International Civil Litigation and the Interests of the Public, available at <www.ila-hq.org/en/committees/index.cfm/cid/1021> (3 March 2013).

[129] *Ibidem.*

[130] See M. MARKOVIC, Vindicating Human Rights Through Civil Litigation, available at <http://podcast.ulcc.ac.uk/accounts/kings/KCL_LLM/Law_PIL_Global_Justice_Series_5_Milan_Markovic.mp3>.

[131] See Legal Aid, Sentencing and Punishment of Offenders Bill, implementing the January 2010 report, "Review of Civil Litigation Costs", of LORD JUSTICE JACKSON (stressing that the UK government, however, is about to implement recommendations for reforming the civil costs system, including eliminating the right of successful claimants to recover success fees from the defendant).

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when a multinational corporation (MNC) is involved as defendant in a human rights case before a civil court.[132] In fact, because of "the complex and protracted nature of these litigations, legal costs are often high (even substantially higher than compensation)".[133] Therefore, as pointed out by Richard MEERAN, "if a successful claimant's legal costs can only be recovered from an MNC to the extent that they correspond to the level of compensation and the level of compensation is reduced (by the Rome II Regulation) in line with compensation in the MNC's host state, then this will serve as a powerful deterrent against claimants' lawyers undertaking these cases".[134] Furthermore, and more generally, to some, a civil judgment alone "may not carry the moral impact of a criminal conviction, since tort actions are viewed as a response to a private injury, rather than to an injury of concern to the whole community".[135]

Civil cases seeking to enforce international provisions on economic, social and cultural (ESC) rights have often resulted in unenforceable judgments.[136] Historically, compared to civil and political rights, there has been considerably little attention placed on the protection systems to enforce ESC rights not only at the international but also at the domestic level.[137] Therefore, relatively few judgments stemming from civil cases seeking to apply international provisions on ESC rights have been effectively enforced in Italy, France, Spain or the UK.[138] These obstacles are not inherent to this type of litigation. Indeed difficulties may also persist in human rights litigations involving states as defendants because of the rule of state immunity in civil proceedings.[139] This is so even though there is currently a

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[132] *Amplius* R. MEERAN, Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States, *City University of Hong Kong Law Review* 2011, p. 18 *et seq*. See also E. J. CABRASER, Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System, (2004) *Vand. L. Rev.* 2211 *et seq.*; A. FRIEDMAN, Beyond the Tort/Crime Distinction, (2006) *B.U.L. Rev.* 103.

[133] *Ibidem*, 19.

[134] *Ibid*.

[135] See B. STEPHENS, Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?, (1997) *Alb. L. Rev.* 585, as quoted by B. VAN SCHAACK (note 16), at 156.

[136] *Amplius* F. SEATZU, Sull'interpretazione del Patto delle Nazioni Unite sui diritti economici, sociali e culturali: regole, criteri ermeneutici e modelli, *Anuario Mexicano de Derecho Internacional* 2012, p. 2 *et seq*.

[137] See INTERNATIONAL COMMISSION OF JURISTS, Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability, available at http://www.humanrights.ch/upload/pdf/080819_justiziabilitt_esc.pdf (3 March 2013).

[138] F. SEATZU (note 136).

[139] State immunity derives from the principle of sovereign equality found in Article 2(1) of the UN Charter. On the subject see, *inter alia,* J. FLAUSS, Droit des immunités et protection internationale des droits de l'homme, *RSDIE* 2000, p. 299; G. RESS, The Changing Relationship between State Immunity and Human Rights, in M. DE SALVIA/ M. VILLIGER (eds), *The Birth of European Human Rights Law – L'éclosion du Droit européenne des Droits de l'homme, Liber Amicorum Carl Aage Nørgaard*, The Hague 1998,

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trend in several states towards an exception to the rule of immunity in cases relating to serious human rights abuses.[140]

V. The Brussels I Regulation Recast and the Possible Threats to Human Rights Litigations before EU Courts

As considered in the sub-paragraphs below, some progress in the areas of the conflict of laws and international civil procedure in Europe might enhance the enforcement pathway record of civil suits seeking remedies for the victims of human rights offences. The Brussels I Regulation Recast, recently approved by the European Parliament and Council, create the foundation for a more effective, less expensive and quick enforcement process that will allow claimants litigating in EU States to seek enforcement of their civil decisions in any EU State in which the defendant holds assets. This is not, however, without a cost. The proposed reform of the Brussels I Regulation may determine the exercise of jurisdiction by the competent national authorities in a manner which affects cases seeking civil remedies for breaches of human rights provisions. Clearly, unless the final version of the amended Brussels I Regulation explicitly excludes cases seeking to enforce international human rights provisions from its jurisdictional discipline, cases seeking civil losses submitted on the basis of extraterritorial jurisdiction can be precluded in the courts of EU states.

The sub-paragraphs below discuss the background of the Brussels I Regulation Recast. They briefly discuss the Brussels/Lugano system on which the Brussels I Regulation Recast was founded. In particular, the sub-paragraphs below illustrate the reformed "Brussels I" Regulation's jurisdictional regime with specific reference to the impact it might produce on litigations within domestic courts aiming to enforce international human rights provisions.[141] Further, the author

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p. 175; M. Karagiannakis, State Immunity and Fundamental Human Rights, *Leiden J. Int'l L.* 1998, p. 11; M. Gavouneli, War Reparation Claims and State Immunity, *Revue hellénique de droit international* 1997, p. 595; J.A. Gergen, Human Rights and the Foreign Sovereign Immunities Act, (1995) *Virginia J. Int'l L.* 765; A.C. Belsky/ M. Merva/ N. Roht-Arriaza, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violation of Peremptory Norms of International Law, (1989) *Calif. L. R.* 365; M. Reimann, A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz v. Federal Republic of Germany, (1995) *Mich. J. Int'l L.* 403; A. Zimmerman, Sovereign Immunity and Violation of International Jus Cogens: Some Critical Remarks, (1995) *Mich. J. Int'l L.* 433; P. De Sena/ F. De Vittor (note 110), at 89 *et seq.*

[140] See below note 145.

[141] For a discussion of the impact of the Brussels I Regulation on human rights litigations see, *inter alia,* O. De Schutter, The Accountability of Multinationals for Human Rights Violations, *European Law,* p. 33 (Center for Human Rights and Global Justice Working Paper); B. Mostajelean (note 33), at 497, 507; M. Peel, European Lawyers in Hunt for Big Game, *Financial Times* 30 January 2008.

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criticises the absence in the text of the Brussels I Regulation Recast of a special exception applying only to litigations aiming to enforce international human rights provisions that would effectively guarantee the right of victims to seek reparation within national courts without significantly changing the overall framework and structure of the Brussels I Regulation Recast Regulation's jurisdictional discipline.

VI. Background to the Brussels I Regulation Recast

The Brussels I Regulation – perhaps the most commonly encountered discipline in terms of jurisdiction and the recognition and enforcement of European judicial decisions[142] – applies to all judicial decisions within its scope delivered in respect of legal proceedings started after its entry into force.[143] Twenty-nine Recitals illustrate some of the fundamental reasons behind the Brussels I Regulation's statutory aims and implementation.[144] Of special significance are the two Recitals below:

> "(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market."

> "(6) In order to obtain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgements be governed by a Community legal instrument which is binding and directly applicable."

These suggest that the Brussels I Regulation is a "Community legal instrument" aiming at "maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured" by unifying the rules of conflict of jurisdiction and rationalising enforcement requirements.[145]

Like the Brussels Convention, as the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[146] is commonly

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[142] See LATHAM & WATKINS, Reform of the Brussels Regulation: Developments in Questions of Jurisdiction and the Recognition and Enforcement of Judgments Across the European Union, *The London Dispute Newsletter* October 2012, p. 2.

[143] The Brussels I Regulation entered into force on 1 March 2004.

[144] See LATHAM & WATKINS (note 142), at 2.

[145] Accordingly, see LATHAM & WATKINS (note 142), at 2.

[146] The negotiation process began in 1959, and the Brussels Convention was eventually promulgated in 1968. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, *OJ* L 299 of 31 December 1972, p. 78 [hereinafter Brussels Convention]. The companion Lugano Convention extends the provisions of the Brussels Convention to the six member states of the European Free Trade

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known, the Brussels I Regulation[147] is a "double" instrument of international civil procedure[148] with respect to domiciliaries of EU States in that it applies both to the exercise of jurisdiction and to the enforcement of judgments.[149] It enacts the general rule that the defendant can be sued before the courts of the country in which he or she is domiciled or habitually resident, regardless of the defendant's nationality.[150] Beyond this general provision, the Brussels I Regulation embraces a series of claim-specific provisions. For instance, tort claims can be brought in the jurisdiction in which the harmful event giving rise to the damage occurred.[151] Therefore, the claimant suing a person in tort may exercise personal jurisdiction according to two provisions of the Brussels I Regulation: the general provision of domicile or the claim-particular provision of locus of harm.

The Brussels I Regulation has the effect of distributing jurisdiction into two broad categories: a required category and a prohibited category with respect to domiciliaries of EU States.[152] All EU States shall make available the bases of jurisdiction indicated on the required category to all parties who are litigating issues within the scope of the Brussels Regulation. Defendants who are domiciliaries of EU Member States cannot be sued except under bases indicated under the Brussels Regulation, even if those bases are allowed under domestic law. Therefore, EU Member States may not allow claimants who are litigating matters within the scope of the Brussels Regulation against domiciliaries of another EU State to utilize these prohibited bases of jurisdiction, even though they are eventually allowed under national law. Article 3 of the Brussels Regulation provides an exemplary, though not exhaustive, catalogue of forbidden bases, and points out provisions in the internal legal orders of EU States (the rules of national jurisdiction set out in Annex I) which are forbidden bases. For instance, Article 3(2) forbids the exercise

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Association (Austria, Finland, Iceland, Norway, Sweden, and Switzerland) and is open to new members; however, new parties must negotiate accession treaties with all other members. European Communities-European Free Trade Association, Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, *OJ* L 319 of 25 November 1988, p. 9, reprinted in *International Legal Materials* 1989, p. 620. Other European states, including Spain and Portugal, later acceded to the Brussels Convention.

[147] The Brussels Regulation is substantively the same as the Brussels Convention (as regards recognition and enforcement) and, indeed, the link between the two instruments is acknowledged in the Recitals to the Brussels Regulation – "Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end".

[148] See U. MAGNUS, Introduction, in U. MAGNUS/ P. MANKOWSKI (note 11), at 4 *et seq*.

[149] See, *inter alia,* F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (CE) n. 44/2001 (La revisione della Convenzione di Bruxelles)*, Padova 2006, p. 10 *et seq*.

[150] Article 2 (1) of the Brussels Regulation provides that: "Subject to this Regulation, persons domiciliated in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

[151] Art. 5 (3) of the Brussels Regulation.

[152] See U. MAGNUS (note 148), at 4 *et seq*.

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of jurisdiction based exclusively on the nationality of the claimant as allowed under French law, and the exercise of transient jurisdiction as it is known in the United Kingdom and Ireland.[153]

Like the Brussels Convention the Brussels Regulation encompasses both enforcement and jurisdiction. The enforcing court or tribunal shall not examine the court of origin's jurisdictional competence according to this Regulation.[154] This is because the Brussels Regulation itself guarantees that jurisdiction was appropriate if a claimant brings a suit before the court of origin. Any judicial decision delivered by an EU State in conformity with the Brussels Regulation's jurisdictional rules is to be automatically recognised and enforced by the courts of other EU States with no reference to the merits of the case.[155]

The Brussels Regulation does not govern the exercise of jurisdiction over domiciliaries of non-EU Member States. To some extent, Article 4 (1) of the Brussels Regulation safeguards for EU States the employment of exorbitant grounds of jurisdiction against domiciliaries of non-EU Member States.[156] At the same time, such judicial decisions shall be recognized and enforced by other EU Member States through Article 33. In other terms, non-domiciliary defendants can be sued under any jurisdictional grounds and can have any resultant judgment directly enforced against them, though they do not profit from the Brussels Regulation's jurisdictional discipline on enforcement as embodied in Article 34. Therefore, the Brussels Regulation does not deal itself with non-domiciliary defendants until the time of enforcement.

The Regulation aims at more uniform provisions and faster and simpler procedures for civil cross-border litigation within the EU. It is founded on the idea that differences between internal laws on jurisdiction and recognition of judgments and differing procedural formalities hinder judicial cooperation within the internal market.[157] An additional aim is to base jurisdiction, and therefore the defendant's duty to submit to the competent court's jurisdiction, on uniform and appropriate connecting factors.[158]

Due to the widespread implementation of the Brussels Regulation regime, judgments against domiciliaries of EU Member States are loosely recognised and enforced throughout Europe.[159] On the other hand, it is harder for litigants outside the Brussels Regulation sphere to enforce judgments abroad. For instance, U.S.

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[153] *Amplius* see P. VLAS, Jurisdiction – Section I: General Provisions, in U. MAGNUS/ P. MANKOWSKI (note 11), at 75.

[154] Art. 38.

[155] See Brussels I Regulation, art. 33 (1): "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required".

[156] Article 4 (1) of the Brussels Regulation provides that: "If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State".

[157] See U. MAGNUS (note 148), at 7 *et seq.*

[158] See U. MAGNUS, (note 148), at 7 *et seq.* (stressing that the defendant shall defend him or herself only at places to which the dispute is sufficiently related).

[159] See, *e.g.,* F. SALERNO, Competenza giurisdizionale, riconoscimento delle decisioni e diritto al giusto processo nella prospettiva europea, *RDIPP* 2011, p. 895 *et seq.*

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judicial decisions can hardly be enforced overseas, partially because of the predominance of large jury awards granting multiple or punitive damages.[160]

The functioning of the Brussels Regulation has been overall positive in Europe. The regime is trustworthy and sound, and the recognition and enforcement of foreign judgments occurs without another review of the judicial decision and thus at little judicial expense.[161] Over time, several countries worked for the establishment of an even more automatic enforcement discipline, and the reformed Brussels I Regulation was finally enacted.

VII. The Launching of the Brussels I Regulation Recast

At its 3207th meeting held in Brussels, the Council of the European Union approved the recast of the Brussels I Regulation in the form settled with the European Parliament in a first reading agreement.[162] Some commentators have noted the complexity and lengthiness of the enforcement procedure under the existing Brussels I Regulation.[163] This is mainly due to the combination of two key factors. The first is Article 38 of the Brussels Regulation, which requires a judgment creditor to achieve a declaration of enforceability from the enforcing member state court ("exequatur") in order to enforce a civil or commercial judgment from one EU member state court in another member state. The second is indirectly the increasingly common tactic of "torpedo" proceedings – that is, where a party commences proceedings in an EU member state other than that selected by the parties (in their choice of court/jurisdiction agreement) in order to cause delay.

In contrast, the Brussels I Regulation Recast removes the need for the exequatur by providing that an EU member state court judgment is immediately enforceable in another EU member state court without any declaration of enforceability being indispensable.[164] The purpose is to streamline the process and diminish time and costs for judgment creditors. Moreover, the Brussels I Regulation Recast eradicates the practice of "torpedo" proceedings. It provides that, where parties have recognised exclusive jurisdiction in a member state court, any other member state court must stay proceedings brought before it until such time as the court

[160] See, *inter alia,* C. CHAO/ C. S. NEUHOFF, Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective, (2012) *Pepperdine Law Review* 147 *et seq.* (stressing that, in contrast, foreign judgments are generally liberally enforced in the United States).

[161] See, *e.g.,* P. WAUTELET, Recognition and Enforcement, in U. MAGNUS/ P. MANKOWSKI (note 11), at 535 *et seq.*

[162] See A. DICKINSON, Brussels I Recast Set in Stone, available at <http://conflictoflaws.net/2012/brussels-i-recast-set-in-stone/> (15 March 2013).

[163] See, *inter alia,* C. LIGHTFOOT/ M. DAVISON/ E. ATTENBOROUGH, Brussels Regulation reforms: key changes and their implications, available at <http://www.lexology.com/library/detail.aspx?g=2bf54b97-9b09-4dba-b75b-bc9f47dd8a2e> (3 March 2013).

[164] Article 39.

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provided for in the jurisdiction agreement rules on its jurisdiction (Article 31(1)) (provided proceedings are brought in that member state's courts).

The Brussels I Regulation Recast, like the Brussels Convention, includes a general rule governing the exercise of jurisdiction. Under this rule, a natural person could be sued where the person was domiciled or habitually resident,[165] and legal persons could be sued in their place of central management or incorporation, or in their place of principal activity if the other locations could not be established.[166] The Brussels I Regulation Recast also recognized claim-specific grounds of jurisdiction over tort and contract claims.[167] Following the general rule of the Brussels Regulation, Article 7(2) provided that the claimant:

> "in matters relating to tort, delict or quasi-delict, *may commence an action* in the courts for the place where the harmful event occurred or may occur".

Lastly, the Brussels I Regulation Recast provides for jurisdiction over a defendant legal entity in the state in which the agency, branch or other establishment is located.[168]

Notwithstanding its significance for litigation aiming to enforce human rights provisions the Brussels I Regulation Recast, unlike the revised Regulation,[169] does not provide that the courts of a Member State will be able to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned ("forum necessitatis").

Like the Council Regulation (EC) No 2201/2003 of 27 November of 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels II-*bis*"),[170] the enforcement provisions of the Brussels I Regulation Recast are quite liberal. A confirmation can be found *inter alia* in Art. 41 which provides that:

> "A judgment given in a Member State which is enforceable in the Member State of enforcement shall be enforced there under the same conditions as a judgment given in that Member State".

At the same time, a court shall decline recognition and enforcement if the decision:

> "(a) […] is irreconcilable with a judgment given in a dispute between the same parties in the Member State of enforcement;

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[165] Art. 3.

[166] Art. 74(1) (stating that for the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business).

[167] Art. 7(1) and (2).

[168] Art. 7(5).

[169] Art. 35 reads as follows: "where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires".

[170] *OJ* L 338 of 23 December 2003, p. 1-9.

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(b) […] is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State of enforcement".[171] The enforcing court shall not undertake a review on the merits of the decision delivered by the court of origin.[172]

VIII. The Impact of the Jurisdictional Rules of the Brussels I Regulation Recast on Cases Aiming to Enforce Human Rights Provisions

As currently drafted, the jurisdictional rules embodied in the Brussels I Regulation Recast reduce the chances for the victims of human rights offences to achieve civil reparations through civil litigations in common law countries or through civil lawsuits in the framework of criminal proceedings in civil law countries.[173] Since the Brussels I Regulation Recast had been conceived as a double instrument of international civil procedure, in which all bases of jurisdiction were either forbidden or mandatory, victims of human rights violations would have been allowed to achieve civil reparations from responsible subjects exclusively in two fora: the forum where the offender is domiciled,[174] or the forum wherein the harmful event occurred or may occur, as indicated in Article 7. In the human rights framework, these fora are normally coincident, thus it is likely only one forum would effectively be available.[175] This is generally a forum which is incompetent to proceed with claims by human rights victims.

If victims had sought to bring a lawsuit against a defendant domiciled in a common-law country of the EU, like England, Scotland or Ireland, the original jurisdictional provisions would have forbidden recourse by victims of human rights violations to transient jurisdiction.[176] More precisely, an individual who was victimized, for instance, in Ireland by a person domiciled therein and who was in voluntary or forced exile in, or had access to the courts of, Scotland would have been forbidden from seeking civil reparations before the competent Scottish courts if the potential defendant travelled to or maintained important contacts in

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[171] Art. 45.

[172] Art. 52 (stressing that under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed).

[173] For similar remarks on the proposed Hague Judgments Convention see B. VAN SCHAACK (note 16), at 178.

[174] Art. 5 reads as follows: "Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter".

[175] See see B. VAN SCHAACK (note 16), at 178.

[176] See *supra* (note 158).

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Scotland.[177] Rather, the victim would have had to return to Ireland in order to seek civil remedy.[178]

The Brussels I Regulation Recast's jurisdictional provisions do not overall take into account that, in certain circumstances, cases aiming to enforce international human rights provisions simply shall be brought before national courts outside of the country in which the harmful event occurred, as redress would be impossible in the jurisdiction in which the harmful event happened. An indirect confirmation lies in the fact that most cases brought under the ATCA in U.S. courts would not have been admissible in the jurisdiction in which the harmful event occurred.[179] Indeed these serious international human rights law breaches generally occur in countries experiencing political upheaval or governed by authorities who are themselves responsible for or complicit in such breaches.[180] As such, national courts in these countries can be unwilling or unable to proceed effectively against offenders or to supply victims with civil remedies.[181]

Cases aiming to enforce international human rights provisions can be brought by subjects who have had to leave the state in which the harmful event occurred, thereby making it hard for them to return to that country in order to submit their claims.[182] Such claimants may even be asylum seekers or refugees, as defined by the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"),[183] who have sought a safe country abroad because of the persecutions or threat of persecutions at home.[184] Clearly, to force these individuals to seek redress in the country from which they have fled is unjust and against the overall purpose of the Refugee Convention. In fact a key aspect of the Refugee Convention is the principle of non-refoulement, which forbids states from sending refugees

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[177] Art. 5(1) reads as follows: "Persons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter".

[178] Things, however, are different in the civil law context. This is because victims of human rights offences are not forbidden to seek civil remedies within the context of criminal proceedings commenced in EU States against third country defendants (not domiciled within the EU) on the basis of extraterritorial forms of jurisdiction. Because the revised Regulation authorizes the exercise of jurisdiction over the non-domiciled within the EU (Art. 4(2)), courts cannot consider attempts to add civil claims to criminal litigations brought under universal jurisdiction as a breach of the jurisdictional rules of the revised Regulation. In this context, the criminal court would have power over the defendant by virtue of universal jurisdiction.

[179] *Amplius* B. VAN SCHAACK (note 16), at 179.

[180] *Ibidem.*

[181] *Ibid* (stressing that: "Human rights violators are often protected from suit in the states in which they act, either because they are agents of the state or because the state condones, is complicit in, indifferent to, or otherwise powerless in the face of, human rights abuses in its territory").

[182] *Ibid.*

[183] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 137, 152; see also United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

[184] See B. VAN SCHAACK (note 16), at 179.

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back to a territory in which their freedom or life would be compromised.[185] Even if such victims are not asylum seekers or refugees, it remains complex for them to return to the country in which the harmful event occurred.[186] They can be in voluntary or forced exile, or have simply moved on and resettled abroad.[187]

Due to all these adverse facts, it is often difficult for victims of human rights offences to achieve legal redress in the courts of the state in which the defendant is domiciled or the harmful event occurred. It is mandatory that victims have access to the courts of any country where the alleged offender can be found.[188]

IX. Some Theoretical and Practical Arguments against Exempting Human Rights Cases from the Jurisdictional Prohibitions of the Brussels I Regulation Recast

There are theoretical and practical arguments against exempting human rights proceedings from the jurisdictional constraints of the Brussels I Regulation Recast in particular and of the corresponding instruments of international civil procedure more in general, however.[189] Some of these arguments are sound and were considered in legal writings by the earliest commentators of the Brussels I Regulation.[190] Amongst these there are the reasons behind the modest use of the Brussels I Regulation in human rights litigations, such as the general principle that the loser of a case pays the winner's costs and the lack of class actions and contingency fee arrangements.[191] That the Brussels I Regulation cannot be applied

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[185] See Refugee Convention (note 183), art. 33(1) ("No Contracting State shall expel or return a refugee... to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

[186] See B. VAN SCHAACK (note 16), at 182.

[187] *Ibidem.*

[188] *Ibid.*

[189] On the subject, see generally C. KESSEDJIAN, Les Actions Civiles pour Violations des Droits de l'Homme, *Travaux du Comité français de droit international privé*, Années 2002-2004, p. 163 *et seq*. The Enforcement of Human Rights and Humanitarian Law by Civil Suits in Municipal Courts: The Civil Dimension of Universal Jurisdiction, Remarks by B. STEPHENS, Civil Remedies in the US Courts for International Human Rights Abuse, in *Proceedings of the ASIL/NVIR Fourth HAGUE Joint Conference*, 1997, p. 158, at 162.

[190] For a good résumé see: P. SCHLOSSER, Jurisdiction in International Litigation: the Issue of Human Rights in Relation to National Law and to the Brussels Convention, *RDI* 1991, p. 5 *et seq*.; H. MUIR WATT, Evidence of an Emergent European Legal Culture: Public Policy Requirements of a Procedural Fairness Under the Brussels and Lugano Conventions, (2001) *Texas Int. Law Journal* 539 *et seq*.

[191] See A. TRIPONEL, in A.P. MORRIS / S. ESTREICHER, *Global Labor and Employment Law for the Practicing Lawyer*, The Hague 2010, p. 113.

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against foreign corporations[192] is another argument which has been recalled against exempting human rights proceedings from the jurisdictional prohibitions of the Brussels I Regulation Recast.[193] Moreover, further arguments have been drawn from the presumption that, if human rights proceedings were exempted from the jurisdictional constraints of the Brussels I Regulation Recast, then this will allow the courts of one country to exercise jurisdiction over nationals of another country, possibly leading to international tensions.[194] In extreme cases, the judiciary could expropriate the executive of its power over the international issues of the state.[195] Indeed this may lead to serious inconvenience such as a separation of powers issue, but it might also gravely affect the effectiveness of the state's foreign policy.[196] This concern applies to the practice of universal jurisdiction more broadly.[197] Firstly, the exercise of such types of extraterritorial jurisdiction will not ineluctably reverse jurisdictional immunity before national courts.[198] Second, a revision of the main multilateral conventions outlawing different human rights violations shows that the nations have nearly unanimously accepted that the exercise of extraterritorial power constitutes a proper reply to the existence of human rights offenders in state territory.[199] Some of these multilateral conventions encompass

[192] But see the Communication from the Commission to the Council and the European Parliament on European Contract Law, para. 50, COM(2001) 398 final (July 11, 2001). See also O. DE SCHUTTER (note 141).

[193] See *ex multis* A. BONFANTI, Diritti umani e imprese multinazionali dinanzi ai giudici europei: sulla revisione del Regolamento (CE) No 44/2001, *RDIPP* 2011, p. 697 *et seq*.; T.C.W. FARROW, Globalization, International Human Rights, and Civil Procedure, (2003) *Alberta Law Review* 671 *et seq.*; B. MOSTAJELEAN, (note 33), at 497 *et seq*.

[194] *Amplius* B. VAN SCHAACK (note 16), at 182. See also P. SCHLOSSER (note 190), at 5 *et seq*.

[195] See B. VAN SCHAACK (note 16), at 182; C. MARINO, Sull'opportunità di un vaglio di compatibilità dei criteri di giurisdizione con l'art. 6 della CEDU, in P. PIRRONE (a cura di), *Circolazione dei Valori Giuridici e Tutela dei Diritti e delle Libertà Fondamentali*, Torino 2011, p. 161 *et seq*.

[196] *Ibidem*, 182.

[197] See, *e.g.,* S.C. GROVER, *The European Court of Human Rights As a Pathway to Impunity for International Crimes*, Heidelberg/Dordrecht/London/New York 2010, 31 (also stressing that: "there is a readiness of states to accept universal criminal jurisdiction with regard to international crimes but to resist to universal civil jurisdiction in regards to the same matters"); M. STÜRNER, Extraterritorial application of the ECHR via private international law? A Comment from a German perspective, *Nederlands International Privatrecht* 2011, p. 8 *et seq*.

[198] See N. BOSCHIERO, Jurisdictional Immunities of the State and Exequatur of Foreign Judgments: a private International Law Evaluation of the Recent ICJ Judgment in Germany v. Italy, in T. SCOVAZZI/ N. BOSCHIERO/ C. PITEA/ C. RAGNI (eds), *International Courts and the Development of International Law – Essays in Honour of Tullio Treves*, The Hague 2013, p. 781 *et seq.*; A. BIANCHI, L'immunité des Etats et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international, *RGDIP* 2004, p. 63; P. DE SENA/ F. DE VITTOR (note 110), at 765.

[199] See, *e.g.,* A.C. Mc CONVILLE, Taking Jurisdiction in Human Rights Tort Litigation: Universality Jurisdiction's Relationship to Ex Juris Service, Forum Non Conveniens and Presumption of Territoriality, in C. SCOTT (ed.), *Torture as Tort*, Oxford 2001, p. 176

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waivers of jurisdiction over infractions among contracting states, because they have accepted in advance to either prosecute or extradite offenders.[200] As a consequence of the enforcement of these provisions in internal legal orders in some countries, citizens are already exercising universal jurisdiction in the criminal context with growing regularity.[201]

Clearly, extraterritorial jurisdiction cannot be exercised without limitations.[202] Due to the risks of judicial overreaching, it is highly questionable that the final version of the Brussels I Regulation Recast did not include a provision clearly spelling out the circumstances in which the exercise of civil universal jurisdiction is allowed.[203] Such an indication would have guaranteed that this jurisdictional principle is invoked in a uniform manner.[204] With the insertion of such an exception, the Brussels I Regulation Recast would have become the first international instrument of civil extraterritorial jurisdiction.

There is also the concern that the exercise of extraterritorial jurisdiction will result in patchwork justice that prosecutes only those offenders who travel abroad.[205] However, the circumstance that not all offenders will subject themselves to extraterritorial jurisdiction by leaving safe haven countries shall not hinder victims from employing those forms of jurisdiction when they are effectively available. The eventual objective is an all-embracing system of redress for victims on the internal and international levels, so that every offender is brought to justice.[206] Civil universal jurisdiction supplies another layer of that broadening mechanism of justice for victims of human rights violations.

It has also been maintained that justice for human rights offenders is better found in their home countries, permitting countries to: "consolidate memories and

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(stressing that: "as a general matter of principle, public law accountability does not necessarily preclude a private aspect to international human rights protection"); B. STEPHEN (note 33), at 10–17; Y. SHANY, National Courts as International Actors: Jurisdictional Implications, *Federalismi* 2009, available at <http://www.effective-intl adjudication.org/admin/Reports/2af9ed4d4a026e581437876dd1b73b87Yuval.pdf> (10 March 2013).

200 See, *e.g.,* J. FLAUSS (note 139), at 299; G. RESS (note 139), at 175; M. KARAGIANNAKIS (note 139), at 11.

201 See M. INAZUMI, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Antwerp 2004, p. 113 *et seq.*; R. O'KEEFE, Universal Jurisdiction: Clarifying the Basic Concept, *Journal of International Criminal Justice* 2004, p. 735-760.

202 See, *e.g.,* D.F. DONOVAN/ A. ROBERTS, Recognition of Universal Civil Jurisdiction, (2006) *American Journal of International Law* 142. See also A. CASSESE, Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction, *Journal of International Criminal Justice* 2003, p. 589-595.

203 Accordingly, with reference to the proposed Hague Judgments Convention B. VAN SCHAACK (note 16), at 182.

204 *Ibidem.*

205 *Ibidem.*

206 *Ibidem.*

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engage in secular rituals of commemoration."[207] Ideally, individuals alleged to have committed grave human rights violations would be proceeded against in the countries in which they perpetrated their offences.[208] This is certainly correct not only for very obvious practical reasons, as it is clear that any evidence of the crimes can only be ascertained in the countries in which the breaches happen, but also for more subjective and personal motives.[209] Nationals of these countries shall consider human rights offenders brought to justice in order to provide a local forum in which victims can appear as witnesses.[210] Nevertheless, when such countries are unable (or unwilling) to start litigations, or when the victims have resettled abroad, other countries should be able to allow suits to proceed in their competent jurisdictions in order to guarantee that international human rights provisions are effectively implemented.[211] A robust, though indirect, confirmation of this statement is found in the fact that the jurisdictional rules of the Brussels I Regulation only apply insofar as they are compatible with the European Convention on Human Rights.[212] Furthermore, another confirmation could be found in the fact that such international civil claims do not hinder related proceedings in home countries when and if they become feasible.

X. Final Remarks

From the above analysis it appears that the absence of an exception for human rights proceedings in the Brussels I Regulation Recast is not without consequences for the victims of human rights breaches. This is mainly since the jurisdictional discipline of the Brussels I Regulation Recast poses a threat to the endeavours of individuals and sovereign states to implement international human rights provisions through civil claims seeking civil remedies before domestic courts. This threat is particularly worrying due to the existence of the rule of prior exhaustion of

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[207] See M. MINOW, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston 1998, p. 46, as quoted by B. VAN SCHAACK (note 16), at 198, para. 214.

[208] See *ex multis* A. SEIBERT-FOHR, *Prosecuting Serious Human Rights Violations*, Oxford 2009, ch. 6.

[209] *Ibidem.*

[210] *Ibid.*

[211] See *supra* (note 199).

[212] See P. WAUTELET (note 161), at 623; P. KINSCH, Private International Law Topics before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011), *YPIL Law* 2011, p. 37-49; See also B. JURATOWITCH, The European Convention on Human Rights and English Private International Law, *Journal of Private International Law* 2007, p. 198 *et seq.*; F.J. ZAMORA CABOT, Derecho Internacional Privado y Derechos Humanos en el Ambito Europea, *Papeles el tiempo de los derechos* 2012, available at <http://www.tiempodelosderechos.es/materiales/working-papers.html> (12 March 2013).

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local remedies[213] that requires in principle individual victims of human rights abuses to go through all of the internal procedures which are available in their countries of residence, without success, before bringing a matter to a regional human rights court like the European and the Inter American Court of Human Rights.[214] It is therefore vital that the Brussels I Regulation Recast ensures that these internal procedures exist and are effectively available in the EU Member states. In particular, the Brussels I Regulation Recast should ensure a wide range of options for the victims of human rights offences to bring civil claims against their offenders. This will guarantee *inter alia* that victims who do not have access (or easy access) to the courts of the state in which the harmful event occurred are not denied legal remedy and that offenders, who are immune from suit in their countries of origin, may be held responsible for their breaches of international human rights provisions wherever they can be found (i.e. regardless of whether or not they are EU-domiciled). Moreover, this will guarantee that the Brussels I Regulation Recast does not hinder states' endeavours to comply with international legal duties to punish or remedy international human rights law breaches.

In doing so, the Brussels I Regulation Recast will acknowledge that human rights proceedings cannot be fully likened to traditional tort proceedings.[215] The Brussels I Regulation Recast must privilege civil actions to implement international human rights because the standards these provisions aim to defend are universal in character, and their breach and remedy is of concern to the EU as a whole.[216] The special quality of this category of international violations naturally leads to recognizing to each state the right to extend its jurisdiction over offenders, even if the offender has no special link with the state.[217]

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[213] On the rule of prior exhaustion of local remedies in international human rights law see also R. PISILLO MAZZESCHI, *Esaurimento dei ricorsi interni e diritti umani*, Torino 2004.

[214] Incidentally, it is worth mentioning, however, that the American Convention on Human Rights ("ACHR") provides that the rule of prior exhaustion of local remedies does not apply when domestic law does not guarantee a due process of law, when the individual has been denied access to local remedies, and where there occurred an excessive and prolonged delay in the decision of the case at the local level (Art. 46 (2)). *Amplius* see S. D'ASCOLI/ K.M. SCHERR, The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection, *EUI Working Papers* 2007/02, p. 13 *et seq*.

[215] Accordingly see B. STEPHENS (note 135), at 545 *et seq*. But see G.P. FLETCHER, *Tort Liability for Human Rights Abuses*, Oxford 2008.

[216] Accordingly, with reference to the proposed Hague Judgments Convention B. VAN SCHAACK (note 16), at 199.

[217] *Amplius* K. LEE BOYD, Universal Jurisdiction and Structural Reasonableness, (2004) *Texas International Law Journal* 7 *et seq*. See also A.M. SLAUGHTER, Judicial Globalization, (2000) *Va. J. Int'l L.* 1103, 1116–19 (discussing the "cross–fertilization" of domestic and international law).

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If domestic courts refuse to entertain meritorious claims brought to implement human rights provisions, or refuse to recognise or enforce judicial decisions resulting from such civil proceedings, they risk violating international law duties.[218]

Due to the special nature of international human rights provisions, it is not advisable to subject different types of cases to the same corpus of jurisdictional rules that fails to take these divergences into account. The arguments presented above[219] acknowledge the circumstance that the Brussels I Regulation Recast will mainly deal with civil and commercial controversies, but at the same time they consider that this regulation shall not preclude the faculty of victims of human rights violations to seek civil remedies before national courts and tribunals.[220]

As demonstrated in particular by the forthcoming EU accession to the ECHR,[221] international human rights law consists of a key group of provisions that is instrumental to the general idea of justice. Nevertheless, if these provisions are to be significant, EU Member states shall implement them and supply far-reaching redress to victims.[222] Indeed civil actions in domestic courts have a pivotal role in this process.[223] A judicial decision denouncing a human rights breach, identifying a responsible individual, and granting reparations can go a long way toward re-establishing a victim's idea of justice.[224] Furthermore, a fully enforceable damage award may help the rehabilitation of victims of human rights breaches who must restart their lives in their countries of refuge.[225] Unless wrongful behaviour is addressed in some public capacity, breaches will be repeated with impunity.

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[218] See, *inter alia,* W.J. ACEVES, Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation, (2002) *Hastings Int'l & Comp. L. Rev.* 261 *et seq.*

[219] See esp. paras. 8-9.

[220] See *mutatis mutandis* B.VAN SCHAACK (note 16), at 199.

[221] For a thorough and updated analysis of this topic see *ex multis* M. KUIJER, The Accession of the European Union to the ECHR: A Gift for the ECHR'S 60th Anniversary or an Unwelcome Intruder at the Party?, *Amsterdamlawforum* 2011, available at <ojs.ubvu.vu.nl/alf/article/download/240/428>.

[222] See, *inter alia,* B. SOOK PATTINAJA-DE VRIES/ O. SPIJKE, Domestic Implementation of International Human Rights: The Receptor Approach, available at <http://invisiblecollege.weblog.leidenuniv.nl/2012/08/28/domestic-implementation-of-international/> (also for a critical assessment of the different approaches to the implementation of international human rights provisions).

[223] See, *e.g.,* H. VERHEUL, Public Policy and Relativity, *Netherlands International Law Review* 1979, p. 129 (stressing that the possibilities of enforcing human rights through civil proceedings are underestimated and should be more frequently used). See also J. SARKIN, Reparation for Gross Human Rights Violations as an Outcome of Criminal Versus Civil Court Proceedings, in K. FEYTER (ed.), *Out of the Ashes: Reparation for Victims of Gross Human Rights Violations*, Antwerpen 2005, p. 151 *et seq.*

[224] See, *inter alia,* D. CASSEL, The Expanding Scope and Impact of Reparations Awarded by the Inter American Court of Human Rights, in K. FEYTER (ed.) (note 223), at 191 *et seq.*

[225] See P. SARDARO/ S. VANDEGINSTE, The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights, in K. FEYTER (ed.) (note 223), at 355 *et seq.*

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At least for these reasons, it is essential that the Brussels I Regulation Recast allows – rather than disallows – actions seeking civil remedies for serious human rights breaches[226] and, in so doing, enhances the implementation of international human rights rules within the EU territory.

[226] Accordingly, with reference to the proposed Hague Judgments Convention B. VAN SCHAACK (note 16), at 199.

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POSSIBILITY AND TERMS FOR APPLYING THE BRUSSELS I REGULATION (RECAST) TO EXTRA-EU DISPUTES

EXCERPTA OF THE STUDY PE 493.024 BY THE SWISS INSTITUTE OF COMPARATIVE LAW

Luigi MARI / Ilaria PRETELLI*

I. Jurisdiction of the European Union: Theoretical Points of Reference
- A. Jurisdiction and Sovereignty
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  - 2. Requirement of Reasonable Limitation of Jurisdictional Power
- B. Refusal of Exorbitant Criteria of Jurisdiction
  - 1. Unilateral Coordination with Foreign Jurisdiction
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  - 1. Jurisdiction over the Person

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            a) Physical Presence of the Defendant
            b) Domicile/Residence/Habitual Residence of the Defendant
            c) Domicile/Residence of a Representative of the Defendant
            d) Citizenship of the Defendant
            e) Citizenship of the Plaintiff
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            b) Asset Venues
            c) *Forum arresti*
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V. Proposed Amendments to Regulation 1215/2012 in Order to Regulate Jurisdiction over Extra-EU Disputes

I. Jurisdiction of the European Union: Theoretical Points of Reference

A. Jurisdiction and Sovereignty

In modern States, jurisdiction and sovereignty have become inseparable juridical categories. Accordingly, jurisdiction is manifested as an exercise of power and is necessarily based upon a legal system invested with sovereignty. This interdependency explains why jurisdiction is defined and understood as a material and compulsory realisation of the legal order in a given case.

1. Unilateral Nature of the Limits of Jurisdiction

Each sovereign legal order – independently of any superior power – is free to regulate the exercise of jurisdiction without taking into account the existence of any other sovereign order. As a result, each State proceeds autonomously and unilaterally in this regard, determining the cases in which its own judges are authorised to exercise jurisdictional power. This may lead to the extension or the restriction of the scope of the field within which such power may be exercised, but in no case can the determination of that field affect the power of any other legal order to autonomously limit the exercise of its own jurisdiction. Each order, when defining the field of its own jurisdictional power, finds itself, as against other orders, in a relationship of reciprocal autonomy and freedom.

2. Requirement of Reasonable Limitation of Jurisdictional Power

In theory, nothing prevents a State from affirming its own jurisdictional power over any controversy, even in the absence of any link to the social environment of which it forms a part.[1] It is, however, only from a purely theoretical point of view that the State's jurisdiction can be considered exempt from all limits; in fact, every State shows that it is well aware of the need to limit the exercise of its jurisdictional power to a clearly defined series of controversies, in some way connected to the field in which its sovereignty is manifested *de facto*. One can in fact easily conclude that, although it is true that no order can impose limits upon another, it is

[1] G. MORELLI, *Diritto processuale civile internazionale*, Padova (2nd ed.), 1954, p. 87 *et seq*.

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nevertheless also true that no legal order can totally ignore the existence of other sovereign powers and of the territorial delimitation of jurisdictional power.[2]

The measure in which a State should take into account the jurisdictional power of other States is, however, an intricate question in so far as it must be decided according to objective and universally valid or accepted criteria. Apart from the possible effects of the right to a fair trial laid down in the ECHR,[3] general rules of public international law provide no assistance. The sole acceptable conclusion that can be drawn from the continuous efforts to formulate fundamental guiding principles of delimitation of jurisdiction is that some theoretical principles apt to delimiting state jurisdiction in a reasonable and non-arbitrary manner can be identified. Applying such principles, jurisdiction should not only be founded upon considerations of "convenience, fairness and justice", but should also open the way towards coordination, more-or-less effective and complete, between the various state jurisdictions.[4]

Nonetheless, it is unmistakably evident that each legislature interprets the reasonableness of the limits of jurisdiction in its own way and that no national doctrine of jurisdiction can avoid unilaterally and autonomously defining the criteria that indicate when a controversy is sufficiently and reasonably connected to the national forum. As such, they thus relegate the need to implement an effective coordination with foreign jurisdictions.

B. Refusal of Exorbitant Criteria of Jurisdiction

Considering the multiplicity of reasons that each legislature can freely set as the foundation of jurisdiction, it is inevitable that the national systems sometimes permit possibly "exorbitant" or "excessive" jurisdictional criteria, as a result of which jurisdiction subsists, although a link between the litigation and the forum, which is reasonable and sufficient to justify the exercise of jurisdiction, is entirely lacking. The well-known prototype of all the exorbitant criteria is that of the nationality (or the residence) of the plaintiff serving as the basis for jurisdiction.

It would be appropriate to make it clear that the concept of exorbitant jurisdiction summarises considerations of legislative policy and cannot be used as a parameter of positive law to evaluate *ex ante* the legitimacy of any particular

[2] R. QUADRI, Studi critici di diritto internazionale, I, 1, Milano 1958, p. 319: il "potere dello Stato, come capacità dello Stato stesso di comandare, e, quindi, di mandare ad esecuzione i suoi comandi, trova limiti insormontabili negli eguali poteri degli altri Stati; e l'ordinamento dello Stato non può non riflettere la limitazione del potere dello Stato. Una norma la quale pretendesse superare i limiti della capacità di comando dello Stato, difetterebbe del requisito della efficacia, della positività, e non sarebbe pertanto espressione che di una mera velleità".

[3] In respect of that problem, which lies beyond the boundaries of the present considerations, see L. MARI, Equo processo e competenza in materia contrattuale. Note minime a propostio della giurisprudenza della Corte di giustizia, in *Liber Fausto Pocar*, II, Milano 2009, p. 673 *et seq*.

[4] L. USUNIER, *La régulation de la compétence juridictionnelle en droit international privé*, Paris 2008, p. 319 *et seq*.

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criterion of jurisdiction. Even apart from the vagueness of the concept, the autonomy enjoyed by States renders baseless any pretention of being able to define *a priori* those criteria of jurisdiction that are legitimate (*i.e.*, non-exorbitant). International practice instead takes a quite different approach: instead of opposing recourse to exorbitant criteria of jurisdiction, it refuses to allow them to serve as suitable criteria of international competence in the context of recognition of foreign judgments. This is also known as indirect international competence).

When a criterion is designated as exorbitant, this accordingly expresses, depending on the case, either a theoretical judgment that the criterion lacks justification, or an evaluation *ex post* which above all takes account of the consequences potentially flowing from the use of that criterion in the course of deciding upon the recognition of a judgment which is based upon it. This possible reaction to excessive autonomy, to which another legal order may be induced when exercising its own jurisdictional power, is an effective incentive for States to place limits on their own recourse to exorbitant criteria of jurisdiction.[5] It is important, however, to avoid confusing the rejection of an exorbitant criterion as a suitable criterion of indirect international competence, with an affirmation of the exclusive competence of the State in which recognition of the judgment is requested (refer *infra*).

1. Unilateral Coordination with Foreign Jurisdiction

The necessity for a legal order to coordinate itself with others in the practical implementation of rules of law – thus taking account of the jurisdictional power that appertains to other legal orders – is an objective fact, which does not need to be demonstrated. Apart from having recourse to international instruments, there are various ways in which a legal order may unilaterally and autonomously attribute relevance to the jurisdictional powers of other legal systems. Limiting ourselves to the essential methods, the most obvious ones (and the most important from a practical point of view) consist of attributing the force of a jurisdictional act to a foreign judgment; in this way, the product of foreign jurisdictional activity is permitted to operate in another legal order where it would otherwise be entirely deprived of the intrinsic force of a jurisdictional act. Another method of recognising the foreign jurisdictional power consists of granting effect to the commencement of foreign proceedings for the purpose of suspending and even preventing the prosecution of national proceedings that appear to duplicate foreign proceedings. Finally, foreign jurisdictional power may be considered jurisdictionally relevant in another legal order in that it excludes the exercise of jurisdiction: either because exclusive character is attributed to a foreign jurisdiction (in a sense that will be explained *infra*), or because the parties to the proceedings had agreed to submit the controversy to a foreign judge, who has confirmed his own jurisdiction over the matter.

[5] On these concepts, *amplius*, see L. MARI, *Il diritto processuale civile della Convenzione di Bruxelles*, Padova 1999, p. 11-15 and 198-203.

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2. *Consequences*

It is appropriate to note that none of these three forms of relevance of foreign jurisdictional power impairs the autonomy of the legal systems that recognise them. The foreign jurisdictional power remains foreign and independent of the legal order in which it has become relevant, just as the jurisdictional power of the latter remains fully independent of the former. In other words, each jurisdictional power remains subject to its own legal order and no connection is created between the jurisdictional organs of the two States, which always unilaterally and autonomously determine the principles of their own jurisdiction.

C. Exclusive Jurisdiction in the True Sense

After these preliminary issues, we must now specify the meaning to be attributed to the concept of *exclusive jurisdiction*.

Used in a narrow sense, and linked to the logical consequences to be drawn from the notion of the term, the concept of exclusivity implies a distribution of jurisdictional power amongst judicial organs. The judge designated as "exclusive" is accordingly the only one legitimated to resolve the controversies foreseen by the norm which results in the distribution of jurisdiction among the territorial courts, to the exclusion of any other judge. It should be noted that the essence of exclusivity is characterised by this single specific consequence, *i.e.*, the exclusion of any possibility that the defendant could be called before a judge other than the one legitimated to decide the issues.

One understands, therefore, how the double effect of the exclusivity – legitimation of a particular judge to exercise jurisdictional power, on the one hand, and the absolute lack of power of any other judge, on the other – can only be achieved by means of a norm which imposes a distribution of jurisdictional power among judicial organs subject to one and the same juridical order. So understood, the concept of exclusivity is regularly employed in the distribution of territorial competence among several judicial organs belonging to the same legal order and correlates to the concept of concurrent territorial competence.[6] This concept corresponds to the exclusivity currently operational in the Brussels system.

[6] More precisely, the exclusivity is manifested in the exclusion of the competence of both the general forum and fora, which are special or alternative to the general forum. This gives rise to a right of the defendant, which the legal order may allow him to waive in case the forum designated by law as exclusive is not also be qualified as compulsory. It is nonetheless possible for an exclusive forum to be optional or compulsory depending upon the particular case, just as it is possible that a compulsory forum may not be characterised as exclusive.

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1. Exclusivity of Jurisdiction in Relation to the Recognition of Foreign Judgments

The concept of exclusivity, understood in the abovementioned narrow sense, cannot be used to qualify a corresponding relationship between judicial organs belonging to different States. In this case, since we are confronted with jurisdictional powers regulated by legal orders which place themselves in positions of reciprocal autonomy and independence, there is no possibility for any norm whatsoever of one of the two legal orders to effect a distribution of jurisdiction with consequences for the powers of the judges of the other legal order.

Nevertheless, the concept of exclusive jurisdiction, as often employed in international civil procedural law, is not taken in its narrow sense described above.

We now consider the position adopted by a particular legal order when confronted with a foreign judgment, the recognition of which is excluded, by virtue of the fact that the legal order has deemed this to violate its own exclusive jurisdiction over the controversy decided by the foreign judge.

In this case, the foreign proceedings are deprived of the prerequisite of the recognition of the judgment which is referred to as *international competence* and which consists of the connection that the litigation should have with the foreign forum (the State of Origin) so that the resulting judgment might take effect in the State in which recognition is desired (the Requested State).[7]

The concept of exclusive jurisdiction now under consideration is, therefore, derived from an evaluation undertaken in the Requested State in order to give effect to a foreign judgment. It is to be noted, however, that this concept does not express the simple absence of an appropriate criterion of international competence with respect to the controversy and the foreign forum. That is to say a connection that corresponds to one of those that would establish jurisdiction in the Requested State. The concept of exclusive jurisdiction goes beyond this simple hypothesis because it contains, and at the same time creates, a link between two distinct evaluations: (a) the existence, within the controversy decided by the foreign judge, of a criterion which is recognised as attributing jurisdiction to the judicial organs of the Requested State, and (b) the exclusion of the possibility that a recognised criterion of international competence exists with respect to the foreign judgment which had settled that controversy, *no matter from which foreign State the judgment originates*.

[7] It is worthwhile to note that international jurisdiction exists independently of the criteria of jurisdiction that the foreign judge has recognised as the foundation of his own power to decide the case, since it is established by means of the same criteria, or principles, which the Requested State uses in order to attribute jurisdictional power to its own judges. This procedure accordingly gives rise to a complete correspondence between the limits of the jurisdiction of the Requested State and the sphere of the international competence of the foreign judge. It is, therefore, clear that this correspondence exists only from the point of view of the legal order of the Requested State and only for the purposes of this pursuit. It is in fact quite possible for the foreign forum to be vested with jurisdiction according to the norms of its own legal order, but be considered as deprived of international competence according to the criteria applied in the Requested State for the purpose of recognition of foreign judgments.

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In other words, in order to be able to speak of exclusive competence, it is necessary to consider one single legal order. Subsequently, it is also necessary that this legal order provide for its own jurisdiction over the controversy. Thereafter, it is necessary that this legal order exclude the possibility of recognising any decision from a foreign State.

This illustrates that the concept of exclusive jurisdiction is absolutely incompatible with any hypothesis of distribution of juridical power, because it expresses the point of view of a single legal order.

To deepen our understanding of the implications of this concept, let us begin by noting that it may apply in two different situations. As previously discussed, the first situation is present if the legal order which we are concerned to understand affirms its own jurisdiction over the controversy and at the same time excludes the possibility to recognise foreign judgments. We are then faced with *exclusive national jurisdiction* of the Requested State. The second situation occurs when the State which we are concerned to understand excludes its own jurisdiction regarding the controversy on the basis of general jurisdictional criteria, and permits recognition only of judgments originating from a particular foreign legal order. In this hypothesis, we are faced with *exclusive foreign jurisdiction*, but it is irrelevant whether the State of Origin of the decision considers itself vested with or deprived of exclusive jurisdiction over the case. The only important factor is whether the Requested State considers that only this particular foreign State is vested with exclusive jurisdiction.

2. Foundations of Exclusivity

Another important aspect to be considered concerns the grounds upon which the exclusivity of the jurisdiction is based. From this point of view, the exclusivity does not originate in the impossibility of recognising any foreign judgment (*i.e.*, cases of exclusive national jurisdiction), or in the possibility of only recognising those judgments that originate from certain States (*i.e.*, cases of exclusive foreign jurisdiction), but instead consists of a true and rightful restriction of jurisdiction, as determined by the Requested State. As a result of this restriction, the parties to the controversy have no other option but to resolve it by resorting to the judge indicated by the norms that have created this restriction. The circumstances in which such a restriction applies, and from which the obligation to submit the dispute to the designated judge originates, are independent of both the rules of (direct) jurisdictional competence and of the rules of (indirect) international competence, since they have a different function. Ultimately, these rules aim to prevent the recognition of a foreign judgment. Therefore, these rules constitute the logical antecedent of the concept of exclusive jurisdiction and are derived from autonomous principles that must be conceptually distinguished from the rules on jurisdiction.

D. Exclusive Competences within the Brussels System

The “Brussels” system (Article 16, Brussels Convention 1968; Article 22, Brussels I Regulation (Regulation 44/2001), and Article 24, Brussels I-*bis* Regulation

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(Regulation 1215/2012) creates various exclusive rules of jurisdiction in the presence of particular connections with the territory of a Member State. Those rules of jurisdiction correspond precisely to the concept of exclusive jurisdiction in the true sense, as described above.[8] In this system, the norms attributing exclusive competence are addressed to all the judges of the Member States taken as a single unit and decree a distribution of jurisdiction according to the typical model of exclusive territorial competence. This imports the legitimation of a single judge to exercise the jurisdictional power and the corresponding absolute lack of power of all other judges. The exclusive nature of this jurisdiction is affirmed by the same rules that institute it and has does not need to be justified. That competence is characterised, furthermore, as being compulsory.

This result is made possible by two peculiar circumstances. Firstly, at the general level of the system, jurisdiction is attributed as a function of the relationship that has been put into place between numerous judges subject to the same set of procedural norms. Secondly, the rules of attribution/distribution of jurisdiction uniformly define the sphere of the exercise of jurisdictional power with respect to the whole body of judges of the Member States. Accordingly, the Brussels regime not only effects a distribution of jurisdiction among the judges of the Member States, but also lays down, within and with respect to *the whole territorial extent of the Union*, the preconditions for the actual exercise of jurisdictional power.

As a consequence of those characteristics of the system, the exclusive jurisdiction thus established cannot be assimilated to the hypotheses of exclusive jurisdiction unilaterally and autonomously foreseen by national legal orders. As has been indicated above,[9] the concept of exclusive jurisdiction must be understood from the point of view of a single State which claims jurisdiction in respect of a particular dispute and simultaneously denies, due to the absence of international jurisdiction, any possibility to recognise any foreign judgment whatsoever that purports to settle it. In contrast, in the Brussels regime the exclusivity is directly correlated to the distribution of jurisdiction amongst all the judges of the Member States, with the effect of preventing the recognition *in all the Member States* of any decision originating from a judge deprived of exclusive competence, not only in the State to the judges of which that competence is attributed. On the other hand, the Brussels system does not stipulate that European judges must decline jurisdiction when the connecting factor – the one used to grant exclusivity to European judges – points to a non-European *forum*.

E. Reflexive Effect

The exclusive competence of the Brussels regime prevents recourse to the national jurisdiction criteria, which remain applicable according to Article 4, in respect of a defendant who is not domiciled in any Member State. The system makes no provision, on the contrary, for the hypothesis under which the prerequisites determinative of the exclusive competence of a judge of the Member States are manifested

[8] *Supra*, under point C.

[9] *Infra*, *sub* III.

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outside the territory of the Union, while the controversy is *also* connected to the territorial area of the Union, by virtue of either the domicile of the defendant or the will of the parties. It is, therefore, uncertain if the criteria of distribution of jurisdiction amongst the judges of the Member States should be applied in this case. According to the theory of "reflexive effect", the Brussels regime does not require the exclusion of the jurisdiction of the judges of the Member States, but rather entrusts the resolution of that question to the judge of the potential forum, who could find that the missing jurisdiction is provided by national law under such a hypothesis, thus excluding the consequences of the application of the criteria of competence specified in the Brussels regime.

Understood in this way, the theory of "reflexive effect" introduces into the Brussels regime a norm that permits the disapplication of the Brussels regime in order to make space for the application of national law. In substance, the theory boils down to a negative rule of jurisdiction laid down by the regime, the operation of which is conditional upon the expectation of the lack of any jurisdiction provided by national law. A lack of jurisdiction on the basis of national law thus prevails over the jurisdiction derived from the Brussels regime.

The prevalence that the theory attributes to national law is not compatible with the *exclusive* nature or with the *unitary and complete* structure of the Brussels regime. The Brussels regime regulates imperatively not only the jurisdiction of the judges of the Member States when confronted with specific connections to their respective territories, but also foresees in the regulation of that jurisdiction in respect of controversies which involve connections to third States (Article 4). This complete character of the system, derived from the incorporation within it of the national rules of jurisdiction, does not permit any negation of *one* connection to the territorial space of the Union in order to give effect to *another* connection with a third State.[10] The theory of "reflexive effect" leads to an arbitrary exclusion of the criteria of competence of the Brussels system, since the national law is made applicable, under this theory, in an autonomous manner and not because it is required by this system, as on the contrary happens in the cases foreseen by Article 4.

F. Conclusions of Part I

The legal order of the European Union has effected, by means of the Brussels regime, a distribution of jurisdictional power amongst the judges present in its territory. This *internal* distribution of jurisdictional power has hitherto not been complemented with a unitary regulation, belonging to the Union itself, which delimits the extent of that power in respect of disputes from outside the scope of the internal distribution. The EU legal order has provided a method for directly resolving the various questions appertaining to (international direct) jurisdiction, treating them simply as questions of internal territorial jurisdiction, but adapting the relevant rules exclusively to the measure and the manner in which they affect

[10] Compare: Court of Justice of the European Union, Opinion 1/03 of 7.2.2006, specifically at points 143, 148 and 153; the earlier proposition in L. MARI (note 5), at 148-149 and 197-203.

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the relations between the judges of the Member States. The Brussels regime does not, however, only regulate situations exclusively connected to the legal orders of the Member States, but operates, in part, also with respect to situations connected to third States. Furthermore, for these situations, the uniform rules of the Brussels regime – by way of reminder: conceived and structured exclusively in respect of the relations between the Member States – only partially deal with the disputes that could require the activation of the judicial power of the Member States, while national law operates for the remaining part. On the whole, the various questions of jurisdiction (direct international jurisdiction) involving connections to the legal orders of third States are partly subjected to the Brussels system – such questions are, therefore, assimilated to questions of internal jurisdiction and treated in a manner identical to those which only relate to the relations between the Member States – and partly to national law, where they are regulated, naturally according to the unilateral point of view of each Member State, as pure questions of international competence.

This structural dichotomy of the Brussels regime – which leads it to operate, in respect of the Member States, as a true and rightful mechanism for the distribution of territorial jurisdiction, and in respect of third States, as a jurisdictional regime that is based in part on the extension of the rules of territorial competence to the delimitation of the extent of jurisdiction and is integrated, for the remainder, into the national rules of each Member State – is not adapted to the need to regulate, in a uniform and reasonable manner, the extent of the jurisdiction of the Union in relation to third States. In the way in which it is currently structured, the Brussels regime permits the use of exorbitant criteria in relation to third States – national criteria which it prohibits on the internal plane – which correspond to a unilateral evaluation of the interests that the Member States deem to be worthy of protection. Yet, that is not all. Even when it operates exclusively as a system of territorial distribution of jurisdictional power within the Union, that same system inevitably intervenes in the regulation of direct international jurisdiction in respect of cases connected to third States using exorbitant rules. In fact, it happens that this system of criteria conceived for the purposes of the internal distribution of jurisdictional power is automatically applied *tel quel* in situations which are predominantly connected to third States, as per the hypotheses presented in respect of the theory of reflexive effect, in such a way that some rules of competence, which are not *per se* exorbitant, actually function in an exorbitant manner in concrete cases.

These results do not provide any reasonable coordination between the sphere of the jurisdictional power of the Union and that of third States. In other words, such coordination cannot be achieved by accepting the theory of reflexive effect, thus implying a resurgence of national private international law. More accurately, coordination between the sphere of the jurisdictional power of the EU and that of the US, China and any other third State can only be obtained by means of a uniform system of jurisdiction which takes into account both the need for coordination and the necessity of guaranteeing protection of the collective interests of the EU.

The EU legal order is invested with autonomy and with the competences necessary for the unilateral determination of the cases in which judges subject to its legal order are authorised to exercise jurisdictional power. Like the national legal

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systems, that of the Union should limit the exercise of jurisdictional power to those disputes that are reasonably connected to the Union. In doing so criteria should be selected that are most apt to satisfy the interests of the Union. It does not seem possible to carry out that task, however, without being well aware that coordination must be effected in global terms, coherently foreseeing and regulating all the circumstances in which foreign jurisdictional powers may become relevant, whilst also taking into account the *principle of reciprocity* which in fact governs international relations.

Therefore, since the rules of (international direct) jurisdiction constitute the fundamental and unavoidable point of reference for determining the criteria of indirect international jurisdiction – itself required for the recognition of foreign judgments – it is in the first instance necessary that the criteria of (international direct) jurisdiction, applicable in situations involving third States, be determined and structured as a function of their indirect relevance as criteria of the international competence of foreign judges. It is thus intuitively obvious that a global and uniform regulation of jurisdictional competence, the operation of which encompasses situations involving third States, cannot be rationally structured, even purely unilaterally, without simultaneously foreseeing the creation of a complete, global and uniform regime for the recognition of judgments originating from third States. Only within the scope of this specific regime for giving force to foreign judgments will it be possible to formulate hypotheses of the exclusive jurisdiction of a third State and of the exclusive jurisdiction of the Union in the sense which has been explained *supra*,[11] which sense is the only conceivable one in respect of relations between the Union and third States characterised by reciprocal autonomy.

II. International Jurisdiction and Domestic Territorial Allocation in International Litigation

A. The Function of Jurisdictional Rules

The essential prerequisite for analysing the possibility and desirability of fully harmonising European jurisdictional rules is a sound awareness of the concept of jurisdictional rules via an analysis of the function of these rules within the legislation of Member States, third States and the European Union.

In this respect, the starting point is to establish and accurately qualify the jurisdictional criteria according to their function. In other words, the first question that must be answered, prior to considering a criterion such as the *forum rei* criterion, the *forum rei sitae* criterion or the *forum commissi delicti* criterion etc., is the following. Is this criterion: (a) a ground for determining whether international jurisdiction exists; (b) a ground for the applicability of national law, European law or international law; and/or (c) a criterion for allocating disputes between national courts?

[11] *Infra*, *sub* III.

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It is important to realize that the same (or identical) criteria are often used for different purposes. For example, in Regulation 1215/2012 (and in the corresponding rules of the former Brussels Convention and the Brussels I Regulation), the *forum rei* contained in Article 4 is *at the same time*, a ground for jurisdiction, a ground for the applicability of Sections I and II of Chapter II of the Regulation and a criterion for distributing jurisdiction *ratione loci*. The same applies to the *forum rei sitae* in Article 24: the Member State in which the property is situated provides at the same time a ground for jurisdiction and territorial adjudication.[12]

This is neither the case for the *forum commissi delicti* in Article 7(2), nor for the *forum destinatae solutionis* in Article 7(1). The latter are *merely* criteria for territorial allocation within the European area of freedom, security and justice *ratione loci*, *i.e.*, criteria allowing the claimant to ascertain which judge or judges may hear the case. Unlike *forum rei* and *forum rei sitae*, these criteria do not render the Regulation applicable in the State they point towards, nor do they provide *per se* a ground for international judicial jurisdiction, for they provide a ground of jurisdiction – and simultaneously, territorial allocation (venue within the Member State)[13] – if, and only if, the defendant is domiciled in another Member State.

For example, the French judge will apply Regulation 1215/2012 to a dispute concerning a sales contract that had to be performed in Marseille only if the defendant is domiciled in another Member State, such as Germany. If the defendant proves that according to German law its domicile is not in Germany and according to US law its domicile is in the USA, the French judge will have to determine its jurisdiction according to its national (*i.e.*, French) rules of private international law. All the other factors connecting the dispute to France – such as the French nationality of the defendant, the French domicile of the claimant, the French city where the contract was negotiated and signed, as well as performed – are of course all irrelevant and cannot lead to the application of Regulation 1215/2012.

On the contrary, if the contract concerns the long-term tenancy of a property located in Aix-en-Provence, the defendant's domicile becomes completely irrelevant and Article 24(1) of Regulation 1215/2012 provides a ground for jurisdiction for the French judge. Moreover, the dispute is adjudicated in the Aix-en-Provence Court.

The heterogeneity of functions of the different sets of criteria can be better understood in light of the specific nature of EU rules. The EU is an entity different from an international organisation and from a Federal State; its peculiar nature has an impact on the structure of its legal norms, as well as on the addressees of its rules.

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[12] As stated by M. FALLON/ Th. KRUGER, The Spatial Scope of the EU's rules on jurisdiction and enforcement of judgments: from bilateral modus to unilateral universality?, *YPIL*, vol. XIV (2012/2013), p. 219: "[In international conventions] often it is the jurisdiction rule itself that defines the spatial application [of the convention. In such cases, when] there is no jurisdiction […] the Convention simply offers no basis for its application. One would then have to fall back on domestic rules".

[13] Except in the case of the trust, see Article 7, No. 6.

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As regards jurisdictional rules, these may be divided in two major models.[14] The first model of rules is that which can be said to encompass supranational, international and distributive rules, similar to those found in international treaties. It is via these rules that the EU allocates territorial jurisdiction to the courts of Member States. An example of this principle is Article 7(2) Regulation 1215/2012 which states that in matters involving torts, provided that the defendant is domiciled in a European Member State, jurisdiction belongs either to the District Court of the domicile of the defendant or to the District Court where the harmful event occurred or may occur.

These types of rules are complemented by a different set of rules – unilateralist rules – that fix the boundaries of EU Member States' jurisdiction. An example of this second rules model is Article 24(1) Regulation 1215/2012. This provides that in proceedings that have, as their object, rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction. This means that all the immovable property situated within the European area of freedom, security and justice is subject to the jurisdiction of EU courts as regards rights *in rem* or tenancies.

The first set of rules aims to allocate judicial jurisdiction among Member States (the model would be that of international convention distributive rules on jurisdiction). The second set of rules has the purpose of dictating to Member States in which circumstances they must accept jurisdiction in a unilateral manner, *i.e.*, regardless of what other States order to their judges in the same circumstances (the model would then be that of national unilateralist rules of jurisdiction).

B. National Sources of International Jurisdiction

The source of national rules on jurisdiction is to be found either in the national procedural law statutes (*e.g.*, France's *code civil*, *code de procédure civile* and *code du travail*, Germany's *ZPO*, UK's Civil Procedure Rules 1999, Denmark's *Retsplejeloven*, United States' Constitution and Code,[15] Japan's Code of Civil Procedure (*hereinafter* "CCP" and Civil Provisional Remedies Act) or in special private international law statutes (*e.g.*, Polish Act of 4 February 2011 Private International Law *Dziennik Ustaw 2011, No. 80, item 432*, Italian Act of 31 May 1995 n. 218 on Private International Law, Swiss Act of 18 December 1987 on Private International Law *Loi fédérale du 18 décembre 1987 sur le droit international privé*, SR 291).

The content of these rules is different according to the type of their source. Within national private international law statutes, these rules are intended to determine when all national judges have jurisdiction to adjudicate a case. A series

[14] A comparable dichotomy is traced by M. FALLON and Th. KRUGER (note 12), at 217 *et seq*. distinguishing a bilateral modus – broadly corresponding to what we call the international conventions distributive model – from unilateral universality – corresponding to what we call the unilateral fixation of the boundaries of national jurisdictional power enacted by each State.

[15] Compare arts. Art. III, § 1 USCS Const. and 1332 USC.

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of factors connecting disputes to the legal order of the home State is provided for, thereby granting the power of *iuris dicere* to home State judges.

For example, Article 50 of the Italian Private International Law Act grants jurisdiction to the Italian judge in matters regarding succession if (a) the deceased was an Italian citizen at the time of death, (b) the estate devolved in Italy, (c) the assets of greater economic value that are part of the succession are located in Italy, (d) the defendant has his/her habitual residence in Italy or lives in Italy or has accepted Italian jurisdiction, unless the request concerns immovable property located abroad, or (e) if the request concerns assets located in Italy.

When no such special pieces of legislation exist, the problem tends naturally to be solved in two different ways.

First, the problem of international jurisdiction is solved by resorting to the rules applied in order to allocate internal disputes to the various national district courts. This, therefore, assigns these rules a second function. Indeed, the German doctrine talks of these rules having "double functionality" (*Doppel Funktionalität*) since they serve two objectives: that of allocating disputes efficiently in the various home State courts (*i.e.*, by allocating cases to the relevant venues), as well as of providing these courts with jurisdiction whenever the relevant connecting factor of an international dispute points towards them.

For example, § 27 ZPO (in conjunction with § 13 and 15 ZPO) allocates international jurisdiction and resolves internal allocation disputes in certain matters of successions, firstly to the Court of the place in which the *de cujus* was domiciled at the time of his death and, secondly, if the *de cujus* was a German citizen not domiciled in Germany at the time of his death, to the Court of the place of its last residence in Germany. In the absence of both of these connecting factors, § 27-2 ZPO allocates the dispute to the *Amtsgericht* Schöneberg in Berlin.

Given that an entirely domestic dispute will always need to be allocated to a domestic Court, the operation of the double functionality will always grant jurisdiction to a German judge, even in the absence of a significant connecting factor. In other words, it is obvious that within any national system a dispute always needs to be allocated to a territorial court. Thus, every national statute on civil procedure contains rules allowing a claimant to identify the competent judge. If these criteria are also used as jurisdictional rules – and not only in their original function of allocating a domestic dispute to a territorial court – the consequence of the extension of the scope of these rules will be that of always granting jurisdiction to a national judge, by virtue of any territorial criterion.

Secondly, within the systems lacking a specific private international law statute, certain exceptions to the internal territorial allocation rules have been developed in order to restrict the exercise of jurisdiction.

For example, Article 5 No. 1 of the Japanese CCP allocates internal disputes on civil obligations to the court of the place for the performance of such a civil obligation, whereas, according to Article 3-3 No. 1 CCP, this is not the case in international disputes in matters of tortious obligations. In other words, in the case of tortious obligations, the connecting factor of the place of performance is merely a criterion for territorial allocation (*i.e.*, the venue), and does not carry the function

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of providing the judge in whose district a tortious obligation must be performed with jurisdictional power.[16]

C. Distribution of Jurisdictional Power among National Courts in National and International Cases

An analysis of the national sources of international civil adjudication reveals two different models for distributing jurisdictional power among home State courts in national and international cases.[17]

The first being an approach in which international jurisdiction is dealt with in accordance with specific rules, most often in a Statute implementing private international law, and the second consisting in a mere extension of the rules on domestic jurisdiction to international cases, usually complemented by some special rules. Within each of those approaches, it is again possible to differentiate two subtypes.

With respect to the first approach, in countries where private international law statutes provide for jurisdictional rules, it will frequently be necessary to carry out a two-step approach before allocating a dispute to a judge. Firstly, it must be considered whether the national judge have jurisdiction according to the rules of private international law. Secondly, one must ascertain which of these judges, according to the internal procedural rules, may hear the case.

For example, in the United Kingdom, "there is a fundamental conceptual difference between the rules of English private international law concerning international jurisdiction and the rules distributing cases among national judges: […] the Courts of England and Wales have jurisdiction over any case in which a writ initiating process has been validly served and do not have jurisdiction over any other cases. This means that the question of jurisdiction is discussed in England and Wales in terms of «service of initiating process». In other words, the scope of international jurisdiction depends on the categories of cases in which a writ is permitted to be served".[18] These categories embody the relevant connecting factors, but have no function in allocating the dispute to a particular district judge. Only once the existence of international jurisdiction is verified can the case be attributed at an early "allocation hearing" to the *small claims track*, the *fact track* or the

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[16] See NISHITANI, National Report for Japan (summary), Annex V, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>, p. 107 *et seq.*

[17] See, for a more detailed analysis and an extensive description of all possible distinctive criteria: A. NUYTS, Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations), JLS/C4/2005/07-30-CE)0040309/00-37, General Report, (final version dated 3 September 2007), p. 5 *et seq.*, whose study "identifies and compares the general structure and connecting factors used in the (then) 27 Member States with respect to the international jurisdiction of their Courts".

[18] See M. SYCHOLD, National Report for the UK, Annex VII, par. 2, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>, p. 126 *et seq.*

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multi-track and referred to a court as a function of that allocation, by virtue of the Civil Procedure Rules 1999.[19] In France, the same two-step analysis is applicable in accordance with Articles 14 and 15 French *Code civil,* as an expression of the so called "privilège de juridiction".[20]

The two-step approach is facilitated where the rules providing international jurisdiction correspond to the rules for territorial allocation within the state (*i.e.*, the venues). Take the example of an accident occurring entirely within the borders of Italy, where all of the parties involved are domiciled in non-European countries. Article 3 Italian PIL Statute grants jurisdiction to the local judge of the place where the accident took place, and the Italian Code of Civil Procedure grants him territorial competence.[21] The conceptual difference between the jurisdictional power and the territorial competence remains, albeit blurred by the identity of the criteria. In fact, a defendant could, under a separate analysis, object to jurisdiction and/or to territorial competence - for example by challenging assertions made as to where the accident took place. In order to contest the Italian jurisdiction, the defendant needs to rely on a special procedure in front of the *Sezioni Unite* of the *Corte di cassazione* (that may be introduced as an incident of the first instance and thus avoiding the appellate court) called "Regolamento di giurisdizione" (art. 375, para. 1, n. 4 and art. 380*ter* Italian *codice di procedura civile*). On the other hand, a challenge based on the absence of territorial jurisdiction will not lead to a dismissal of the claim, but has merely procedural consequences and leads to a *translatio iudicii*. In other words, the procedure *continues* in front of the judge that has territorial competence.

The second category of rules is characterized by the fact that the heads of jurisdiction are the same as those allocating disputes among judges within a State. For example, Article 1166 French Code of Civil Procedure provides that "an application for adoption must be made […] if the applicant lives abroad, [to the court] within the judicial district of the person to be adopted; if the applicant and the person to be adopted live abroad, [to] the court chosen by the applicant".[22] In these cases, the rule providing for jurisdiction also points to a venue.

The second main approach is found in countries such as Austria (§ 27a *Jurisdiktionsnorm*), Germany (§§ 12 to 40 ZPO, § 105 FamFG) and Sweden. In these countries, the approach towards international jurisdiction, and the criteria relied on by courts, are rooted in existing rules of domestic allocation rather than in the rules on international jurisdiction, as is the cases in countries such as Italy and France. In this second group of systems, these rules, by definition, point to a single national court because their primary aim is not to grant jurisdiction, but instead to

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[19] *Ibidem.*

[20] Article 14 and 15 of the Civil Code grant jurisdiction to French court on the sole ground that the plaintiff (Article 14) or respectively, the defendant (Article. 15), is a French national. See Cour de cassation, Ch. Civ. 1, 29 February 2012, 11-40.101. See B. AUDIT/ L. D'AVOUT, *Droit international privé*, Nos 332 *et seq*.

[21] Article 20 Italian Code of Civil Procedure provides for the venue of the District Court of the place where the civil obligation is born or has to be performed.

[22] Ch. DODD, *The French Code of Civil Procedure in English*, Oceana Publications 2004, p. 254 *et seq*.

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allocate disputes to the different district judges. In the absence of a special and separate private international law statute, these rules have been given an ancillary effect; that is to say that of granting jurisdiction to the sole judge towards to whom they point.[23] The German BGH has adopted this approach, described as "Doppelfunktionalität" of the rules on *Gerichtsstände*.[24] The Austrian *Jurisdiktionsnorm* and the German *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG) explicitly affirm the double function of the rules on domestic territorial allocation. An important consequence of this approach is that there is no need for the two-step analysis referred to above. If the dispute has to be allocated to a particular Court's district, it follows that the District Court has jurisdiction over the case, unless the peculiar circumstances of the case forbid this conclusion.[25]

With respect to certain subject matters, these countries do indeed have special provisions on international jurisdiction (*e.g.*, §§ 98 to 106 FamFG for Germany), but the general rules derive from the "double function" of the criteria for distributing the cases to the district courts.

A sub-category of the second approach is found in countries such as Denmark, Norway and Japan. In these countries, national civil procedure provisions address by way of exceptions international geographical allocation issues. In these cases, the national provision on territorial allocation is specifically adapted to international cases. For example, section 246 Danish *Retsplejeloven* (Administration of Justice Act, or RPL) restricts the scope of domestic rules of territorial jurisdictional allocation when the defendant is (a) a person not domiciled in Denmark, (b) a person whose last known place of residence was outside Denmark, or (c) a person whose last known domicile was outside Denmark. Therefore, Danish procedural law creates *ad hoc* criteria for disputes concerning non-Danish defendants. A similar example is provided by the rule established by Article 5 No. 1 of the Japanese CCP in conjunction with Article 3-3 No. 1, as discussed above.

What broadly distinguishes the two approaches examined is firstly, the starting point for any analysis, and secondly, their function. The rules in the first approach have the objective of circumscribing a State's "jurisdictional power" and indicating to judges when to exercise such power. According to the second approach, the majority of rules have the objective of efficiently distributing disputes to the district courts, and – in order to let them operate in the international context – either one must attribute to them a double effect or the legislature needs to add new rules to adapt the existing ones to international cases.

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[23] Y. NISHITANI, International Jurisdiction of Japanese Court in comparative perspective, *Netherlands International Law Review*, p. 251 *et seq.* comp. her comments to Articles 4-22 of the Japanese Code of Civil Procedure.

[24] Entscheidung des Großen Zivilsenates des BGH (14.6.1965), BGHZ 44, 46 and the literature quoted by A. FÖTSCHL, National Report for Germany with references to Austria, Annex III, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>. p. 80 *et seq.*

[25] The parallelism of regimes is only adequate if there is no difference in the interests governing the situation of the parties: please refer to the arguments quoted by A. FÖTSCHL (note 24), *passim*.

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D. Territorial Allocation from a Comparative Perspective

From a comparative point of view, grounds for determining jurisdiction can be grouped into four major categories. Firstly, grounds related to the person, *e.g.*, by way of their physical presence for a meaningful amount of time, combined with their will of maintaining such presence (domicile, residence) or by way of their genetic and cultural roots (citizenship) – that justifies their subjection to jurisdiction as is the case in certain countries, as well as in Regulation 1215/2012. Secondly, the physical attachment of the *res litigiosa* or (in certain States more extensively) of any *res* belonging to the defendant (whether or not useful *ad actoris satisfaciendum*) to the territory subject to sovereignty. Thirdly, the physical advent of the event linked to the origin of the dispute (*e.g.*, tort, performance of the obligation in contract and/or consumer law or maintenance law) for reasons of procedural economy. Fourthly and finally, the will of the parties by means of the submission of their dispute to a particular legal order. Certain legal orders have an fifth additional head of jurisdiction which grants the claimant the possibility to bring a case in his own forum without there being a predetermined link to that jurisdiction. There have to be objective and important reasons, submitted to the evaluation of the judge. The issue concerns the *forum necessitatis*.

1. Jurisdiction over the Person

a) Physical Presence of the Defendant

Physical presence alone suffices as a basis for jurisdiction in the United Kingdom[26] and, to a certain extent, in Denmark (*opholdsværnting*, tag-jurisdiction, § 246 sect. 2 RPL).[27]

This criterion derives from the *ubi te reperio ibi te iudico* principle, that may be explained as follows: "he who has been served with the King's writ and finds himself within the King's realm is subject to the jurisdiction of the King's courts".[28] While in the UK, mere physical presence is sufficient, Danish law requires a place of abode in Denmark at the time of service of documents.[29]

b) Domicile/Residence or Habitual Residence of the Defendant

In most countries, *e.g.*, France (art. 42 ss. CPC), Germany (§§ 12 to 19 ZPO), Italy (art. 3 PIL), Japan (art. 3-2 (1) 1st alternative CCP), Poland (articles 27-30 CCP),

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[26] See M. SYCHOLD (note 18), at 127 *et seq.* for a comprehensive description of the rule and its meaning for natural and legal persons.

[27] See A. FÖTSCHL, National Report for Denmark with references to Norway and Sweden, Annex I, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>, p. 50 *et seq.*

[28] See M. SYCHOLD (note 18), at 127.

[29] See A. FÖTSCHL (note 27), at 53.

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and Switzerland (art. 2 LDIP), the domicile of the defendant provides the general ground for jurisdiction. Definitions and interpretations of the concept of domicile might vary greatly from one legal system to the other. For this reason this criterion is usually accompanied by alternative general criteria, such as the residence[30] or the habitual residence[31] of the defendant.

In other countries, the relevant factor is residence, *e.g.*, Denmark (§ 235 RPL, § 448d sect. 1 RPL, 456c RPL, § 2), but its definition is broad enough to include the most diffused definition of domicile, *i.e.*, "the centre of a person's life."

When the defendant is a legal person, company, association or foundation it may be very difficult to ascertain where it "lives". The place where the principal office is situated (*e.g.*, Italy, Japan, Poland),[32] or where the centre of activity is situated (*e.g.*, France) are taken into account.

c) Domicile/Residence of a Representative of the Defendant

Art. 3 para. 1 Italian PIL grants jurisdiction when the general representative of the defendant is domiciled or resident in Italy, and has been duly authorised to sue and be sued.

d) Citizenship of the Defendant

Citizenship is the general venue for German diplomats (§ 15 ZPO), and a special venue for succession in Germany (§ 27 sect. 2 ZPO). In Italy it is widely used in civil status, family and succession matters (Articles 9, 22, 32, 37, 40, 42, 50 l. 218/95).

When the defendant is a legal person, the criterion is that of the seat of incorporation (*e.g.*, Switzerland).[33] As with natural persons, it is very easy to ascertain "citizenship", since companies are "creatures of the law" and are necessarily incorporated under a specific law.

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[30] Article 3-2 (2nd) alternative. See D. SOLENIK National Report for France, Annex II, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>, p. 64 *et seq*.

[31] Article 109 (1) and (2) Swiss Private International Law Act.

[32] The Italian law does not contain express provisions, but it is traditionally thought that the domicile of natural persons corresponds to the main seat of legal persons (see. T. BALLARINO, La società per azioni nella disciplina internazionalprivatistica, in G.E. COLOMBO/ G.B. PORTALE (eds), *Trattato delle società per azioni*, Vol. IX, Torino 1994, p. 1-212).

[33] Article 43 para. 3 French Code of Civil Procedure; Articles 109(1), 149(2)(b), 151(1), and 152(b) Swiss Private International Law Act.

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e) Citizenship of the Plaintiff

This is the famous "privilege" of jurisdiction of Article 14 French Civil Code.[34] Moreover, in many countries, such as Italy, Poland, and Switzerland, the criterion is widely used in family law and non-contentious legal disciplines in general.

2. Jurisdiction in rem

a) Forum rei sitae

In case of rights *in rem* and, in certain cases, rental contracts over immovable property and lease,[35] France and Sweden (Sect. 1 point 2 of 10-3 Act on Civil Procedure) grant jurisdiction to the judge of the place where the good is located, regardless of its movable or immovable nature. The majority of States, however, make a difference according to the nature – movable or immovable – of the *res*. In the United Kingdom, claims *in rem* are brought only against a ship, or an aircraft, or something within such a vessel (fuel, cargo) by means of physical attachment of the writ to some part of the superstructure of the vessel. Under UK law, the attachment of the writ grants jurisdiction to the UK. In Japan, the *situs* of property brings with it international jurisdiction when the subject matter of the claim (movable, immovable or intangible property) is located in Japan (Art. 3-3 No. 3 CCP) or the claim is related to immovable located in Japan (No. 11).

b) Asset Venues

In Germany, monetary claims against a person who has no residence (*Wohnsitz*) in Germany may be brought in front of the District Court where the assets belonging to that person are located. If the property is not immovable, but a credit, the *forum patrimonii* is either the Court of the place of residence of the debtor of the defendant or, when the credit is secured by a pledge, the place where such pledge is (see § 23 ZPO).[36] In Norway, § 4-3 sect. 2 Tvisteloven grants jurisdiction to the judge of the place where the debtor's assets are located, provided the case has sufficient connection to Norway. In Sweden, the location of the asset is residual; it serves to grant jurisdiction when the defendant in monetary claims has no residence (or seat in cases where it is a company) in Sweden. Sect. 1 point 1 of 10-3 Act on Civil

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[34] See D. SOLENIK (note 30), at 64 *et seq.*

[35] See D. SOLENIK (note 30), at 64 *et seq.* J. SKALA, National Report for Poland, Annex VI, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>, p. 109 *et seq.*, esp. p. 113.

[36] § 23: *Besonderer Gerichtsstand des Vermögens und des Gegenstands. Für Klagen wegen vermögensrechtlicher Ansprüche gegen eine Person, die im Inland keinen Wohnsitz hat, ist das Gericht zuständig, in dessen Bezirk sich Vermögen derselben oder der mit der Klage in Anspruch genommene Gegenstand befindet. Bei Forderungen gilt als der Ort, wo das Vermögen sich befindet, der Wohnsitz des Schuldners und, wenn für die Forderungen eine Sache zur Sicherheit haftet, auch der Ort, wo die Sache sich befindet.*

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Procedure determines jurisdiction according to the location of the defendant's property. The notion of assets includes receivables only when, (i) these are incorporated in a letter of debt called *skuldbrev* or (ii) these are secured by a pledge. In these cases, the Swedish judge may accept jurisdiction on the basis of the *situs* where the document is recorded or, respectively, the *situs* of the pledge. The relationship between the value of the claim and the value of the asset is totally irrelevant. Japan and Switzerland also grant *situs* jurisdiction on the basis of the defendant's seizable (or seized, for Switzerland) property (though this has been criticised in Swiss legal writing). To restrict its scope, the relevant subject matter of the claim is limited to the payment of money and the *situs* jurisdiction is precluded when the value of the property is extremely low (Art. 3-3 No. 3 CCP).

c) Forum arresti

Jurisdiction for taking provisional measures belongs to the court capable of executing the measure in France and Switzerland.[37]

3. Subject-Matter Jurisdiction

a) Place of Performance of the Contract/Place of the Tort

In matters of civil liability for torts or contracts, the places where the obligation arose or, respectively, where the obligation has been performed or needed to be performed or where the service are accepted as a ground for jurisdiction in Italy, France, Poland, Germany, Japan and Switzerland.[38]

In maritime transport contracts, France refers to the port of loading and boarding, or unloading and landing.[39]

b) Domicile/Residence or Habitual Residence of the Weaker Party

The reasons for protecting the defendant as expressed by the principle *actor sequitur forum rei* are weaker when the defendant is substantially stronger than his counterparty. In particular, these cases involve consumers, creditors in case of maintenance obligations, or employees. In these cases, French law,[40] Polish law,[41] Japanese law and Swiss law[42] all provide for *forum actoris* jurisdiction.

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[37] See D. SOLENIK (note 30), at 72.

[38] Please refer to the national reports for detailed information.

[39] See D. SOLENIK (note 30), at 66.

[40] See D. SOLENIK (note 30), at 72.

[41] See J. SKALA (note 35), at 113.

[42] See L. HECKENDORN URSCHELER, National Report for Switzerland, Annex VIII, Study PE 493.024 available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf>, p. 138 *et seq.*

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4. Submission to Jurisdiction

a) *Choice-of-Court Agreement*

In the United Kingdom, the choice of English or Welsh courts always grants jurisdiction to the chosen judges, unless there appears to be a good reason for refusing leave.[43] In France, a choice-of-court agreement can only confer exclusive jurisdiction on the French judges and will not be capable of impairing French jurisdiction to consider the validity of the clause where it seeks to confer exclusive jurisdiction in favour of a foreign judge.

b) *Submission to Jurisdiction*

In most countries – *e.g.*, UK,[44] Italy (art. 4, al. 1 PIL), Japan (art. 3 CCP), Switzerland (art. 6 PIL) etc. – jurisdiction will be granted to a court which would not have it otherwise if the defendant appears before that court without objecting to jurisdiction. Submission to jurisdiction is sometimes limited to property issues (*e.g.*, Italy and Switzerland).

5. Judicial Acceptance of Jurisdiction

The *forum necessitatis* can be found under French law, Swiss law and German law. However, German doctrine is very doubtful as to its practical importance.[45] In Switzerland and France, case law illustrates that the *forum necessitatis* is actually used occasionally.

E. Conclusions of Part II

If we compare the national rules to the European rules, it appears that Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and, in substance, Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast),[46] as well as Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation No. 1347/2000, are based on a method which addresses the issues of territorial allocation among the Courts of European Member States, while

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[43] See M. SYCHOLD (note 18), *passim.*

[44] See M. SYCHOLD, (note 18), at 126 *et seq.*.

[45] See A. FÖTSCHL (note 27), at 80 *et seq.*

[46] With the exceptions of jurisdiction over consumers, employees and – maybe – with the exception of choice-of-court agreements.

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leaving the issue of international jurisdiction in "non-European" disputes to national rules.

Instead, Regulation 650/2012 does not make any distinction between jurisdiction over a defendant domiciled in a Member State and jurisdiction over a defendant domiciled outside the area of freedom, justice and security.

Therefore, it seems possible to characterise the rules provided for by the first two Regulations within the "private international law" approach; the relevant rules being founded on a distinction between jurisdiction and intra-EU allocation of disputes. The Succession Regulation appears, on the other hand, to correspond more to the double functionality principle, since it provides a series of connecting factors with a view to allow the exercise of jurisdiction within European Member States courts.

III. Exclusive Jurisdiction from a Comparative Perspective

A. Proximity, Effectiveness and Exclusivity

The categories of criteria for determining jurisdiction, as examined above, are traditionally thought to be expressions of the "principle of proximity".[47] Their organization within the Brussels regime points to two different understandings of that principle. The first is that, when the legal order of a particular State is able to "guarantee the effectiveness" of its allocation of a given case – precisely because it is the only possible legal order where the enforcement of the judgment can take place – that State will have exclusive jurisdiction in relation to the case, *regardless* of any other possible points of contact of the case with other States.[48] The criterion is hierarchically superior to all others on account of the principle of effectiveness and the State may be said to have effective control over the substance of the dispute.

Secondly, in the absence of a link capable of guaranteeing the effectiveness of the evaluations of a particular *forum*, the legal orders of States linked with the case are – as a matter of fact – in an equal position to hear and decide the case. Therefore, the points of contact are all comparable and sufficient. This explains why the claimant may choose between the principal/general *forum* of the defendant or the special *fora* identified through their proximity to the subject-matter of the dispute.

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[47] T. BALLARINO/ G.P. ROMANO, Le principe de proximité chez Paul Lagarde, in *Le droit international privé: esprit et méthodes, Mélanges en l'honneur de Paul Lagarde*, Paris 2005, p. 37 *et seq.*

[48] See F. KAHN, *Gesetzeskollisionen*, 1928 (1891), p. 31 *et seq.*, DICEY, MORRIS & COLLINS, *The Conflict of laws*, 2012, No. 22-025: "The rationale for the application of the *lex situs* to many questions of property law is […] that the country of the *situs* has control over the property".

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Coordination can be very straightforward in cases where a vertical hierarchy of venues can be identified, *i.e.*, when a State has been able to determine jurisdiction, and to impose and render effective its evaluations. No overlap is possible. In all other cases, the overlap between two courts equally empowered with jurisdiction over the case (neither of which is able to solely guarantee the effectiveness of its own evaluation of the relevant criteria), can only be prevented by the common adoption of principles such as the one founding the rules on *lis pendens – i.e. prior in tempore potior in iure* – or that elaborated by the *forum conveniens* doctrine.

The Brussels regime of coordination is indeed founded on exclusive jurisdiction and *lis pendens*. In the following paragraphs we examine unilateral coordination of jurisdiction by the Member States.

B. Exclusive Jurisdiction of the Forum

1. *Claims* **in rem** *Related to Immovable Assets Located within the Territory of the Forum*

In the United Kingdom, the national courts have exclusive jurisdiction as regards to equitable orders concerning conduct involving immovable property in England and Wales.[49] In Switzerland, Article 97 PIL (read in conjunction with Article 108 PIL) prevents recognition of foreign judgments dealing with real property rights (*droit reels / dingliche Rechte*) concerning real property located in Switzerland. It can be argued, therefore, that claims *in rem* related to immovables located within the territory of the *forum* need to be exclusively brought to the judge of the *forum* (with the notable exception of succession cases). German doctrine and case law agrees that claims *in rem* (*i.e.*, property law disputes) concerning immovable assets (*dinglicher Gerichtsstand*, § 24 ZPO), and claims on lease and leasehold concerning also immovable assets (*Klagen bei Miet- und Pachtsachen*, § 29a ZPO) are exclusively subject to German jurisdiction.[50] Similarly, in France, claims *in rem*, rental contracts of immovable assets and succession-related actions fall under the exclusive jurisdiction of French courts. In Italy and Poland, only rights *in rem* or possession of real estate fall under the exclusive jurisdiction of the *forum*. On the other hand, Japanese jurisdiction rules do not grant exclusive jurisdiction to the *situs* of immovable property, even if the claim concerns rights *in rem* (Article 3-3 No. 11 CCP).

2. **Pacta sunt servanda***: Jurisdiction Prorogated by the Will of the Parties Involved*

In Switzerland, jurisdiction clauses validly agreed upon by the parties are exclusive according to Article 5(3) PIL whenever one of the following two circumstances occur: either one of the parties involved has his domicile or his habitual residence

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[49] See M. SYCHOLD (note 18).

[50] BGH 28.9.1994, *NJW* 1995, p. 58. *Amplius* A. FÖTSCHL (note 24).

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or a place of business in the canton where the chosen court sits, or if the case has to be decided by Swiss law according to the PIL statute. In France, a choice-of-court agreement is regarded as conferring exclusive jurisdiction when established in favour of a French court.

3. Implementation of Public Policy Legislation

It is interesting to note that exclusive jurisdiction rules may also be used in order to protect public policy. An extremely interesting example, although not covered by the present research, is provided by Article 3151 Quebec Civil Code, according to which, "a Québec authority has exclusive jurisdiction to hear in first instance all actions founded on liability for damage suffered in or outside Québec as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec".[51] Similar provisions, although less clear as regards to their exclusiveness, are § 32a and § 32b German ZPO[52] relating to damages caused by industrial factories and damages caused by false or misleading information on the capital markets respectively. Ultimately, the Ministry of Justice decided on the non-exclusive character of these grounds of jurisdiction at the international level.

Also falling into this category is the Polish *forum* for marital matters (Article 1100 Polish Code of Civil Procedure), as well as the Polish *forum* for relationships between parents and children. This also includes matters of adoption (Article 1101 Polish Code of Civil Procedure) in cases where Polish citizens or persons residing in Poland are involved. In Switzerland, scholarly writers and courts agree that, in matters of validity or registration of intellectual property rights, the jurisdiction at the place where the authority keeping the register has its office is exclusive.[53] This is also in line with Article 3-5(3) CCP of Japan.

Protective measures in respect of weaker parties may well be included in this category. According to the current interpretation of § 29c ZPO, the venue for doorstep contracts with consumers residing in Germany is exclusive. If the consumer has no residence or place of abode in Germany, the exclusivity of jurisdiction according to the ZPO does not prevent the German courts from exercising jurisdiction by referring to the general rules of procedure. German doctrine speaks of "half-sided exclusivity" (*halbseitig ausschliessliche Gerichtstände*) because the exclusivity is prescribed only in favour of the consumer and leaves the consumer free to also sue the professional at the domicile of the professional.

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[51] The civil code of Quebec in force is online at <http://www.canlii.org/en/>. On this rule see P. DE VAREILLES-SOMMIÈRES, Lois de police et politiques législatives, *Rev. crit. dr. int. pr.* 2011, p. 207 *et seq.* and the references at notes 178 *et seq.*

[52] A. FÖTSCHL (note 24), at 91.

[53] See L. HECKENDORN URSCHELER (note 42), at 138 *et seq.* In these cases Swiss courts also have jurisdiction if the defendant is domiciled in Switzerland. If he is not domiciled and there is no representative, courts at the place where registers are kept also have jurisdiction. It is a subsidiary ground of jurisdiction. However, it is also termed as exclusive, since a foreign decision will not be recognized if the authority keeping the register has its office in Switzerland.

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C. Denial of Jurisdiction of the Forum in Cases where the Only Relevant Connecting Factor Is Abroad

The majority of States do not prevent jurisdiction from being exercised by their judges in circumstances where the case in question is related to their legal order by one or more of the connecting factors listed above. Among these, Germany – with its *forum patrimonii* and *forum necessitatis* – almost always grants itself jurisdiction, despite the absence of meaningful connecting factors with the case.[54] Equally, very few legal systems decline jurisdiction over a case when it is connected to the *forum* by virtue of one or more of the connecting factors enumerated above.

Moreover, even in these few legal systems where a general rule prescribing to decline jurisdiction under certain circumstances exists, various exceptions allow the exercise of jurisdiction notwithstanding the existence of such a general rule.

The only clear examples of legal systems prescribing that jurisdiction be declined concern cases related to rights *in rem* or leasehold as regards to immovable assets and those involving choice-of-court agreements.

However, in the case of choice-of-court agreements, no State declines jurisdiction *a priori* by simply relying on the validity of a clause favouring another designated judge. The use of exceptions, which provide for a judicial review of the validity of a clause purporting to choose a court is commonly admitted, despite the so-called presumption of validity of such clauses. Control, albeit summary in nature, is always carried out by the national court before it is prepared to decline jurisdiction in favour of the designated judge.

D. Claims *in rem* Related to Immovable Assets Located in Foreign Land

Italy,[55] France[56] and Poland[57] claim exclusive jurisdiction on real estate actions relating to immovable assets located in their territory and, by the same token, decline jurisdiction on claims related to immovable assets located abroad.

In the United Kingdom, the national courts do not have jurisdiction in cases concerning immovable property situated in foreign States. The rule is interpreted as a principle of public international law in light of the equivalence between territorial sovereignty and ownership of land. This principle is, however, being substantially eroded; claims regarding immovable property abroad are only dismissed in the increasingly rare cases in which a plaintiff is not able to raise any equitable claims in connection with this immovable property.[58]

In line with Article 22 Regulation No. 44/2001, Germany does not prevent the exercise of jurisdiction by German courts on proprietary claims (including contracts for lease or leasehold) when the object of the claim is real estate located

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[54] *Ibid.*

[55] Article 5, l. 218/95.

[56] See D. SOLENIK (note 30), at 75.

[57] See art. 1102[2] of the Polish code of Civil Procedure. See J. SKALA (note 35), at 116.

[58] See M. SYCHOLD (note 18), at 130.

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in a Non-Member State.[59] On this basis, a dispute, for example, between the German-domiciled owner of an apartment located in Egypt and the German-domiciled agency that rents the apartment does not necessarily have to be brought in front of the Egyptian court. This would suggest that the *Doppelfunktionalität* principle is in fact only used to attribute jurisdiction to German Courts, and that the provisions of § 12 ZPO (which state that "exclusive jurisdiction" means excluding every other *forum*, including the *forum* prorogated by the will of the parties) only refers to local, and not international, jurisdiction. It has, therefore, also been argued that these provisions do not bar the exercise of German jurisdiction and so have no veto-effect (*Sperrwirkung*). This is despite the fact that a third State's Court should, according to the ZPO, have exclusive jurisdiction in certain circumstances. In short, there is no reflexive effect.

In Switzerland, jurisdiction clauses validly agreed upon by the parties in principle prevent the exercise of jurisdiction by Swiss Courts according to Art. 5 (and Art. 149b PIL as regards trusts) but this principle is deprived of effect where it results in abusively depriving the defendant of a Swiss protective *forum*. Despite the definition of "exclusive", the Swiss judge has jurisdiction, even though he was not designated by the relevant clause, for the purposes of determining the validity of the clause.

Different exceptions also exist in France where, apparently, only a *lis pendens* exception in favour of the foreign chosen court allows French courts to decline jurisdiction.[60] Japanese courts defer to an exclusive choice of foreign courts, insofar as the agreement is valid and the designated courts are legally or factually not prevented from exercising jurisdiction (Art. 3-7 CCP).

1. **Pacta sunt servanda*: Jurisdiction Derogated by the Will of the Parties Involved***

In Switzerland, jurisdiction clauses validly agreed to by the parties in principle prevent the exercise of jurisdiction by Swiss Courts according to Article 5 (and Article 149b PIL as regards trusts), but this principle is deprived of effect if it results in the abusive deprivation of a Swiss protective *forum* for the defendant. Despite the definition of "exclusive", the Swiss judge has jurisdiction, even though he was not designated by the relevant clause, for the purposes of determining the validity of the clause.

Different exceptions also exist in France where, apparently, only a *lis pendens* exception in favour of the foreign chosen court allows French courts to decline jurisdiction.[61] Japanese courts defer to an exclusive choice of foreign courts, insofar as the agreement is valid and the designated courts are legally or factually not prevented from exercising jurisdiction (Article 3-7 CCP).

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[59] A. FÖTSCHL (note 24), at 89 *et seq*.

[60] See D. SOLENIK (note 30), at 77 *et seq*.

[61] *Ibid*.

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2. *Sovereign or Similar Immunities, Public Services etc.*

All national courts lack jurisdiction in the following cases: (a) where the defendant is a diplomatic and consular agent, or a family member of either of these, (b) where the defendant is an international organization, properly identified, (c) where the defendant is a foreign State, or (d) an emanation of a foreign State (subject to numerous exceptions and differences from State to State). These exceptions are excluded from the scope of the present research, since they derive from public international law and do not affect procedural issues. The same applies in the case of disputes related to acts of civil status, granting patents etc.

E. Lack of Jurisdiction of the Forum if – and only if – Another State Assumes to Have, in the Case in Question, an Exclusive Ground of Jurisdiction

The majority of States consider the attitude of other States towards a given case to be irrelevant with regard to their assessment of appropriate jurisdiction. Few examples exist of a unilateral will by a State to coordinate with other States. A good example is, nonetheless, available in Article 86 Swiss PIL, according to which:

> "1. Swiss judicial or administrative authorities at the last domicile of the deceased have jurisdiction to take the measures necessary to deal with the inheritance estate and to entertain disputes relating thereto.
>
> 2. The above provision does not affect the exclusive jurisdiction claimed by the state where real property is located".

According to these provisions, the *forum* lacks jurisdiction on the succession of a Swiss resident as regards immovable assets located outside Switzerland, *if and only if*, the State where the immovable assets are located claims the exclusive jurisdiction of its own courts.

These rules are the most appropriate *unilateralist* rules for guaranteeing the harmonious jurisdictional treatment of an international case. It is only by looking at the attitude of the foreign State that it becomes possible to determine if the exercise of national jurisdiction is useful and necessary. Exercising national jurisdiction may, for example, be unnecessarily costly, since the party who wants to take advantage of it will not be able to rely on the decision across the border, and will have to start entirely new proceedings.

In the United Kingdom, the attitude of another State towards the case can, at the discretion of the relevant court, always be taken into account in evaluating the convenience of an English *forum* within the context of the application of the *forum non conveniens* principle.[62]

[62] See M. SYCHOLD (note 18), at 132.

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F. *Lis alibi (extra territorium) pendens*

According to Article 1098 Polish Code of Civil Procedure, proceedings pending abroad have no influence on the proceedings before Polish courts if the jurisdiction is given to them by Polish law. In France, it seems that the French courts have a discretionary power to dismiss an action when a *lis pendens* exception is filed.[63] In the United Kingdom, the principle of *lis pendens* is subsumed within the concept of *forum (non) conveniens* and is, therefore, subject to the discretionary determination of the judge. The date on which foreign proceedings were commenced is, therefore, considered purely accidental and thus irrelevant; the decision on "convenience" depends more on the behaviour of the party in the foreign proceedings, for example if the foreign action aims at quickly obtaining a judgment (so called "torpedo actions") etc.[64] In France, Germany, Italy and Switzerland, a positive prognosis of recognition is required in order to accept the defendant's exception on *lis pendens*. In Japan, although no specific rules have been adopted for international parallel litigation, the judge can refrain from exercising jurisdiction under special circumstances (Article 3-9 CCP) to give *de facto* priority to foreign proceedings. This is comparable to the doctrine of *forum non conveniens.*

G. Grounds for Non-Recognition Related to International Indirect Jurisdiction

International indirect heads of jurisdiction, although reciprocal, are not identical to international heads of jurisdiction. In other words, international indirect heads of jurisdiction are prescribed by specific rules or principles. These specific rules or principles have a different function than the rules on international heads of jurisdiction. They neither deal with the existence nor with the distribution of jurisdictional power. Instead their function is restricted to the conditions under which a foreign judgment may be recognized.

In the United Kingdom, Poland, Germany, Italy, Japan and Switzerland, the lack of international indirect jurisdiction is considered a ground for non-recognition. This refers not only to the violation of a national exclusive ground of jurisdiction, but also to a non-exclusive ground of jurisdiction of a third State.

German doctrine talks of a *Spiegelbildlichkeitsprinzip*, meaning that Germany will only recognize decisions emanating from a foreign State if Germany, in the reverse situation, would have had jurisdiction to deal with the case. French and Italian doctrines refer to international indirect heads of jurisdiction.

In summary, it is a means of imposing "reciprocity" on other States; if you do not act the same way as I would, had I been in the situation in which you are now, I will not recognize your action.

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[63] See D. Solenik (note 30), at 78.

[64] See M. Sychold (note 18), at 132.

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IV. Jurisdiction of the European Union and Relations with Third States

Already the Hess-Pfeiffer-Schlosser report on the application of the Brussels I Regulation in Member States[65] called for amendments of its rules in order to avoid discrimination among European claimants and thereby enhance the area of freedom, security and justice foreseen by Article 61 EC Treaty (now Article. 67 TFEU). The Nuyts Report also proffered a similar conclusion. This report, after examining different options, prefers a simple and easily implementable approach that consists of the mere extension of the existing jurisdictional rules to claims against defendants domiciled in third States.[66] In addition, the Nuyts Report proposed that the extension of the scope of the existing rules be accompanied with the introduction of additional grounds of jurisdiction, so as to compensate the unavailability – also in extra-EU cases – of the national rules of jurisdiction in force. Furthermore, the Report called for the introduction of rules allowing European judges to decline jurisdiction under certain circumstances.[67]

This analysis received widespread approval in academic circles and by the European institutions, as illustrated by the Impact Assessment analysis of the European Commission preparing the Brussels I recast[68] and, more importantly, by Regulation No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. More generally, it has recently been pointed out that, at least in the field of private international law, the European Union is today in a position comparable to that of a nation State.[69]

The different developments and analyses point towards further steps that could and, in our opinion, should be taken to further harmonize the rules regulating international jurisdiction.

It must be pointed out that the ultimate goal of the rules regulating international jurisdiction is to ensure that decisions regarding disputes involving parties or property situated in third States are pronounced by the forum, not only if there is a

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[65] B. Hess/ Th. Pfeiffer/ P. Schlosser, The Brussels I Regulation 44/2001, Application and Enforcement in the EU, Study JLS/C4/2005/03, Munich 2008, p. 45 *et seq*. See also: GEDIP, "Consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen 2008, Padua 2009, Copenhagen 2010) Proposed amendment of Chapter II of Regulation 44/2001 in order to apply it to external situations", available at <http://www.gedip-egpil.eu/documents/gedip-documents-20vce.htm>.

[66] Please refer to A. Nuyts (note 17), at 117 *et seq*.

[67] *Ibid*, and at 141 *et seq*.

[68] Commission staff working paper Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final, SEC (2010) 1548 final, p. 23 *et seq*.

[69] See M. Fallon and Th. Kruger (note 12), at 218: "The EU possesses a legislator, a territory and judges who have to apply the law".

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reasonable and legitimate interest to do so, but also to make sure that these decisions are exportable whenever they need to be enforced in a third State connected with the dispute.

In light of this underlying rationale, the most relevant options for developing the international rules on jurisdiction within the EU seem to be the following: (a) the setting of unilateral EU rules of jurisdiction for non-EU cases; (b) the negotiation of bilateral or multilateral rules of jurisdiction or indirect rules of jurisdiction with third States (especially treaties on the mutual recognition and enforcement of judgments).

In the following paragraphs we will examine the above options with a reference to the existing national approaches. We will also discuss the opportunity to reproduce national rules within the EU, bearing in mind that where third States are involved, the issue of jurisdictional rules is addressed in order to harmonise access to justice, and to ensure recognition and enforcement of European judgments abroad and, at the same time, to ensure recognition and enforcement of third States' judgments in Europe.

A. Unilateral Coordination by States

As mentioned earlier, the European Union, up until the recast was approved, had left it to each Member State to coordinate their jurisdictional power with that of third countries; the European Union, in the Brussels I Regulation, has only assumed the task of coordinating jurisdictional power with regard to intra-EU disputes.

1. Purely Unilateral Coordination

With the exception of the Inter-Nordic Conventions and the Conventions negotiated within the European Union framework,[70] Denmark has almost no bilateral agreements as regards to recognition and enforcement of foreign decisions.[71] This means that Denmark attempts to coordinate its jurisdictional power with that of other countries in a purely unilateral manner.[72]

2. Unilateral Coordination with Foreign Countries by Means of Reciprocity

The United Kingdom generally tends to deal with cross-border legal cooperation, by means of reciprocity schemes.[73] Such schemes assume that States will adopt a liberal approach in the recognition and enforcement of foreign decisions towards States that are themselves liberal towards UK decisions. Complementary to that,

[70] See A. FÖTSCHL (note 27), at 50 *et seq.*

[71] *Ibid.*

[72] *Amplius ibid.*

[73] See M. SYCHOLD (note 18), at 126 *et seq.*

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the UK thus restricts recognition and enforcement of foreign decisions in the same way as the State author of such a decision would restrict recognition and enforcement of a UK decision. However, reciprocity arrangements do not simply derive from a unilateral decision of the UK, but underwent negotiations with different States;[74] the UK is also part of the Hague Convention on the Recognition of Divorces and Legal Separations (Hague Conference Convention No. 18). Its reluctance towards solutions derived from international cooperation (see annex IV) is, therefore, not absolute.

B. Recommendations for Unilateral Coordination from a European Perspective

In our opinion, a shift from the status quo will simplify matters, increase the predictability of decision-making and improve homogeneity with other EU instruments.

As regards the first outcome, reducing the number and diversity of the rules on international civil procedure in force in each Member State would simplify the task for lawyers, judges, public authorities, and in the end, European citizens. Limiting the categories of sources where jurisdictional rules may be found in each Member State will also lead to simplification. Having a harmonized set of rules also enhances predictability and security.

Furthermore, the adoption of European rules and the European Court of Justice's power to interpret them might eventually lead to a uniform interpretation of these rules, through the definition of autonomous concepts. Even though uncertainties and divergences in the interpretation of new autonomous concepts may emerge at first, uniformity will, in the end, help to create a common legal terminology, encompassing the existing diversity of national legal concepts, and may eventually increase the pace of justice. The common legal framework will subsequently increase predictability even in cases where third country defendants are involved.

As regards to the homogeneity and consistency within European law, it is important to refer to Regulation No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. This recent Regulation leads to the abolition of the existing national rules on jurisdiction in succession matters, making no distinction between intra-EU and extra-EU disputes.[75]

Moreover, the adoption of uniform jurisdictional rules would facilitate recognition and enforcement of judgments pronounced in third States. In fact, the recognition in one Member State (according to national rules) of a judgment pronounced in a third State, in principle, bars the recognition of a European judgment

[74] *Ibid.*

[75] See A. BONOMI/ P. WAUTELET, *Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruxelles 2014, *passim.*

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on the same matter in that Member State. In order to prevent this situation, uniform rules on recognition and enforcement of judgments are not actually required, provided that the European Union adopts uniform principles on indirect rules for jurisdiction. The European Union could simply have a black list of prohibited *fora* with the effect that a judgment pronounced in a third State will not be recognised in Europe if the court outside the EU based its jurisdiction on a ground that the European Union considers exorbitant.

While such a shift from the status quo appears preferable, it is still necessary to analyse the way in which future actions could be taken.

1. The Reasons to Differentiate between EU and Non-EU Cases

Until now, the criterion of domicile draws the main dividing line between what is regarded as intra-EU and what is regarded as extra-EU. Nevertheless, other criteria such as exclusive jurisdiction, also establish a distinction between intra and extra EU-disputes.

In intra-EU cases, the claimant suing the defendant in a Member State may also sue him in another Member State, pursuant to Art. 7 Regulation 1215/2012. In our opinion, these criteria that provide the claimant with an alternative forum (and in certain cases a *forum actoris*) should not serve as unconditional grounds for jurisdiction irrespective of the domicile of the defendant.

A recent example is provided by the proposed amendments to the Brussels I Regulation recast in the field of employment law. The case has been made in favour of creating an exclusive *forum* for industrial actions.[76] In the explanatory statement of the motion for a European Parliament Resolution on this topic, it is clearly stated: "the objective [of the newly proposed rules] is to protect individual Member States' rules on employment from being undermined by the jurisdiction of other Member States".[77] In order to reach this objective, according to the *Rapporteur* Evelyn Regner, "jurisdiction and applicable law should be that of the same Member State, as far as possible".[78] The rule has, therefore, been drafted bearing in mind the need to identify "which Member States' jurisdictions have the right to adjudicate disputes". It does, however, not intend to provide any ground for jurisdiction in case of extra-EU disputes.

In this case the dispute is deemed "extra-EU" whenever the industrial action is not to be or has not been taken in a European Member State.[79]

A second example is provided by Article 7(1)(b) Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)". It is only possible to understand the rationale of the ECJ decisions De

[76] See Draft Report on "Improving private international law: jurisdiction rules applicable to employment", 2013/2023 (INI), 8.5.2013, PR/931852EN.doc, PE508.078v.01-00 and Amendments 1-12, AM/939102EN.doc, 17.6.2013.

[77] *Ibid.*, p. 6/9.

[78] *Ibid.*

[79] *Ibid.*

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Bloos,[80] Color Drack[81] and Car Trim[82] – restricting the *forum destinatae solutionis, i.e.*, the forum of the place of performance –in the framework of the European Union area of freedom, security and justice. However, these restrictions do not seem to be suitable whenever the *forum destinatae solutionis* needs to serve as an unconditional ground for jurisdiction in "extra-EU" cases.

It is difficult to explain why EU-based companies exporting goods to non-EU States should be deprived of a European *forum* when seeking execution of monetary obligations to be performed in European Member States.

A different issue concerns the so-called "reflexive effect" of exclusive grounds of jurisdiction as a means of unifying the rules applicable to extra-EU disputes and those applicable to intra-EU cases. Such a principle will not always appear to be appropriate. An example is provided by German case law: in case of a monetary claim based on a rental contract over a house located in a third State – *e.g.*, New Zealand – it seems inappropriate and overly burdensome on the parties to force them – if both reside in the same EU Member State – *e.g.*, Germany – and entered into a contract having in mind German rules governing rental contracts – to sue and, respectively, defend themselves in New Zealand. Not only does this lead to an increase in expenses, but it also results in uncertainty as regards to the applicable law.

In certain circumstances, the European Union may well prohibit the exercise of jurisdiction due to the strong links between the dispute and a third State. However, such a rule would have to be a specific rule for extra-EU cases, and would have to be drafted in terms which grant European judges the ability to accept or decline jurisdiction – in the presence of such strong ties – rather than in terms of designating the competent (third State's) judge.

In summary, we do not see valid and convincing reasons to override the existing separate private international law treatment of intra-EU cases and that of extra-EU cases. There are, in our opinion, important reasons – a different constellation of interests and differing considerations as to access to justice – to maintain the distinction. As the Court of Justice of the European Union explained in the Lugano opinion,[83] the Brussels regime is indeed founded on such a dichotomy.

2. *Creating* ad hoc *Criteria for Non-EU Cases*

Rather than providing a different function for the existing rules, it is preferable to establish a coherent and comprehensive system of jurisdiction in cases where non-EU defendants are involved that should have due regard for access to justice and

[80] ECJ, 6 October 1976, *A. De Bloos, SPRL v Société en commandite par actions Bouyer*, *ECR* [1976], 01497.

[81] ECJ, 3 May 2007, *Color Drack GmbH v. Lexx International Vertriebs GmbH*, *ECR* [2007] I-03699.

[82] ECJ, 25 February 2010, *Car Trim GmbH v. KeySafety Systems Srl.*, *ECR* [2010] I-01255.

[83] ECJ, 7 February 2007, Opinion No. 1/2003.

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lack of mutual trust considerations, as well as for the ultimate need of dealing with recognition and enforcement of judgments from non-EU States.

The abolition of *exequatur* suggests that the European Union considers itself as a unified jurisdictional power – as explicitly stated by the ECJ in the Lugano opinion[84] – and confirms that the Brussels regime has the function of distributing jurisdiction among Member States. Consequently, the European Union should also adopt uniform rules in order to trace the boundaries of such unified jurisdictional power.

The purpose of distributive criteria is that of identifying, in a straightforward manner, the territorial court having the right to adjudicate an intra-EU dispute, while uniform rules on jurisdiction over extra-EU disputes would have the alternative purpose of guaranteeing access to justice and, possibly, the enhancement of European substantive rules in the European area of freedom, security and justice.

In summary, the European system should be provided with a specific set of rules aimed at distributing cases among European judges (*i.e.*, the existing Brussels I rules) and with another specific set of rules aimed at affirming (or even possibly denying) the existence of the jurisdictional power of Member States.

More specifically, the existing dividing lines between EU and non-EU cases should be maintained. The articles distributing intra-EU cases among European judges (*i.e.*, Sections 2 to 7 of Chapter II of Regulation 1215/2012) should also be maintained. A provision enumerating a list of all criteria giving jurisdiction to European judges in case of non-EU disputes should be drafted.[85]

The setting of specific rules declaring when the European Union claims jurisdiction over a case and when it does not would also have the advantage of encouraging negotiation of international agreements with third States on the reciprocal recognition and enforcement of judgments.

C. Bilateral Coordination with Foreign Countries by Means of International Cooperation through Treaties

France, Germany, Italy, Poland and Switzerland show a firm belief in solving issues of recognition and enforcement of foreign decisions towards third States by way of international (either bilateral or multilateral) treaties.[86] Scandinavian States have an enhanced cooperation and longstanding experience in double conventions on jurisdiction and reciprocal recognition of judgments that covers almost every domain of civil law. Furthermore, Denmark is part of the Hague Convention on enforcement of maintenance obligations towards children; the Hague Convention on recognition in divorce law; the Hague Convention on enforcement of

[84] *Ibid.*

[85] It would be possible to adopt all the national criteria granting jurisdiction to Member State, with the exception of those that are not really used or that do not guarantee the enforcement of the decision abroad.

[86] See extensively D. SOLENIK (note 30), at 64 *et seq.*; L. HECKENDORN URSCHELER (note 42), at 138 *et seq.*

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maintenance obligations; the Hague Convention on child abduction; and the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (of 19 October 1996).

D. Recommendations for Promoting Bilateral Coordination

Under this recommended policy option, the EU would seek to negotiate international agreements that would establish common rules on jurisdiction and the recognition and enforcement of judgments at the international level. Such agreements would notably ensure that third countries take jurisdiction on the basis of internationally accepted criteria if they wish to ensure that their judgments will be recognised within the EU and vice versa.

As stated above, these conventions may contain a list of indirect criteria for jurisdiction or merely include a black list of prohibited *fora* in order to bar the international "movement" of a decision pronounced on the basis of a ground that the European Union considers exorbitant.

E. Conclusions and Recommendations

It is important to bear in mind that the European Union has no power to allocate jurisdiction in third States, in the same way as it has – and so far exercises – the power to distribute jurisdiction within the EU. Nonetheless, the European Union may well set the limits of its (Member States') jurisdiction where non-EU cases are concerned.

In this regard, the EU could establish – in a similar fashion to the national legislature – in which circumstances an international case should be decided by a European judge and, possibly, under which circumstances a European judge should decline jurisdiction because its forum is not appropriate, economical or convenient under concerns of legislative policy.

An alternative option is to erase the reference to the domicile of the defendant and using identical jurisdiction criteria for EU and non-EU cases. This way, the existing rules for distributing jurisdiction among Member States would also serve as grounds for European judicial jurisdiction in non-EU disputes. However, for the reasons explained above (see §§4.2, 4.2.1 and 4.2.2) we prefer the option of creating grounds for jurisdiction on an *ad hoc* basis for defendants who are not domiciled in a Member State, under what can be called the "private international law" approach. This approach maintains and reveals the conceptual difference between the issue of distributing cases among the European judges and the issue of deciding, unilaterally, which connecting factors are considered relevant for the EU in order to found the jurisdiction of European judges.

In our view, the European system, currently operating a specific set of rules aimed at distributing cases among European judges (*i.e.*, the existing Brussels I rules), should also be provided with a specific set of uniform jurisdictional rules on which Member States' courts may accept jurisdiction or decline it. We consider that specific unilateral – instead of the existing bilateral – rules on the issue of

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choice-of-forum and *lis pendens*, as well as on the issue of recognition and enforcement of third States' judgments should also be adopted for non-EU cases. These jurisdictional criteria might be used as criteria of international indirect jurisdiction in order to recognise and enforce judgments pronounced by third States' judges.

Uniform rules for non-EU cases would increase access to justice and predictability as regards to the enforcement of judgments in international disputes involving parties or property located in third States. Moreover, unilateral coordination via the adoption of a set of criteria allowing the EU to draw the boundaries of Member States' jurisdictional power would also be in line with developments in other areas, and it would enhance free and fair movement of judgments.

However, unilateral coordination is, by definition, imperfect. It works best if non-EU States collaborate in making it work. It could, nevertheless, represent an essential starting point and a good basis for negotiations with a view to concluding international agreements. An international covenant with one or more third States guarantees access to justice and predictability over recognition and enforcement of judicial judgments of EU Member States abroad and vice versa. We consider, in other words, that legal certainty on recognition and enforcement of judicial decisions from non-EU States may only be acquired through binding international instruments.

As stated above, these options are not exclusive of each other. On the contrary, they are perfectly compatible and, in our opinion, they should be pursued in parallel.

By way of summary, we would suggest the following recommendations:

(a) We recommend that the European Union maintain separate provisions for cases within the European area (EU cases) and those cases outside the European area (non EU cases).

(b) According to the current Brussels regime, the European jurisdictional rules are applied to EU cases, and national rules are applied to non-EU cases. In the future, we recommend that the European Parliament, as legislature, should draft a specific set of rules in order to unify and substitute the current plethora of national jurisdictional rules currently applicable to non-EU cases.

(c) At present, many criteria allow for distinctions to be drawn between EU and non-EU cases, according to the jurisdictional rules to be applied. The two main criteria are the domicile of the defendant and the exclusive forum for actions related to immovable assets. Accordingly, EU cases embrace all actions against a defendant domiciled within the EU. However, this criterion does not apply in case of actions related to rights on immovable assets located in Member States (as well as to the other hypothesis of Art. 24(1) Reg. 1215/2012). Even if the domicile of the defendant is in a third State, this case is always considered as an EU-case by virtue of the location of the immovable and the European exclusive jurisdiction rules will apply. These dividing lines should be maintained or rethought in terms of legislative policy (since they indirectly determine how far the substantive rules reach).

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In other words, we recommend that the European Parliament maintain the existing dividing lines.

(d) Furthermore, we recommend that the European Parliament adopt legislation laying down the criteria providing for jurisdiction of EU Member States where non-EU cases are concerned, taking into account the issue of choice-of-forum and *lis pendens*, as well as the issue of recognition and enforcement of third States' judgments, given that these criteria will have to be used as criteria of international indirect jurisdiction in order to recognise and enforce judgments pronounced by third States' judges;.

(e) Finally, we recommend that the European Parliament should promote bilateral or multilateral conventions on recognition and enforcement of judgments with its principal strategic commercial partners.

V. Proposed Amendments to Regulation 1215/2012 in Order to Regulate Jurisdiction over Extra-EU Disputes

Article 2:

The reference to Member States should be removed from letters a) and b);

A letter g) should be added as shown hereafter, with a view to determining what is a "Non-Member State of origin" and thereby excluding any reference to authentic instruments, since the rules on jurisdiction do not concern non-jurisdictional authorities:

"*For the purposes of this Regulation:*

(a) "judgment" means any judgment given by a court or tribunal of a ~~Member~~ *State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.*
For the purposes of Chapter III, "judgment" includes provisional, including protective, measures ordered by a court or tribunal, which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;
(b) "court settlement" means a settlement which has been approved by a court of a ~~Member~~ *State or concluded before a court of a* ~~Member~~ *State in the course of proceedings;*
(c) "authentic instrument" means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:
(i) relates to the signature and the content of the instrument; and
(ii) has been established by a public authority or other authority empowered for that purpose;
(d) "Member State of origin" means the Member State in which, as the case may be, the judgment has been given, the court settlement has

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been approved or concluded, or the authentic instrument has been formally drawn up or registered;
(e) "Member State addressed" means the Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought;
(f) "court of origin" means the court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.
(g) "Non-Member State of origin" means the Non-Member State in which, as the case may be, the judgment has been given or the court settlement has been approved or concluded.

Article 6:

The entire article should be amended as follows:

"~~1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.~~
~~2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.~~
1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2), Article 24 and Article 26(1), as well as to all existing bilateral or multilateral conventions, be determined by the following rules:
a) In matters relating to a contractual or unilateral obligation, the courts of the Member State at the place where the obligation has or should have been performed shall have jurisdiction;
b) In matters relating to rights in rem to movable property, the courts of the Member State at the place where the movable property is located shall have jurisdiction;
c) In matters relating to torts, the courts of the Member State at the place where the harmful event occurred or may occur shall have jurisdiction;
d) In matters relating to the violation of intellectual property rights, the courts of the Member State in which the rights have been or may be infringed, or where the damage has been suffered, shall have jurisdiction;
e) In matters relating to unjust enrichment, repayment of amounts wrongly received, *negotiorum gestio* and *culpa in contrahendo*, the courts of the Member State at the place where the event giving rise to the related obligation occurred, or at the place of performance of the obligation giving rise to the claim, shall have jurisdiction;
f) In respect of actions brought against the settlor, the trustee or the beneficiary of a trust created by the operation of a statute, or by a written instrument, or by parole and evidenced in writing, the courts

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of the Member State in which the trust is domiciled shall have jurisdiction;
g) In matters relating to provisional or protective measures, the courts of the Member State in which the measure is sought shall have jurisdiction;
h) In respect of actions related to an action pending before the courts of a Member State, the court seized of the pending action shall have jurisdiction.

2. Subject to Article 18(1), Article 21(2), Article 24 and Article 26(1), the courts of a Member State shall decline jurisdiction whenever the parties, regardless of their domiciles, have agreed that a court or the courts of a Non-Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, unless the agreement is null and void:
i) as to its formal validity, under the provisions of art. 25, or;
ii) as to its substantive validity, under the law of that Non-Member State.

3. The courts of a Member State shall decline jurisdiction in matters relating to rights in rem to immovable property located abroad."

As explained in the Report, cases within the European area (EU cases) and cases outside the European area (non-EU cases) shall be specifically addressed. The reasons to differentiate lie in the acknowledgment that the EU has the power of allocating disputes among EU judges, whereas the EU does not have the power of allocating disputes to non-EU judges.

Article 33

A reference to Article 6 (as amended above) should be added:

"*1. Where jurisdiction is based on Article 4 or on Article* 6*, 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seized of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:*

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
2. The court of the Member State may continue the proceedings at any time if:
(a) the proceedings in the court of the third State are themselves stayed or discontinued;
(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
(c) the continuation of the proceedings is required for the proper administration of justice.
3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

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> *4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.*"

Article 34

Article 34 should be deleted because it is formulated in too generic terms: the power of the judge to stay proceedings is so wide that it allows to cast doubt on the respect of the right to a fair trial and law certainty.

Since Article 34 operates as a negative rule of jurisdiction, because it allows the EU judge to dismiss the proceedings pending before him – it may potentially impair the right of the plaintiff and of the defendant to be heard by the "tribunal established by law" (art. 6 ECHR).

Within the EU, there is no necessity to prevent abuses potentially deriving from the stay or dismiss of an action related to a proceeding previously filed in another Member State, since the rules of jurisdiction are uniform rules.

Conversely, such a risk, in connection with the stay or dismiss of an action related to a proceeding previously filed in a Third State, exists because the rules on which the non-EU judge has grounded his jurisdiction escape to the control of the European Union.

Moreover, the risk of contradictory judgements is prevented by the wide notion of lis pendens, which is sufficiently comprehensive to include hypothesis traditionally qualified, within national legal orders, as hypothesis of "related actions".

Article 35

The final reference to Member States should be removed from the last sentence of the Article:

> "Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter."

CHAPTER III – RECOGNITION AND ENFORCEMENT

A new section 3 should be added (between the current Articles 44 and 45; between the current section 2 and 3) with the following title:

New Section 3

Recognition and enforcement of Non-Member States' judgments

New Article 45

1. A judgment given in a Non-Member State shall be recognised in Member States in accordance with the following provisions.
2. Any interested party who raises the recognition of a judgment given, in accordance with the national procedures providing for exequatur, apply for a decision that the judgment be recognised and enforced in a Member State.
3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction to determine that question.

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New Article 46

A decision of a court of a Non-Member State shall be recognised and enforced in a Member State:

a) If that court of the Non-Member State would have had jurisdiction according to the criteria set out in Section 1, Chapter II of the present Regulation;
b) If the judgment is final and no appeal or revision proceedings are pending, and;
c) If Article 45 does not provide grounds for refusal of recognition and enforcement.

Uniform criteria of recognition and enforcement of judgments seem the most natural consequence of the unification of rules of jurisdiction achieved through Article 6 above.

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RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS IN NON-EU JURISDICTIONS

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN AUSTRALIA

Sirko HARDER[*]

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1. Lack of "International Jurisdiction"
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I. Introduction

This article explores the rules governing the recognition and enforcement of certain foreign judgments in Australia. This article does not discuss the recognition and enforcement in one Australian jurisdiction of a judgment rendered in another Australian jurisdiction. Suffice to say that a judgment rendered by a court in one Australian jurisdiction may be registered in an equivalent court of another Australian jurisdiction, and will then have the same force and effect as if it had been given by the registering court.[1]

The discussion in this article is confined to judgments in general matters of private law. This excludes judgments in matters of bankruptcy and insolvency, corporations law, family law (including maintenance), mental health, succession law and public law.[2] The discussion is further confined to judgments *in personam*, as opposed to judgments *in rem*. Judgments *in personam* determine the rights between the parties *inter se*. An example is an order to transfer property to the other party. Judgments *in rem* affect the status of a corporate or natural person, or affect or create rights in property as against the whole world.[3]

Australian law has three different regimes for the recognition and enforcement of foreign judgments of the type under discussion: the common law rules (which are uniform throughout Australia[4]), the Foreign Judgments Act 1991 (Cth),

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[1] Service and Execution of Process Act 1992 (Cth), s 105.

[2] Some of the excluded areas are discussed by M. DAVIES/ A.S. BELL/ P.L.G. BRERETON, *Nygh's Conflict of Laws in Australia* (9th ed.), Chatswood 2014, chs. 26-31, 36. Judgments in family law matters are included in the discussion (in German) by R. ELLGER, Anerkennung und Vollstreckung zivilgerichtlicher Urteile – insbesondere familiengerichtlicher Entscheidungen – im Verhältnis zu Australien, in N. WITZLEB/ R. ELLGER/ P. MANKOWSKI/ H. MERKT/ O. REMIEN (eds), *Festschrift für Dieter Martiny zum 70. Geburtstag*, Tübingen 2014, p. 663.

[3] The difference between judgments *in personam* and judgments *in rem* is explained in *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85 at [21].

[4] Where the enforcement of a foreign judgment at common law requires service of process outside Australia and New Zealand, differences between Australian jurisdictions

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and Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth). The applicability of each of the three regimes depends upon the country, and sometimes also the court, from which the judgment emanates.

Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth) applies to judgments given by any court of New Zealand on or after 11 October 2013 (the date when the Act came into force).[5] The Foreign Judgments Act 1991 (Cth) applies to judgments from all courts of three of Canada's common law provinces and four other countries (including New Zealand judgments given before 11 October 2013), and to judgments from "superior courts" of 29 other countries.[6] The common law rules apply to all foreign judgments not governed by either Act.

The common law rules will be examined first, followed by a discussion of the Foreign Judgments Act 1991 (Cth) and a brief overview of Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth).

II. Common Law Rules

A. Prerequisites of Recognition

At common law, there are three prerequisites for the recognition of a foreign judgment *in personam*:

(1) Australian law regards the foreign court as competent to adjudicate upon the matter;

(2) the judgment is final and conclusive;

(3) there is an identity of parties.[7]

The judgment-creditor bears the onus of proof in relation to those matters.[8] A few decisions have pronounced a fourth prerequisite, namely that the judgment be for a certain (fixed) sum of money. The three established prerequisites and the supposed fourth prerequisite will now be examined.[9]

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exist in respect of the circumstances in which such service is permitted. This will be discussed further below.

[5] Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010 (Cth), sch 1, s 6.

[6] The relevant Canadian provinces and other 33 countries are listed in the Foreign Judgments Regulations 1992 (Cth).

[7] *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [18]; *Maleski v Hampson* [2013] NSWSC 1794 at [4]. See also *Schnabel v Lui* [2002] NSWSC 15 at [75].

[8] *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [19]; *Bhushan Steel Ltd v Severstal Export GmbH* [2012] NSWSC 583 at [150].

[9] It is unclear whether a foreign judgment that is void under the foreign law can be recognised in Australia at common law; see M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at paras. 40.57 – 40.61.

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1. Court of Competent Jurisdiction

At common law, a foreign judgment *in personam* cannot have any effect in Australian proceedings unless Australian law regards the foreign court as competent to render the judgment.[10] This requirement is not concerned with the foreign court's jurisdiction under its own law. Rather, the exercise of jurisdiction by the foreign court must have been appropriate in the eyes of Australian private international law.[11] This "international jurisdiction"[12] of a foreign court is settled in two categories of case: where the judgment-debtor was served with initiating process while present or resident in the foreign country, and where the judgment-debtor voluntarily submitted to the jurisdiction of the foreign court.[13] These two categories align with the two categories of case in which Australian courts assume jurisdiction over a defendant at common law: where the defendant is present in the forum, and where the defendant has submitted to the court's jurisdiction. There is some authority for an additional category of a foreign court's international jurisdiction, namely where the judgment-debtor is a citizen of the foreign country. These three categories of case will now be examined.[14]

a) Judgment-Debtor was Present or Resident in the Foreign Country

Australian law regards a foreign court as a court of competent jurisdiction where, at the time of the commencement of the foreign proceedings, the judgment-debtor was present or resident in the foreign country. The concepts of presence and residence have been established in relation to natural persons and need some adjustment in the case of corporations. The discussion will start with natural persons.

It needs to be remembered that the basis of a foreign court's international jurisdiction now under consideration mirrors a basis upon which Australian courts assume jurisdiction over a defendant at common law. At common law, a defendant served with initiating process in the forum is amenable to the jurisdiction of the court.[15] It is no obstacle that the defendant's presence in the forum was fleeting,[16] or

[10] *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [18]; *Maleski v Hampson* [2013] NSWSC 1794 at [4].

[11] *Crick v Hennesy* [1973] WAR 74, 75; *Norsemeter Holdings AS v Boele* [2002] NSWSC 370 at [13]; *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [261]; *Wong v Jani-King Franchising Inc* [2014] QCA 76 at [20].

[12] *Martyn v Graham* [2003] QDC 447 at [22]; *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [261]-[262].

[13] *Bhushan Steel Ltd v Severstal Export GmbH* [2012] NSWSC 583 at [148]; *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [262].

[14] The merits of alternative approaches are discussed by M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at paras. 40.21-40.26; R. MORTENSEN/ R. GARNETT/ M. KEYES, *Private International Law in Australia* (2nd ed.), Chatswood 2011, paras. 5.20-5.22; N. TADMORE, Recognition of Foreign *in personam* Money Judgments in Australia, 2 *Deakin Law Review* 129 (1995), p. 182-187.

[15] *Laurie v Carroll* (1958) 98 CLR 310, 331.

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was required by law.[17] But service in the forum will not found jurisdiction where the defendant was fraudulently enticed into the forum for the sole purpose of serving initiating process.[18] These rules are mirrored for the purpose of a foreign court's international jurisdiction. Australian law regards the foreign court as a court of competent jurisdiction if the document initiating the foreign proceedings was served on the judgment-debtor in the foreign country,[19] even if during a fleeting visit,[20] as long as the judgment-debtor was not fraudulently enticed into the foreign country for the sole purpose of serving process.[21] On principle, it is problematic to regard a fleeting visit as a sufficient territorial connection.[22]

A foreign court should also be regarded as a court of competent jurisdiction where the judgment-debtor, at the time of the commencement of the foreign proceedings, resided in the foreign country but was served with initiating process while temporarily out of the country.[23] It would be odd if fleeting presence was sufficient while residence, which entails a stronger connection with the territory, was not.

Where the judgment-debtor is a natural person, the presence or residence in the foreign country must be that of the judgment-debtor personally. Presence or residence in the foreign country cannot be established merely by having an agent there, even if the dispute between the judgment-creditor and the judgment-debtor arose out of the operations of the judgment-debtor's agent in the foreign country.[24] Turning now to corporations, a corporation cannot literally have a physical presence. The term "presence" is a shorthand formula for denoting a sufficient territorial connection. It is, again, useful to start by looking at the common law rules determining when an Australian court has jurisdiction over a corporation.[25] A corporation's "presence" in the forum for the purpose of jurisdiction requires three

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[16] *Laurie v Carroll* (1958) 98 CLR 310, 331; *Evers v Firth* (1987) 10 NSWLR 22, 29; *Perrett v Robinson* [1985] 1 Qd R 83, 84-85, 89.

[17] *John Sanderson & Co (NSW) Pty Ltd (in liq) v Giddings* [1976] VR 421, 424; *Baldry v Jackson* [1976] 1 NSWLR 19, 22-23.

[18] *Watkins v North American Land and Timber Co Ltd* (1904) 20 TLR 534, 536; *Laurie v Carroll* (1958) 98 CLR 310, 331; *Baldry v Jackson* [1976] 1 NSWLR 19, 22-23; *Perrett v Robinson* [1985] 1 Qd R 83, 84-85, 89-90.

[19] *Herman v Meallin* (1891) 8 WN (NSW) 38; *Maleski v Hampson* [2013] NSWSC 1794 at [6].

[20] *Herman v Meallin* (1891) 8 WN (NSW) 38; *Close v Arnot* (NSWSC, GRAHAM A.J., 21 November 1997).

[21] *Close v Arnot* (NSWSC, GRAHAM A.J., 21 November 1997).

[22] N. TADMORE (note 14), at 143-144.

[23] *Martyn v Graham* [2003] QDC 447 at [22]; M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 40.7.

[24] *Seegner v Marks* (1895) 21 VLR 491.

[25] Those common law rules are now largely superseded by provisions of the Corporations Act 2001 (Cth).

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things.[26] First, the corporation must carry on business in the forum, which can be done only by an agent with authority to act on behalf of the corporation.[27] Secondly, the business must be carried on at some fixed and definite place within the forum. Thirdly, the business must have continued for a sufficiently substantial period of time.[28] The last two requirements were illustrated by GZELL J. in *Fiduciary Ltd v Morningstar Research Pty Ltd* with the following example:

> "A Hong Kong company carrying on a tailoring business that sends a representative to a hotel room in Australia for short periods of time to take measurements for garments and receive orders may carry on business in Australia but, in the absence of a fixed place owned or leased by it and operated for more than a minimal period of time, the company is not in Australia."[29]

The rules on when a corporation is "present" in the forum for the purposes of jurisdiction are mirrored for the purpose of establishing a foreign court's "international jurisdiction". Where the judgment-debtor is a corporation, therefore, Australian law regards the foreign court as a court of competent jurisdiction if the corporation, at the time of the commencement of the foreign proceedings, carried on business in the foreign country at a fixed place for some period of time.[30] It is not required that the dispute arose out of the operation of the corporation's agent or branch in the foreign country.

It is unclear how the requirement of presence (of a corporation or natural person) in the foreign jurisdiction is applied where the foreign court is in a federal state, such as Canada, the United Kingdom or the United States. Is presence in the court's particular law district required or is presence in the federal state as a whole sufficient? The answer may depend upon a number of factors and may not be the same for every federal state or for every court of the same federal state.[31]

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[26] The three requirements were set out by HOLLAND J. in *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 165, following *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715, 718-719 (BUCKLEY L.J.).

[27] *City Finance Co Ltd v Matthew Harvey & Co Ltd* (1915) 21 CLR 55, 66 (ISAACS J.).

[28] Maintaining a stand at an exhibition for nine days may be sufficient: *Dunlop Pneumatic Tyre Co Ltd v Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co* [1902] 1 KB 342; *State of Queensland v Property Nominees Pty Ltd* (1982) 6 ACLR 739, 745-746.

[29] [2004] NSWSC 381, (2004) 60 NSWLR 425 at [38].

[30] *Littauer Glove Corp v F W Millington (1920) Ltd* (1928) 44 TLR 746, 747; *Bushfield Aircraft Co v Great Western Aviation Pty Ltd* (1996) 16 SR (WA) 97, 100-101.

[31] See *Adams v Cape Industries plc* [1990] Ch 433, 555-557.

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b) *Judgment-Debtor Submitted to the Foreign Court's Jurisdiction*

A judgment-debtor may have voluntarily submitted to the jurisdiction of the foreign court either by prior agreement between the parties or by voluntary conduct inconsistent with protest of jurisdiction.[32]

Voluntary submission exists where an agreement between the parties confers (exclusive or non-exclusive[33]) jurisdiction upon the foreign country for the dispute in question. The choice of the law of a certain country as the law governing the contract or a dispute does not by itself imply a conferment of jurisdiction upon the courts of that country.[34]

The second form of submission is voluntary conduct inconsistent with protest of jurisdiction. Initiation of the foreign proceedings constitutes submission to the foreign court's jurisdiction.[35] Thus, a foreign court has international jurisdiction to dismiss a claim and make a cost order against an unsuccessful plaintiff.[36] A foreign court also has international jurisdiction to decide on counter-claims by the defendant against the plaintiff which arise out of the same subject matter as the plaintiff's claim, but may have no international jurisdiction (by virtue of submission by conduct) to decide on *unrelated* counter-claims.[37]

Raising arguments on the substance of the claim before the foreign court without protesting against the court's jurisdiction constitutes submission to that jurisdiction,[38] unless appearance before the foreign court was withdrawn in accordance with the foreign court's procedural rules.[39] Pursuant to s 11 of the Foreign Judgments Act 1991 (Cth), voluntary submission does not occur by appearance before the foreign court only to such extent as was necessary to protect, or obtain the release of, property seized, to contest the jurisdiction of the court, or to invite

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[32] *Bhushan Steel Ltd v Severstal Export GmbH* [2012] NSWSC 583 at [148]; *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [262].

[33] See *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [266].

[34] *Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* [1968] 1 NSWR 577; *Keenco v South Australia & Territory Air Service Ltd* (1974) 8 SASR 216, 219-221; *Re Siromath Pty Ltd (No. 3)* (1991) 25 NSWLR 25, 30; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 424-425 (DAWSON and MCHUGH JJ.); *ACE Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 at [34], [47].

[35] *Emanuel v Symon* [1908] 1 KB 302, 309 (BUCKLEY L.J.), approvingly cited in *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300, 302; *Centrebet Pty Ltd v Baasland* [2012] NTSC 100, (2012) 272 FLR 69 at [40]; *Jani-King Franchising Inc v Jason* [2013] QSC 155 at [30].

[36] *Eisenberg v Joseph* [2001] NSWSC 1062 at [7].

[37] Australian courts assume jurisdiction over foreign plaintiffs in respect of counter-claims arising out of the same subject matter as the plaintiff's claim, but not in respect of unrelated counter-claims: *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156, 174; *Nudd v Taylor* [2000] QSC 344 at [21]-[27].

[38] *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [22]; *Martyn v Graham* [2003] QDC 447 at [23]; *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [29].

[39] *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300, 302-303.

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the court in its discretion not to exercise jurisdiction. Section 11 applies to foreign judgments *in personam* not registrable under the Act and thus governed by the common law rules.

c) Judgment-Debtor is a Citizen of the Foreign Country

In two cases, trial judges in the Supreme Court of New South Wales have regarded a foreign court as a court of competent jurisdiction, in the absence of presence and submission, on the ground that the judgment-debtor was a citizen of the foreign country.[40] On principle, citizenship by itself should not provide a sufficient connection with a country to render the courts of that country competent to exercise jurisdiction over a defendant.[41]

2. Judgment is Final and Conclusive

At common law, a foreign judgment *in personam* cannot have any effect in Australian proceedings unless the judgment is "final and conclusive".[42] A distinction has been made between adjudications that are provisional and adjudications that are completely effective unless and until altered; the latter are regarded as final and conclusive while the former are not.[43] Thus, the lodgement of an appeal, or the possibility to do so, does not prevent a foreign judgment from being final and conclusive.[44] However, the Australian court may make the enforcement of an appealable foreign judgment subject to conditions,[45] or may stay proceedings until the appeal against the foreign judgment has been decided upon[46] or the deadline for

[40] *Federal Finance and Mortgage Ltd v Winternitz*, NSWSC, SULLY J., 9 November 1989; *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218, (2010) 79 NSWLR 425 at [20]-[28], [35]. See also *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300, 302. By contrast, only presence, residence and submission were listed as bases of international jurisdiction in *Martyn v Graham* [2003] QDC 447 at [22].

[41] *Rainford v Newell-Roberts* [1962] IR 95; M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at paras. 40.24-40.25; R. MORTENSEN/ R. GARNETT/ M. KEYES (note 14), at para. 5.20; N. TADMORE (note 14), at 147.

[42] *Ainslie v Ainslie* (1927) 39 CLR 381; *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [18]; *Maleski v Hampson* [2013] NSWSC 1794 at [4].

[43] *Ainslie v Ainslie* (1927) 39 CLR 381, 390 (ISAACS J.), 410 (STARKE J.); *Somodaj v Australian Iron and Steel Ltd* (1963) 109 CLR 285, 297-298; *Barclays Bank Ltd v Piacun* [1984] 2 Qd R 476, 477-478; *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508, 518 (KIRBY P.); *Schnabel v Lui* [2002] NSWSC 15 at [153].

[44] *Benefit Strategies Group Inc v Prider* [2007] SASC 250, (2007) 211 FLR 113 at [9]; *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 at [26]-[27]; *McLaughlin v Dungowan Manly Pty Ltd* [2011] NSWSC 215, (2011) 82 ACSR 582 at [53].

[45] *Ainslie v Ainslie* (1927) 39 CLR 381, 404 (POWERS J.).

[46] See *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [30]; *JP Morgan Chase Bank NA v PT Indah Kiat Pulp and Paper Corporation* [2012] NSWSC 1279 at [39].

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lodging an appeal has passed without an appeal being lodged.[47] An Australian judgment enforcing a foreign judgment may be set aside if the foreign judgment is set aside or varied.[48]

A foreign judgment that can still be set aside by the judgment-rendering court itself is regarded as final and conclusive unless the judgment was rendered without the judgment-debtor having an opportunity to raise all defences (or claims where applicable) and the judgment-debtor has the right to start proceedings in the judgment-rendering court that will result in a fresh decision after consideration of all of the judgment-debtor's defences (or claims).[49] Where the judgment-debtor had an opportunity to raise all defences (or claims), it is immaterial whether the judgment-debtor made use of that opportunity. A foreign default judgment is therefore final and conclusive,[50] although its annulment will lead to the annulment, or stay of execution, of an Australian judgment based on it.[51]

3. Identity of Parties

At common law, a foreign judgment *in personam* cannot have any effect in Australian proceedings unless there is an identity of parties.[52] This does not mean that there must be a complete identity of parties between the foreign proceedings and the Australian proceedings. What is meant is that a foreign judgment can bind only persons that are parties to the Australian proceedings and were also parties to the foreign proceedings. The binding effect of the judgment between those persons is not affected by the participation of additional persons in either set of proceedings.[53] For example, if C has obtained a judgment from a court in the Philippines against a partnership as well as the partners personally, C can enforce the judgment in Australia against one partner alone unless the partners are jointly, and not jointly

[47] See *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 at [59].

[48] *RDCW Diamond (Pty) Ltd v Da Gloria* [2007] NSWSC 1325 at [24].

[49] *Nouvion v Freeman* (1889) 15 App Cas 1; *Schnabel v Lui* [2002] NSWSC 15; *Bank Polska Kasa Opieki Spolka Akcyjna v Opara* [2010] QSC 93, (2010) 238 FLR 309 at [63].

[50] *Barclays Bank Ltd v Piacun* [1984] 2 Qd R 476, 477-478; *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508, 517-521, 525-527; *Re Dooney* [1993] 2 Qd R 362, 365; *Schnabel v Lui* [2002] NSWSC 15 at [77], [152]; *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [35].

[51] *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [35]; *Benefit Strategies Group Inc v Prider* [2007] SASC 250, (2007) 211 FLR 113 at [17].

[52] *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [18]; *Maleski v Hampson* [2013] NSWSC 1794 at [4].

[53] See *Newcom Holdings Pty Ltd v Funge Systems Inc* [2006] SASC 284 at [33]-[35].

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and severally, liable.[54] But if C sued only the partnership in the Philippines, the foreign judgment cannot be enforced in Australia against a partner personally.[55]

4. Fixed Sum of Money

It has been said in a few *obiter dicta* that a foreign judgment *in personam* cannot be recognised,[56] or recognised and enforced,[57] in Australia at common law unless the judgment is for a certain (fixed) sum of money. The dicta of the second type may be understood as merely expressing the traditional rule at common law that an action on a foreign judgment *in personam* can be brought only in the form of an action for debt, which requires a claim for a certain or ascertainable sum of money.[58] But those *dicta* may also be understood as being concerned with recognition in general, beyond enforcement. The *dicta* of the first type must be so understood. It is doubtful that it was ever correct to say that foreign non-money judgments *in personam* can never be recognised, and thus can never have any effect,[59] in Australia. In any event, that proposition must be rejected today. It should be accepted that preclusionary effects such as *res judicata* or issue estoppel (discussed below) can be created in Australian proceedings by a foreign non-money judgment *in personam*,[60] such as a judgment that dismisses a claim on substantive grounds,[61] or orders the defendant to do, or not to do, a certain act.[62]

B. Defences to Recognition

Where the prerequisites for the recognition of a foreign judgment in Australia at common law are satisfied, the judgment-debtor may still prevent the recognition by

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[54] *Martyn v Graham* [2003] QDC 447 at [30], [36]; *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 at [37]-[39].

[55] See *Blohn v Desser* [1962] 2 QB 116, 124.

[56] *Australian Competition and Consumer Commission v Chen* [2003] FCA 897, (2003) 132 FCR 309 at [55]; *Bhushan Steel Ltd v Severstal Export GmbH* [2012] NSWSC 583 at [146]; *Ocean Marine Insurance Co Ltd v CSR Ltd* [2012] NSWSC 1229 at [99]. The same view is expressed by M. Davies/ A.S. Bell/ P.L.G. Brereton (note 2), at para. 40.2.

[57] *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [18]; *Maleski v Hampson* [2013] NSWSC 1794 at [4].

[58] This rule and its possible demise are discussed further below.

[59] A foreign judgment can have no effect in Australian proceedings unless it is recognised: *Bank of Western Australia v Henderson (No. 3)* [2011] FMCA 840, (2011) 253 FLR 458 at [39]-[40]; cf. *Re Kesner* [2014] VSC 86 at [30].

[60] M. Tilbury/ G. Davis/ B. Opeskin, *Conflict of Laws in Australia*, South Melbourne 2002, p. 176-177, 224.

[61] *Slaveska v Elenchevski* [2013] VSCA 283 at [41].

[62] *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44, (2012) 262 FLR 119 at [132], [135] (issue estoppel arising from foreign anti-suit injunction). See also *Wang v Zhao* [2012] NSWSC 706 at [49].

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establishing a defence. The judgment-debtor bears the onus of proof in that respect. A foreign judgment cannot be impeached on the ground that the foreign court mistook either the facts or the law, even the law of the recognising forum.[63] There are only few defences, which will now be discussed insofar as they are relevant to judgments *in personam* in general matters of private law.[64]

1. Fraud

A foreign judgment obtained by fraud will not be recognised in Australia at common law.[65] Fraud in this context means intentionally misleading the foreign court into making a certain decision.[66] It must be fraud on the part of the judgment-creditor.[67] Perjury by a witness in the foreign proceedings is not sufficient in itself,[68] even if the witness was an agent of the judgment-creditor.[69] The judgment-creditor must have procured the perjury or been privy to procuring it.[70]

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[63] *Norsemeter Holdings AS v Boele* [2002] NSWSC 370 at [14]; *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [77]-[79]; *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [31]; *SK Foods LP v SK Foods Australia Pty Ltd (in liq) (No. 3)* [2013] FCA 526, (2013) 214 FCR 543 [53]-[54].

[64] Defences not relevant here are the rule against the enforcement of foreign public law (see *Schnabel v Lui* [2002] NSWSC 15 at [177]; *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV* [2010] FCA 1293 at [22]) and the Australian Government's power to exclude or limit the recognition of foreign judgments in competition matters, pursuant to s 9 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth).

[65] *Cloverdell Lumber Co Pty Ltd v Abbott* (1924) 34 CLR 122, 128, 131; *Ainslie v Ainslie* (1927) 39 CLR 381, 402 (HIGGINS J.); *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [36]-[38].

[66] *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [26]. Judicial misconduct has also been described as "fraud": *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [19]; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69, (2011) 91 IPR 438 at [53] (RARES J.). However, it will foster clarity if judicial misconduct is classified exclusively as a denial of natural justice; see *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [36]-[37].

[67] *Keele v Findley* (1990) 21 NSWLR 444, 448-449; *Close v Arnot* (NSWSC, GRAHAM A.J., 21 November 1997); *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [37], [40]-[41]; *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [25].

[68] *Keele v Findley* (1990) 21 NSWLR 444, 448-449; *Close v Arnot* (NSWSC, GRAHAM A.J., 21 November 1997); *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [37], [40]-[41]; *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [25].

[69] *Keele v Findley* (1990) 21 NSWLR 444, 449; *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [39], [42]; *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [25].

[70] *Keele v Findley* (1990) 21 NSWLR 444, 448-449; *Close v Arnot* (NSWSC, GRAHAM A.J., 21 November 1997); *Benefit Strategies Group Inc v Prider* [2005] SASC

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It is not settled whether a foreign judgment can be impeached in Australia on the ground of fraud where the evidence on which the allegation of fraud is based was available to the judgment-debtor during the foreign proceedings.[71] English courts permit the impeachment of a foreign judgment on the ground of fraud even if that allegation was,[72] or could have been,[73] raised in the foreign proceedings.[74] By contrast, Canadian courts permit the impeachment of a foreign judgment on the ground of fraud only where it relates to the foreign court's jurisdiction,[75] or where it is based upon evidence that was not known, and could not have been discovered with reasonable effort, at the time of the foreign proceedings.[76] In Australia, the issue has yet to be decided by an appellate court,[77] and there are conflicting decisions by courts of first instance. Most of those decisions have endorsed the English approach,[78] while others have required fresh evidence.[79]

194, (2005) 91 SASR 544 at [37], [40]-[41]; *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [25].

[71] See *Maleski v Hampson* [2013] NSWSC 1794 at [28]-[44]. The impeachment of an *Australian* judgment on the ground of fraud requires fresh evidence: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, 540-541.

[72] *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295; *Vadala v Lawes* (1890) 25 QBD 310; *Jet Holdings Inc v Patel* [1990] 1 QB 335, 344-345; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484-489.

[73] *Syal v Heyward* [1948] 2 KB 443, 448-449.

[74] This approach is defended by R. GARNETT, Fraud and Foreign Judgments: The Defence that Refuses to Die, 1 *Journal of International Commercial Law* 161 (2002), 171.

[75] *Powell v Cockburn* [1977] 2 SCR 218, 234; *Beals v Saldanha* [2003] SCC 72, [2003] 3 SCR 416 at [51]; *Lang v Lapp* [2010] BCCA 517, (2010) 11 BCLR (5th) 280 at [20].

[76] *Beals v Saldanha* [2003] SCC 72, [2003] 3 SCR 416 at [52], [233]; *Lang v Lapp* [2010] BCCA 517, (2010) 11 BCLR (5th) 280 at [17]-[19].

[77] The issue was left open by the Full Court of the Supreme Court of South Australia in *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [41].

[78] *Norman v Norman (No. 2)* (1968) 12 FLR 39, 47 (in respect of fraud going to the foreign court's jurisdiction); *Res Nova Inc v Edelsten* (NSWSC, FOSTER J., 7 May 1985); *Yoon v Song* [2000] NSWSC 1147, (2000) 158 FLR 295 at [15]-[22]; *Trainor Asia Ltd v Calverley* [2007] WADC 124, (2007) 53 SR (WA) 277 at [26]-[28]; *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 at [45]-[48].

[79] *Keele v Findley* (1990) 21 NSWLR 444, 449-458; *Close v Arnot* (NSWSC, GRAHAM A.J., 21 November 1997); *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [19]. This approach is supported by M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 40.74.

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2. *Denial of Natural Justice*

A foreign judgment will not be recognised in Australia at common law if the foreign court did not accord natural justice to the judgment-debtor.[80] Natural justice requires at least that the judgment-debtor was given sufficient notice of the foreign proceedings,[81] and an opportunity of presenting his or her case before an impartial tribunal.[82] The judgment-debtor must have been given notice of the foreign proceedings in sufficient time to be able to prepare his or her case.[83] This does not necessarily require communication of the proceedings to the judgment-debtor personally.[84] Giving notice of foreign proceedings through a method permitted by the foreign civil procedure law does not violate natural justice only because that method is not known in Australian civil procedure law.[85]

3. *Violation of Australian Public Policy*

A foreign judgment will not be recognised in Australia at common law if such recognition would be repugnant to Australian public policy (*ordre public*), either because of the way in which the judgment was obtained (for example, denial of procedural fairness[86]) or because of the law applied by the foreign court. It requires a violation of fundamental values of Australian law. A foreign judgment will not be denied recognition only because an Australian court would have decided the matter differently. In *Stern v National Australia Bank*, TAMBERLIN J. in the Federal Court of Australia said:

> "The thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence. A number of

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[80] *Ainslie v Ainslie* (1927) 39 CLR 381, 402 (HIGGINS J.); *Posner v Collector of Interstate Destitute Persons (Vic)* (1946) 74 CLR 461, 472 (LATHAM C.J.); *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [24].

[81] *Posner v Collector of Interstate Destitute Persons (Vic)* (1946) 74 CLR 461, 472 (LATHAM C.J.); *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [24]; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69, (2011) 91 IPR 438 at [50] (RARES J.).

[82] *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [24]; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69, (2011) 91 IPR 438 at [50] (RARES J.).

[83] *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [24].

[84] *Terrell v Terrell* [1971] VR 155, 157; *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [28].

[85] *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [28].

[86] *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, (2002) 210 CLR 491 at [51] fn. 111.

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the cases involve questions of moral and ethical policy; fairness of procedure, and illegality, of a fundamental nature."[87]

4. Incompatible Judgment

Australian courts have not had an opportunity to decide authoritatively on when the recognition of a foreign judgment at common law will be refused on the ground that the judgment conflicts with another judgment between the same parties on the same subject matter. Australian courts are likely to follow the decision by the Privy Council in *Showlag v Mansour* (applying legislation in Jersey) to the effect that where there are two conflicting foreign judgments, each pronounced by a court of competent jurisdiction and final and not open to impeachment on any ground, the earlier of them in time must be recognised to the exclusion of the other.[88] It can also be assumed that a foreign judgment that conflicts with an earlier Australian judgment will not be recognised.[89] Recognition should equally be denied to a foreign judgment that conflicts with a subsequent Australian judgment, for the latter cannot have been rendered unless the foreign judgment was either not pleaded in the earlier Australian proceedings or then held not to be entitled to recognition in Australia. Either circumstance ought to preclude reliance on the foreign judgment in subsequent Australian proceedings.[90]

C. Effects of Recognition

A foreign judgment entitled to recognition may be given the effects that it has under the foreign law (extension of effects) or the effects of a comparable judgment of the recognising forum (equalisation of effects),[91] or some combination of those.[92] Until recently, Australian courts determined the preclusionary effects of a recognised foreign judgment exclusively under the rules applying to Australian judgments (equalisation of effects), but no alternative approach was suggested by a

[87] [1999] FCA 1421 at [143]; affirmed, without discussion of the present issue, in [2000] FCA 294, (2000) 171 ALR 192.

[88] [1995] 1 AC 431, 440.

[89] *Re Bulong Nickel Pty Ltd* [2002] WASC 226, (2002) 26 WAR 466 at [18]; *Re Glencore Nickel Pty Ltd* [2003] WASC 18, (2003) 44 ACSR 210 at [44]. Those decisions relied on *Vervaeke v Smith* [1983] 1 AC 145; *ED & F Man (Sugar) Ltd v Yani Haryanto (No. 2)* [1991] 1 Lloyd's Rep 429, 436.

[90] The opposite view, namely that a foreign judgment ought to prevail over a subsequent Australian judgment, is taken by M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 40.94; N. TADMORE (note 14), at 165.

[91] See P. BARNETT, The Prevention of Abusive Cross-Border Re-Litigation, 51 *I.C.L.Q.* 943 (2002), p. 954; H. LINKE, Selected Problems Relating to Lis Alibi Pendens and the Recognition of Judgments, in COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (ed), *Civil Jurisdiction and Judgments in Europe*, London 1992, p. 178.

[92] See S. HARDER, The Effects of Recognized Foreign Judgments in Civil and Commercial Matters, 62 *I.C.L.Q.* 441 (2013), p. 443.

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party or considered by a court. In a few recent cases, judgment-debtors argued that the effect of a foreign judgment in Australia cannot be greater than its effect under the foreign law, and that argument succeeded.[93] It remains to be seen whether this new trend continues.

Recognition of a foreign judgment may be sought for the purpose of its enforcement or for the purpose of deriving preclusionary effects from it. The preclusionary effects that a recognised foreign judgment may have in Australia at common law are *res judicata* (or cause-of-action estoppel), issue estoppel and *Anshun* estoppel.[94] The following discussion will examine those three doctrines first and the enforcement procedure afterwards.

1. *Preclusionary Effects*

a) Res judicata *(or Cause-of-Action Estoppel)*

The doctrine of *res judicata* (or cause-of-action estoppel) prevents a re-litigation of a cause of action, for example a claim for tort or breach of contract. This effect may arise from a foreign judgment[95] as well as an Australian judgment,[96] provided in each case that the judgment is "on the merits".[97] In the context of *res judicata*, the phrase "on the merits" denotes a judgment on the substance of the claim and not just on procedural matters.[98] BLUE J. in the Supreme Court of South Australia explained this in *Attorney-General for South Australia v Kowalski*:

> "The doctrine of *res judicata* applies only to final judgments on the merits. On the one hand, *res judicata* applies to a judgment by consent or in default of appearance or defence. On the other hand, dismissal of an action for want of prosecution or non compliance

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[93] *PCH Offshore Pty Ltd v Dunn (No. 2)* [2010] FCA 897, (2010) 273 ALR 167 at [96]-[112]; *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [185], [210], [235]-[239]; *Slaveska v Elenchevski* [2013] VSCA 283 at [41] fn 24.

[94] The etymologic root of the word "estoppel" is old French "estouper" and "estoupail", meaning to stop.

[95] *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2011] FCAFC 69, (2011) 91 IPR 438 at [45] (RARES J.); *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [185]; *SK Foods LP v SK Foods Australia Pty Ltd (in liq) (No. 3)* [2013] FCA 526, (2013) 214 FCR 543 at [22]-[25].

[96] *Western Australia v Fazeldean (No. 2)* [2013] FCAFC 58, (2013) 211 FCR 150 at [24].

[97] *Owston Nominees No. 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76, (2011) 248 FLR 193 at [123]; *CHU Underwriting Agencies Pty Ltd v Wise* [2012] WASCA 123, (2012) 43 WAR 487 at [80]; *Rowe v Stoltze* [2013] WASCA 92, (2013) 45 WAR 116 at [45].

[98] *Thirteenth Corp Pty Ltd v State* [2006] FCA 979, (2006) 232 ALR 491 at [33]; *Mango Boulevard Pty Ltd v Spencer* [2010] QCA 207 at [56] (MUIR JA); *Rowe v Stoltze* [2013] WASCA 92, (2013) 45 WAR 116 at [45]; *Western Australia v Fazeldean (No. 2)* [2013] FCAFC 58, (2013) 211 FCR 150 at [25].

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> with an order for discovery does not give rise to *res judicata*. Dismissal of an action on the ground that a plaintiff has no tenable claim constitutes a final judgment on the merits."[99]

A judgment that upholds a claim is necessarily a judgment "on the merits" and prevents the judgment-debtor from denying the claim. Where a foreign court upholds the claim before it but the judgment-debtor fails to satisfy the judgment, the judgment-creditor can bring a fresh action on the same claim in Australia,[100] and the judgment-debtor will have no defence.

Before 2013, Australian courts applied Australian law's doctrine of *res judicata* to foreign judgments without investigating whether and to what extent the foreign judgment had preclusionary effects under the foreign law.[101] But two cases from 2013 may mark the beginning of a new approach. In *Telesto Investments Ltd v UBS AG*,[102] SACKAR J. in the Supreme Court of New South Wales opined that a Singaporean judgment cannot create *res judicata* in Australian proceedings between the same parties unless it does so in fresh Singaporean proceedings between the parties, which he found to be the case. Citing this decision, Neave JA, speaking for the Victorian Court of Appeal in *Slaveska v Elenchevski*, observed that the *res judicata* effect of a foreign judgment in Australian proceedings "may perhaps depend on whether the law of the foreign jurisdiction has an equivalent doctrine precluding action being brought on a matter already subject to a foreign judgment".[103]

b) Issue Estoppel

An Australian judgment may create an issue estoppel, preventing a re-litigation in Australia of any issue that was determined by the court and was legally indispensable to the court's final conclusion.[104] Issue estoppel does not extend to issues that

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[99] [2014] SASC 1 at [188]. See also *Hamersley Iron Pty Ltd v National Competition Council* [2008] FCA 598, (2008) 247 ALR 385 at [60]; S. MAIDEN, Recent Steps in the Evolution of Res Judicata, Cause of Action Estoppel and the *Anshun* doctrine in Australia, 25 *Australian Bar Review* 130 (2004), p. 139-140.

[100] *Miller v Caddy* (1985) 80 FLR 398, 405; *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [28]; *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [16]. Where an *Australian* judgment upholds a claim, the judgment-creditor cannot bring a fresh action on the claim in Australia, because of the rule that the claim merges in the judgment: *Blair v Curran* (1939) 62 CLR 464, 532 (DIXON J.); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597, 611-612; *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502, 507-508, 510, 512.

[101] *In the Marriage of Caddy and Miller* (1986) 84 FLR 169, 177; *Taffa v Taffa* [2012] FamCA 181 at [207], [244], [280].

[102] [2013] NSWSC 503, (2013) 94 ACSR 29 at [185].

[103] [2013] VSCA 283 at [41] fn. 24.

[104] *Blair v Curran* (1939) 62 CLR 464, 532 (DIXON J.); *Jackson v Goldsmith* (1950) 81 CLR 446, 466 (FULLAGAR J.); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597. For the question of whether issue estoppel and *Anshun* estoppel are true

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were collateral or subsidiary.[105] A foreign judgment too may give rise to an issue estoppel in Australian proceedings,[106] even where the Australian court would determine the issue under a different law[107] or a different test[108] than the one applied by the foreign court. The courts have recognised that they must exercise caution in applying the doctrine of issue estoppel, especially where the estoppel is said to arise from a foreign judgment.[109]

Only judgments "on the merits" can create an issue estoppel.[110] The same requirement exists in the context of *res judicata*, but the meaning of the phrase "on the merits" is different. In the context of issue estoppel, every application of a rule of law to certain facts is a decision "on the merits".[111] This includes decisions on procedural matters,[112] such as the existence of an exclusive jurisdiction agreement between the parties in respect of the dispute.[113] Thus, the requirement of the judgment being "on the merits" merely removes mere findings of fact and mere statements of the law from the scope of the doctrine of issue estoppel. A judgment given in default of defence can give rise to issue estoppels,[114] but only "in respect

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estoppels, see R.P. MEAGHER/ J.D. HEYDON/ M.J. LEEMING, *Equity: Doctrines and Remedies* (4th ed.), Chatswood 2002, para. 17-020.

[105] *Blair v Curran* (1939) 62 CLR 464, 532 (DIXON J.); *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44, (2012) 262 FLR 119 at [122]-[124].

[106] *Society of Lloyd's v White* [2004] VSCA 101 at [21]; *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592, (2008) 248 ALR 573 at [64]-[66]; *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44, (2012) 262 FLR 119 at [132]-[135].

[107] *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592, (2008) 248 ALR 573 at [77]-[78], [82].

[108] *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44, (2012) 262 FLR 119 at [130].

[109] *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592, (2008) 248 ALR 573 at [63].

[110] *Palmbay Nominees Pty Ltd v Fowler* [2003] WASCA 217 at [57]; *Phillip Morris Ltd v Attorney-General for Victoria* [2006] VSCA 21, (2006) 14 VR 538 at [123]; *Owston Nominees No. 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76, (2011) 248 FLR 193 at [123].

[111] *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar* [1985] 1 WLR 490, 499; *Castillon v P & O Ports Ltd (No. 2)* [2007] QCA 364, [2008] 2 Qd R 219 at [54]; *Prestige Property Services Pty Ltd v Madzoski* [2008] WASCA 58 [66] (BUSS JA).

[112] *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44, (2012) 262 FLR 119 at [132], [135].

[113] *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar* [1985] 1 WLR 490, 499; *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592, (2008) 248 ALR 573 at [64]-[66].

[114] *Van den Heuvel v Perpetual Trustees Victoria Ltd* [2010] NSWCA 171, (2010) 15 BPR 28,647 at [210]; *Mango Boulevard Pty Ltd v Spencer* [2010] QCA 207 at [116]; *Mothership Music Pty Ltd v Flo Rida (aka Tramar Dillard)* [2012] NSWCA 344 at [8] (MEAGHER JA). Cf. *Palmbay Nominees Pty Ltd v Fowler* [2003] WASCA 217 at [57].

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of what must «necessarily and with complete precision» have been thereby determined".[115]

The question arises whether the ability of a foreign judgment to create an issue estoppel in Australian proceedings depends upon the foreign law having a doctrine similar to that of issue estoppel. An affirmative answer seems to have been given in only one case. In *Telesto Investments Ltd v UBS AG*,[116] SACKAR J. in the Supreme Court of New South Wales opined that a Singaporean judgment cannot create an issue estoppel in Australian proceedings between the same parties unless it does so in fresh Singaporean proceedings between the parties, which he found to be the case. In a number of other cases, both before[117] and after[118] SACKAR J.'s decision, a foreign judgment was regarded as being capable of giving rise to an issue estoppel in Australian proceedings, without investigation into the effects of the judgment under the foreign law. However, in none of these cases was it argued that the effect of the judgment under the foreign law was relevant to its effect in Australian proceedings.

c) Anshun *Estoppel*

In *Port of Melbourne Authority v Anshun Pty Ltd*,[119] the High Court of Australia laid down that a party to Australian proceedings is precluded from raising a claim or defence that should reasonably have been, but was not, raised in previous Australian proceedings between the same parties.[120] This rule prevents the waste of judicial resources and protects parties from being vexed twice in the same matter.[121]

[115] *Sneddon v New South Wales* [2012] NSWCA 351 at [185] (MEAGHER JA), citing in support: *Blair v Curran* (1939) 62 CLR 464, 531-532 (DIXON J.); *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1012; *New Brunswick Railway Co v British and French Trust Corp Ltd* [1939] AC 1, 21 (LORD MAUGHAM LC); K.R HANDLEY, *Spencer Bower and Handley: Res Judicata* (4th ed.), Chatswood 2009, para. 2.23.

[116] [2013] NSWSC 503, (2013) 94 ACSR 29 at [185], [210].

[117] *Armacel Pty Ltd v Smurfit Stone Container Corporation* [2008] FCA 592, (2008) 248 ALR 573 at [66]; *Wang v Zhao* [2012] NSWSC 706 at [49].

[118] *SK Foods LP v SK Foods Australia Pty Ltd (in liq) (No. 3)* [2013] FCA 526, (2013) 214 FCR 543 at [25]; *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882 at [102]. Perhaps also *Slaveska v Elenchevski* [2013] VSCA 283 at [41], where the possibility of the foreign law being relevant was expressly raised in relation to *res judicata* but not in relation to issue estoppel.

[119] (1981) 147 CLR 589. The same principle has long been recognised in England, the leading case being *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313.

[120] The mere opportunity to raise the matter in the first proceedings is not sufficient for an *Anshun* estoppel; it must have been unreasonable not to raise the matter: *Ruddock v Taylor* [2003] NSWCA 262, (2003) 58 NSWLR 269 at [82]; *Champerslife Pty Ltd v Manojlovski* [2010] NSWCA 33, (2010) 75 NSWLR 245 at [3]-[4], [52], [89].

[121] *Spalla v St George Motor Finance Ltd (No. 6)* [2004] FCA 1699 at [67]-[69].

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In a few dicta, it has been said that a foreign judgment can give rise to an *Anshun* estoppel in Australian proceedings.[122] Those dicta did not say whether that effect depended upon the judgment having an equivalent effect under the foreign law. Other decisions have left open whether a foreign judgment can give rise to an *Anshun* estoppel in Australian proceedings at all.[123] In the two most recent decisions considering the question, it was held that a foreign judgment can give rise to an *Anshun* estoppel in Australian proceedings if, and only if, the foreign law has an equivalent doctrine which precludes the raising of the relevant claim or defence in fresh proceedings in the foreign jurisdiction.[124]

2. Enforcement

At common law, foreign judgments cannot as such be enforced in Australia.[125] The judgment-creditor needs to obtain an Australian judgment that gives effect to the foreign judgment. Depending upon the circumstances, this can be done through an action based upon the original claim (for example breach of contract or tort), or through an action based directly upon the foreign judgment, or both.[126] Each avenue requires the Australian court to have jurisdiction over the judgment-debtor. The two avenues and the issue of jurisdiction will now be examined. It will be assumed throughout that the foreign judgment in question is entitled to recognition at common law.

a) Action on the Original Claim

As mentioned before, a claim upheld by a foreign court may be raised again in an Australian court, and the doctrine of *res judicata* precludes any defence other than satisfaction of the judgment. Thus, the judgment-creditor may obtain summary judgment from an Australian court.[127] The Australian judgment may then be enforced in Australia.

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[122] *In the Marriage of Caddy and Miller* (1986) 84 FLR 169, 177; *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [28]; *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [16].

[123] *Talacko v Talacko* [1999] VSC 81 at [48]-[52]; *Commonwealth Bank of Australia v White (No. 4)* [2001] VSC 511 [45].

[124] *PCH Offshore Pty Ltd v Dunn (No. 2)* [2010] FCA 897, (2010) 273 ALR 167 at [96]-[112] (following *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433); *Telesto Investments Ltd v UBS AG* [2013] NSWSC 503, (2013) 94 ACSR 29 at [235]-[239].

[125] *Martyn v Graham* [2003] QDC 447 at [16].

[126] *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [3]; *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [28]-[29]; *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [15]-[16]. Where both actions are available, they can be brought in the alternative: *Delfino v Trevis (No. 2)* [1963] NSWR 194, 196.

[127] *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [38].

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So far, this avenue of obtaining an Australian judgment based upon a foreign judgment *in personam* seems to have been taken only where the foreign judgment contained an order to pay a certain amount of money to the judgment-creditor. But there is no reason why this avenue should not also be available for foreign judgments that order the judgment-debtor to do, or not to do, a certain act.[128] In those circumstances, there can be no doubt that the judgment-creditor may bring a fresh action in Australia on the original claim (if the Australian court has jurisdiction over the judgment-debtor), and the only question is whether the foreign judgment creates *res judicata*. There is no reason why this should not be the case, since a foreign non-money judgment *in personam* may give rise to an issue estoppel in Australian proceedings.[129] The Australian court would have to mirror the foreign order as closely as possible.[130]

b) Action on the Judgment

When a foreign court orders the judgment-debtor to pay a certain amount of money to the judgment-creditor, an Australian judgment based upon the foreign judgment may be obtained through an action for debt.[131] An action for debt is a common law action for the recovery of a certain or ascertainable sum of money, for example the purchase price in a contract for the sale of goods or land. A foreign judgment can be the source of a debt, and the only possible defence is satisfaction of the judgment. The judgment-creditor may thus obtain summary judgment,[132] and the Australian judgment can be enforced in Australia. An action for debt based upon a foreign money judgment can be brought whether it is a judgment on the substance of the claim before the foreign court,[133] or a cost order against the then defendant,[134] or a cost order against the then plaintiff.[135]

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[128] LORD COLLINS (ed.), *Dicey, Morris and Collins on the Conflict of Laws* (15th ed.), London 2012, para. 14R-020 fn. 74 (for English law).

[129] *Telesto Investments Ltd v UBS AG* [2012] NSWSC 44, (2012) 262 FLR 119 at [132], [135].

[130] See, in the context of an action on the judgment, R.F. OPPONG, Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond, 29 *UBC L. Rev.* 257 (2006), p. 268-269; S.G.A. PITEL, Enforcement of Foreign Non-Monetary Judgments in Canada (and Beyond), 3 *Journal of Private International Law* 241 (2007), p. 247.

[131] In *Xplore Technologies Corporation of America v Tough Corp Pty Ltd* [2008] NSWSC 1267 at [16], an action for debt and an action on the judgment were mentioned as two distinct avenues in cases of money judgments. But it is not clear what difference there can be between them; see *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [26].

[132] *RDCW Diamonds Pty Ltd v Da Gloria* [2006] NSWSC 450 at [38].

[133] An example is *JP Morgan Chase Bank NA v PT Indah Kiat Pulp and Paper Corporation* [2012] NSWSC 1279.

[134] An example is *Benefit Strategies Group Inc v Prider* [2005] SASC 194, (2005) 91 SASR 544 at [82].

[135] An example is *Eisenberg v Joseph* [2001] NSWSC 1062.

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Traditionally, an action on a foreign judgment could be brought only in the form of an action for debt, and was thus unavailable for judgments that contained orders other than an order to pay a certain sum of money.[136] This limitation has purely historical reasons,[137] and cannot be justified on principle.[138] It has been relaxed in some other common law countries,[139] and been ignored in some Australian cases.[140] For example, in *Independent Trustee Services Ltd v Morris*,[141] BRYSON A.J. in the Supreme Court of New South Wales ordered an account of administration on the basis of wilful default, mirroring an order made by an English court. It remains to be seen whether this trend continues.

c) Jurisdiction over the Judgment-Debtor

An Australian judgment giving effect to a foreign judgment cannot be obtained unless the Australian court has jurisdiction over the judgment-debtor. This requires service of initiating process on the judgment-debtor. The mere presence of assets in Australia is not sufficient.[142] An initiating process issued by an Australian court can always be served in Australia, even in a state or territory other than the one issuing the process,[143] and in New Zealand.[144] Service in another country is permitted only in certain circumstances,[145] which are set out by legislation of the relevant

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[136] See *Schnabel v Lui* [2002] NSWSC 15 at [75]; *Mobi-Light Inc v KK Machinery Pty Ltd* [2010] WADC 105 at [20]; *Jani-King Franchising Inc v Jason* [2013] QSC 155 at [3]-[4].

[137] Namely the old rule that the proper action on a foreign judgment is an action in *indebitatus assumpsit* or debt: M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 40.38; N. TADMORE (note 14), at 140. However, there may be an old equitable jurisdiction to enforce foreign non-money judgments: R.W. WHITE, Enforcement of Foreign Judgments in Equity, 9 *Sydney Law Review* 630 (1980-1982).

[138] K. PHAM, Enforcement of Non-Monetary Foreign Judgments in Australia, 30 *Sydney Law Review* 663 (2008).

[139] *Pro Swing Inc v ELTA Golf Inc* [2006] SCC 52, [2006] 2 SCR 612 (Canada); *Miller v Gianne* [2007] Cayman Islands LR 18 at [60]-[68] (Cayman Islands); *Brunei Investment Agency v Fidelis Nominees Ltd* [2008] Jersey LR 337 at [35] (Jersey).

[140] *White v Verkouille* [1990] 2 Qd R 191 (involving a judgment *in rem*); *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742, (2005) 222 ALR 676; *BCBC Singapore Pte Ltd v PT Bayan Resources TBK (No. 3)* [2013] WASC 239, (2013) 276 FLR 273.

[141] [2010] NSWSC 1218, (2010) 79 NSWLR 425 at [30]-[37]. The action in that case was based directly upon the English judgment and not upon the original cause of action: [2010] NSWSC 1218, (2010) 79 NSWLR 425 at [19].

[142] *Caswell v Sony/ ATV Music Publishing (Australia) Pty Ltd* [2012] NSWSC 986 at [68].

[143] Service and Execution of Process Act 1992 (Cth), s 15(1).

[144] Trans-Tasman Proceedings Act 2010 (Cth), pt 2.

[145] See *Gros v Jones* [2011] NSWSC 1605 at [12].

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jurisdiction.[146] While the provisions of the various jurisdictions have many commonalities, there are differences too.[147]

With regard to actions on the foreign judgment itself, service outside Australia and New Zealand is permitted by the provisions of the Australian Capital Territory, New South Wales, South Australia and Tasmania, because the types of action for which those provisions permit service include actions "to enforce" a foreign judgment in the forum.[148] The other jurisdictions have no such provision. Since the judgment-creditor in an action on the judgment does not rely on the original claim, it does not seem possible to invoke a ground of service that would be satisfied by the original claim, for example the fact that the dispute concerned a contract made or breached, or a tort committed, within the forum.

With regard to an action on the original claim, the subject matter of the dispute needs to fall within one of the categories of action for which service outside Australia and New Zealand is permitted. It is unclear whether an action on the original claim constitutes an action "to enforce" a foreign judgment for the purpose of the provisions in the Australian Capital Territory, New South Wales, South Australia and Tasmania.

III. Foreign Judgments Act 1991 (Cth)

The Foreign Judgments Act 1991 (Cth) ("FJA") creates a regime under which certain foreign judgments can be registered in certain Australian courts and, unless the judgment-debtor successfully impeaches the registration, be enforced like a judgment of the registering court. The FJA applies to a foreign judgment if the judgment is from a country listed in the Foreign Judgments Regulations 1992 (Cth) ("FJR") and is either from a "superior" court of that country or from an inferior court listed in the FJR.[149] A country is to be listed if substantial reciprocity of treatment is assured in relation to the enforcement in that country of money judgments from all Australian superior courts.[150] Inferior courts of a country are to be listed if substantial reciprocity of treatment is assured in relation to the enforcement in that country of money judgments from all or some Australian inferior courts.[151]

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[146] Legislation permitting service outside Australia and New Zealand exists for the High Court of Australia (in its original jurisdiction), the Federal Court of Australia, and the Supreme Court of every Australian state and territory. An initiating process issued by any other Australian court cannot be served outside Australia and New Zealand.

[147] The provisions of all jurisdictions are discussed by M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at paras. 3.51-3.106; R. MORTENSEN/ R. GARNETT/ M. KEYES (note 14), at paras. 2.44-2.84.

[148] Court Procedures Rules 2006 (ACT), r 6501(1)(w); Uniform Civil Procedure Rules 2005 (NSW), sch 6 para (u); Supreme Court Civil Rules (SA), r 40(1)(j); Supreme Court Rules 2000 (Tas), r 147A(1)(t).

[149] Foreign Judgments Act 1991 (Cth), s 5(1), (3).

[150] Foreign Judgments Act 1991 (Cth), s 5(1).

[151] Foreign Judgments Act 1991 (Cth), s 5(3).

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The rules of the FJA do not differ significantly from the common law in relation to the circumstances in which a foreign judgment *in personam* is entitled to recognition in Australia. But the Act profoundly facilitates the enforcement of recognised foreign judgments. The details will now be discussed. The following discussion will largely ignore special provisions of the FJA with regard to New Zealand judgments since the FJA applies to such judgments only if given before 11 October 2013.[152]

The registration scheme involves two distinct stages.[153] In the first stage, the judgment-creditor must prove that certain (mostly formal) requirements are satisfied. If this is successful, the judgment will be registered. In the second stage, the judgment-debtor must prove that one of certain grounds for the setting aside of the registration is satisfied.

A. Prerequisites of Registration

Under the FJA, a foreign judgment can be registered in the Supreme Court of an Australian state or territory if eight requirements are satisfied. The judgment-creditor bears the onus of proof in relation to those requirements.[154]

First, the judgment must be a final or interlocutory judgment made in civil proceedings or a compensation order made in criminal proceedings.[155]

Secondly, the judgment must be an "enforceable money judgment",[156] defined as a judgment under which money other than a fine, other penalty, tax or a similar charge is payable.[157] Regulations can extend the application of the FJA to non-money judgments,[158] but no such regulations have been made.

Thirdly, the judgment must be from a country listed in the Schedule to the FJR. So far, the list includes three of Canada's common law provinces and 33 other

[152] Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010 (Cth), sch 1, s 6; sch 2, s 23.

[153] See *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [64]-[71], where it was held that no *Anshun* estoppel precludes the judgment-debtor from raising in the second stage matters that could have been raised in the first stage.

[154] *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [67].

[155] Foreign Judgments Act 1991 (Cth), s 3(1). The definition of "judgment" further includes certain foreign arbitral awards.

[156] Foreign Judgments Act 1991 (Cth), s 5(4).

[157] Foreign Judgments Act 1991 (Cth), s 3(1). The definition of "enforceable money judgment" includes judgments for New Zealand tax and certain Papua New Guinea tax. The Act specifies how a foreign currency is to be converted into Australian dollars: Foreign Judgments Act 1991 (Cth), s 6(11)-(11B).

[158] Foreign Judgments Act 1991 (Cth), s 5(6), (7).

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countries, mainly Commonwealth and European countries. The list excludes the nine most populous countries in the world,[159] most notably the United States.

Fourthly, the judgment must be from a specified court. If the FJR list inferior courts of the relevant country,[160] the judgment may be from an inferior court listed or from a "superior" court.[161] If the FJR do not list inferior courts of the relevant country, the judgment must be from a "superior" court and must not have been given on appeal from a judgment given by an inferior court.[162] For every country listed, the FJR list all courts regarded as superior, but it is open to a judgment-creditor to prove that a court not listed as superior is in fact superior.[163] Fifthly, the judgment must be "final and conclusive".[164] The FJA does not comprehensively define that phrase but does provide that a judgment may be final and conclusive even though it has been or may be appealed.[165] That provision mirrors the position at common law, and it seems uncontroversial that the phrase "final and conclusive" under the FJA has the same meaning as at common law.[166] Where the judgment has been, or may still be, appealed, the registering court may order that enforcement of the judgment be stayed until the final determination of the appeal or another date.[167]

Sixthly, no more than 6 years must have passed since the judgment was given or, where there was an appeal, since the last judgment in the proceedings was given.[168]

Seventhly, the judgment must not be wholly satisfied.[169] If it is partially satisfied, it can be registered in respect of the remaining balance.[170]

Eighthly, the judgment must be enforceable in the judgment-rendering country.[171] This is not the case, for example, where a limitation period for the enforcement of the judgment under the foreign law has expired.[172]

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[159] Except for the Hong Kong Special Administrative Region of the People's Republic of China.

[160] Foreign Judgments Regulations 1992 (Cth), reg 5. So far, the list includes three Canadian provinces, New Zealand, Poland, Switzerland and the United Kingdom.

[161] Foreign Judgments Act 1991 (Cth), s 5(4)(b).

[162] Foreign Judgments Act 1991 (Cth), s 5(4)(b)(i), (9). See *Gros v Jones* [2011] NSWSC 1605 at [9].

[163] Foreign Judgments Act 1991 (Cth), s 5(2).

[164] Foreign Judgments Act 1991 (Cth), s 5(4)(a).

[165] Foreign Judgments Act 1991 (Cth), s 5(5).

[166] See *Bank Polska Kasa Opieki Spolka Akcyjna v Opara* [2010] QSC 93, (2010) 238 FLR 309 at [59]-[63].

[167] *Foreign Judgments Act 1991* (Cth), s 8(1).

[168] Foreign Judgments Act 1991 (Cth), s 6(1).

[169] Foreign Judgments Act 1991 (Cth), s 6(6)(a).

[170] Foreign Judgments Act 1991 (Cth), s 6(12).

[171] Foreign Judgments Act 1991 (Cth), s 6(6)(b).

[172] *Society of Lloyd's v Marich* [2004] FCA 1502, (2004) 139 FCR 560 at [15]-[16].

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A foreign judgment that satisfies all eight requirements can be registered in the Supreme Court of any Australian state or territory.[173] Where some provisions of a foreign judgment satisfy the requirements and others do not, the judgment can be registered in respect of the former provisions.[174] A judgment registered under the FJA is registered also for the cost of registration and interest due up to the time of registration.[175]

Registration does not require that the court in which registration is being sought has jurisdiction to hear an action by the judgment-creditor against the judgment-debtor.[176] This is an important difference to the enforcement of foreign judgments at common law.

Applications for registration are usually processed *ex parte*,[177] but the FJA does not require this.[178] A judgment that satisfies the requirements "is to" be registered.[179] However, registration must be refused where it appears from the information before the court that registration if made would have to be set aside on the judgment-debtor's application.[180]

B. Grounds for Setting Aside Registration

Within a period to be specified by the registering court,[181] the judgment-debtor may impeach the registration of a foreign judgment under the FJA.[182] The registered judgment cannot be enforced during that period and, if the judgment-debtor makes an application to have the registration set aside, until after the application has been finally determined.[183] Registration of a foreign judgment under the FJA cannot be set aside unless one of the grounds set out in s 7(2) of the FJA is satisfied.[184] The

[173] Foreign Judgments Act 1991 (Cth), s 6(2)(c). Certain judgments from New Zealand may be registered in the Federal Court of Australia: Foreign Judgments Act 1991 (Cth), s 6(2)(a).

[174] Foreign Judgments Act 1991 (Cth), s 6(13).

[175] Foreign Judgments Act 1991 (Cth), s 6(15).

[176] See *Hunt v BP Exploration Co (Libya) Ltd* (1980) 144 CLR 565, decided under former state legislation.

[177] *Rent Plus Ltd v Sorenson (No. 2)* [2013] NSWSC 67 at [20].

[178] *Rent Plus Ltd v Sorenson (No. 2)* [2013] NSWSC 67 at [21]; *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* [2014] NSWCA 3 at [13].

[179] Foreign Judgments Act 1991 (Cth), s 6(3).

[180] *Rent Plus Ltd v Sorenson (No. 2)* [2013] NSWSC 67 at [22].

[181] Foreign Judgments Act 1991 (Cth), s 6(4). The period may be extended: Foreign Judgments Act 1991 (Cth), s 6(5). See *De Santis v Russo* [2001] QCA 457, [2002] 2 Qd R 230 at [23]; *Sywak v Sywak* [2009] NSWSC 1393, (2009) 236 FLR 471.

[182] Foreign Judgments Act 1991 (Cth), s 7(1).

[183] Foreign Judgments Act 1991 (Cth), s 6(10).

[184] *Rent Plus Ltd v Sorenson (No. 2)* [2013] NSWSC 67 at [84].

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judgment-debtor bears the onus of proof in that respect.[185] With one exception (prior judgment on the same matter), those grounds are compulsory in the sense that registration must be set aside, the court having no discretion.[186]

Some of the grounds are self-evident. Registration of a foreign judgment under the FJA must be set aside in any of the following events: the FJA does not, or does not anymore, apply to the judgment;[187] the judgment was registered for an amount greater than the amount payable under it when registered;[188] the judgment was registered in contravention of the FJA;[189] the judgment has been reversed on appeal or otherwise set aside in the judgment-rendering country;[190] the rights under the judgment are not vested in the person who applied for registration;[191] the judgment has been discharged or wholly satisfied.[192]

The other grounds for setting aside registration mirror largely (but not completely) the common law rules on the foreign court's "international jurisdiction" and the defences to recognition. This will now be examined.

1. Lack of "International Jurisdiction"

Registration of a foreign judgment under the FJA must be set aside where the courts of the judgment-rendering country "had no jurisdiction in the circumstances of the case".[193] This ground refers to the competence of the foreign court in the eyes of Australian law, not the court's jurisdiction under its own law.[194] The FJA provides that international jurisdiction is lacking where the subject matter of the

[185] *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [67].

[186] *Bank Polska Kasa Opieki Spolka Akcyjna v Opara* [2010] QSC 93, (2010) 238 FLR 309 at [48]-[49].

[187] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(i). An example is *Morf-Zinggeler v Morf* [1999] WASC 96, involving a Swiss judgment rendered before the Act became applicable to Swiss judgments.

[188] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(ii). The judgment can be re-registered in the correct amount: Foreign Judgments Act 1991 (Cth), s 9(1).

[189] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(iii). Where registration is set aside solely because the judgment is not enforceable in the foreign country, the judgment can be re-registered if and when it becomes so enforceable: Foreign Judgments Act 1991 (Cth), s 9(2).

[190] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(vii).

[191] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(viii).

[192] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(ix), (x). A foreign judgment is wholly satisfied once the judgment-debtor has paid the whole of the amount in the foreign currency even if that is less than its equivalent in Australian dollars: *Sywak v Sywak* [2009] NSWSC 1393 at [27]-[30].

[193] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(iv).

[194] *De Santis v Russo* [2001] QCA 457, [2002] 2 Qd R 230 at [9]; *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* [2014] NSWCA 3 at [53]; *Marks v Australia and New Zealand Banking Group Ltd* [2014] QCA 102 at [27].

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foreign proceedings was immovable property situated outside the foreign country.[195] Otherwise, the FJA specifies six grounds of international jurisdiction in respect of foreign judgments *in personam*.[196] One ground is the simple fact that the judgment is for New Zealand tax.[197] The other five grounds can be consolidated into the categories of submission and residence/ place of business. They will now be examined.

a) Submission to the Foreign Court's Jurisdiction

Under the FJA, international jurisdiction exists where the judgment-debtor "voluntarily submitted to the jurisdiction of the original court".[198] The FJA does not generally define the meaning of voluntary submission, but it does specify certain categories of case in which voluntary submission is assumed to be absent or present.

The FJA sets out two specific instances of voluntary submission. The first is where the judgment-debtor "was plaintiff in, or counter-claimed, in" the foreign proceedings.[199] This provision says nothing on counter-claims brought by the judgment-creditor. The second instance of voluntary submission set out in the FJA is where the judgment-debtor "had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction" of the foreign court.[200] The word "agreed" in that phrase seems to include not only jurisdiction clauses in a contract but any indication of willingness to litigate in the foreign country.[201]

It is further provided that voluntary submission does not occur by participating in proceedings only to such extent as is necessary to protect, or obtain the release of, property seized, to contest the jurisdiction of the court, or to invite the court in its discretion not to exercise jurisdiction.[202] This provision ensures that the conduct described will not be regarded as voluntary submission. It does not follow that voluntary submission is to be assumed in all cases not covered by the provision.[203]

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[195] Foreign Judgments Act 1991 (Cth), s 7(4)(a).

[196] Foreign Judgments Act 1991 (Cth), s 7(3)(a). The definition of "action *in personam*" in s 3(1) excludes certain areas of private law, all of which are excluded from the scope of this article.

[197] Foreign Judgments Act 1991 (Cth), s 7(3)(a)(vi).

[198] Foreign Judgments Act 1991 (Cth), s 7(3)(a)(i).

[199] Foreign Judgments Act 1991 (Cth), s 7(3)(a)(ii).

[200] Foreign Judgments Act 1991 (Cth), s 7(3)(a)(iii).

[201] M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 41.20.

[202] Foreign Judgments Act 1991 (Cth), s 7(5). An equivalent provision exists in respect of recognition at common law, as mentioned before: Foreign Judgments Act 1991 (Cth), s 11.

[203] *Zeta-PDM Ltd v Petro Technology Australia Pty Ltd* [2011] WASC 338 at [17]-[19].

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In cases not covered by a specific provision, the common law rules on voluntary submission have been applied,[204] which is appropriate. Thus, any voluntary conduct inconsistent with protest against jurisdiction constitutes voluntary submission. The prime example is the raising of arguments on the substance of the claim without contesting jurisdiction.[205] It has been held that an unsuccessful attempt to raise arguments on the substance of the claim does not constitute voluntary submission.[206] It has also been held that the combination of protest against jurisdiction with arguments on the substance of the claim constitutes voluntary submission.[207] However, this should not apply where the foreign court's procedural rules required such a combination,[208] or where the judgment-debtor made it abundantly clear that the protest against jurisdiction was the main defence and that the arguments on the substance of the claim were only subsidiary.[209]

b) *Residence or Place of Business in the Foreign Country*

The FJA sets out two grounds of international jurisdiction based upon a territorial connection between the judgment-debtor and the foreign country. International jurisdiction exists where "the judgment debtor was a defendant in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court.210 International jurisdiction further exists where "the judgment debtor was a defendant in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court".[211]

Apart from the difference between residence and place of business, those provisions treat corporations and natural persons in the same way. Regardless of whether the judgment-debtor is a corporation or a natural person, the country in which the judgment-debtor's residence or principal place of business is situated has international jurisdiction for any claim, and any other country in which the judgment-debtor maintains an office has international jurisdiction for claims that relate to a transaction effected by that office. This differs from the position at common law, where a natural person cannot be present through an agent, and

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[204] *Fletcher Steel v Moghe* [2006] NSWSC 425 at [10].

[205] *Marks v Australia and New Zealand Banking Group Ltd* [2014] QCA 102 at [38].

[206] *De Santis v Russo* [2001] QCA 457, [2002] 2 Qd R 230 at [22]. In that case, an Italian court ignored a letter in which the judgment-debtor had made arguments on the substance of the claim.

[207] *Fletcher Steel v Moghe* [2006] NSWSC 425 at [10].

[208] See *Starlight International Inc v Bruce* [2002] EWHC 374 (Ch), [2002] I L Pr 35 at [14]; M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 40.16.

[209] See *Marc Rich & Co AG v Società Italiana Impianti pA* [1992] 1 Lloyd's Rep 624, 633.

[210] Foreign Judgments Act 1991 (Cth), s 7(3)(a)(iv).

[211] Foreign Judgments Act 1991 (Cth), s 7(3)(a)(v).

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where a corporation can be sued in any country in which it has an office even if the claim does not arise out of the operations of that office.[212]

The FJA does not define the meaning of "residing" in a country. Since it is used as a natural person's equivalent to a corporation's *principal* place of business, it ought to exclude a fleeting visit to a country.[213] The FJA defines "country" as including any region that is part of a country.[214] But this does not resolve the question of whether, where the foreign country is a federal state, the judgment-debtor's residence or place of business needs to be in the specific law district in which the judgment was rendered or whether it can be anywhere in the federal state.

In the absence of voluntary submission to the foreign court's jurisdiction, there can be no international jurisdiction where the judgment-debtor was entitled under international law to immunity from the jurisdiction of the foreign court,[215] or where "the bringing of the proceedings in the country of the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court".[216] The latter provision applies, for example, where there is an arbitration agreement or an exclusive jurisdiction agreement in favour of a country other than the judgment-rendering country.

2. Lack of Notice of the Proceedings

Registration of a foreign judgment under the FJA must be set aside where "the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear".[217] The phrase in brackets indicates that "notice" means actual knowledge of the proceedings, excluding substituted service by advertisement etc.[218] It is necessary to know the court in which the proceedings take place, the nature of the proceedings and the type of relief claimed.[219] This ground of setting aside registration does not cover denials of natural justice other than lack of notice of the proceedings, in particular lack of an opportunity to present one's case before an impartial tribunal. Those cases need to be brought under the general public policy ground discussed below.

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[212] M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 41.20.

[213] The opposite view is taken by M. DAVIES/ A.S. BELL/ P.L.G. BRERETON (note 2), at para. 41.20.

[214] Foreign Judgments Act 1991 (Cth), s 3(1).

[215] Foreign Judgments Act 1991 (Cth), s 7(4)(c).

[216] Foreign Judgments Act 1991 (Cth), s 7(4)(b).

[217] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(v).

[218] *Barclays Bank Ltd v Piacun* [1984] 2 Qd R 476, 478 (decided under former state legislation); *Esso China Inc v Chan* [1999] VSC 294 at [2]; *Bank Polska Kasa Opieki Spolka Akcyjna v Opara* [2010] QSC 93, (2010) 238 FLR 309 at [37].

[219] *Maschmann v Wenzel* [2007] NSWSC 850 at [21].

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3. Fraud

Registration of a foreign judgment under the FJA must be set aside where "the judgment was obtained by fraud".[220] The term "fraud" is not defined in the Act and has been interpreted in the same way as at common law, namely as intentionally misleading the foreign court into making a certain decision.[221] An allegation of fraud must be pleaded distinctly and with particularity,[222] and must be strictly proved.[223] Under the FJA, as at common law, it is not settled whether a contention of fraud may be based upon evidence that was, or could have been, presented before the foreign court. A contention based upon such evidence has been allowed in some first-instance decisions,[224] but denied in another.[225]

4. Violation of Australian Public Policy

Registration of a foreign judgment under the FJA must be set aside where the enforcement of the judgment in Australia would be contrary to public policy.[226] The FJA does not define "public policy", but since this ground of setting aside registration is drawn from the common law, its application is guided by common law principles.[227] Thus, "public policy" must be understood as *ordre public*, requiring a violation of fundamental values of Australian law. In *Jenton Overseas Investment Pte Ltd v Townsing*, WHELAN J. said that

> "substantial injustice, either because of the existence of a repugnant law or because of a repugnant application of the law in a particular case, may invoke the public policy ground. But it will only do so where the offence to public policy is fundamental and of a high

[220] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(vi).

[221] *De Santis v Russo* [2001] QSC 65, (2001) 27 Fam LR 414 at [16]; *Ramanathan v Naidu* [2007] NSWSC 693 at [24]; *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [126]-[128], [143].

[222] *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* [2014] NSWCA 3 at [123].

[223] *De Santis v Russo* [2001] QSC 65, (2001) 27 Fam LR 414 at [16]; *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* [2014] NSWCA 3 at [125].

[224] *De Santis v Russo* [2001] QSC 65, (2001) 27 Fam LR 414 at [16]; *Ramanathan v Naidu* [2007] NSWSC 693 at [19]-[24].

[225] *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [118]-[122]. On appeal, the question was left open, but it was said that there are "powerful reasons" for permitting a contention of fraud only on the basis of new evidence: *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* [2014] NSWCA 3 at [137].

[226] Foreign Judgments Act 1991 (Cth), s 7(2)(a)(xi). This ground does not apply to judgments in respect of New Zealand tax.

[227] *Jenton Overseas Investment Pte Ltd v Townsing* [2008] VSC 470, (2008) 21 VR 241 at [6]; *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [155].

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order. For the public policy ground to be invoked in this context enforcement must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs".[228]

5. *Prior Judgment on the Same Matter*

Registration of a foreign judgment under the FJA *may* be set aside where "the matter in dispute in the proceedings in the original court had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter".[229] It is not required that the other judgment has been, or could be, registered under the FJA. Thus, the other judgment may be from any court of any country (including Australia),[230] provided that it is "final and conclusive" and from "a court having jurisdiction in the matter". The meaning of those two phrases must be the same as in the context of registration. What *is* required is that the other judgment was given before the registered judgment. Thus, the existence of a *subsequent* Australian judgment on the same matter does not permit registration under the FJA to be set aside.

It is not required that the prior judgment is incompatible with the registered judgment, or between the same parties, or valid in the jurisdiction in which it was rendered or, if from a foreign country, entitled to recognition in Australia. This is why this ground of setting aside registration under the FJA is in the discretion of the court. The existence of a prior judgment should not lead to the setting aside of registration under the FJA where the prior judgment is compatible with the registered judgment,[231] or is between different parties, or has been overturned on appeal, or is not entitled to recognition in Australia because of fraud, denial of natural justice etc.

C. Effects of Registration and Registrability

With regard to the effects of registration, the FJA generally prescribes an equalisation (as opposed to an extension) of effects. Section 6(7) of the FJA does this for enforcement by providing that, for the purposes of enforcement procedures and interest, a registered foreign judgment is to be treated as if it had been given by the registering court at the date of registration. Since a judgment given by the Supreme Court of an Australian jurisdiction may, for the purpose of enforcement, be registered in the Supreme Court of any other Australian jurisdiction,[232] a foreign

[228] [2008] VSC 470, (2008) 21 VR 241 at [22]; approvingly quoted in *Allardyce Lumber Co Ltd v Quarter Enterprises Pty Ltd (No. 2)* [2012] NSWSC 438, (2012) 265 FLR 217 at [156].

[229] Foreign Judgments Act 1991 (Cth), s 7(2)(b).

[230] It may also be from the same country as the registered judgment: *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd* [2014] NSWCA 3 at [64]-[68].

[231] R. MORTENSEN/ R. GARNETT/ M. KEYES (note 14), at para. 5.66.

[232] Service and Execution of Process Act 1992 (Cth), pt 6.

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judgment registered in the Supreme Court of an Australian jurisdiction may equally be registered in the Supreme Court of any other Australian jurisdiction,[233] unless enforcement has been stayed because an appeal is pending.[234]

The equalisation approach applies generally also to the preclusionary effects of a registered foreign judgment. Section 12(1) of the FJA provides that a foreign judgment registered under the FJA must "be recognised in any Australian court as conclusive between the parties to it in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings". In other words, a registered foreign judgment creates *res judicata*.[235] Since this effect is independent of the effects of the foreign judgment under the foreign law, s 12(1) is consistent only with the equalisation approach. However, s 12(1) does not entirely equate the effects of a registered foreign judgment with those of a comparable Australian judgment since it does not provide for an issue estoppel or an *Anshun* estoppel.

Section 12(1) provides that a *res judicata* effect is also created by a foreign judgment that is *not* registered if the judgment can be registered or if it could be registered were it a money-judgment. A non-money judgment may thus create *res judicata* by virtue of the FJA even if it is not entitled to recognition at common law. With regard to all judgments covered by s 12(1), s 12(2) provides that there will be no *res judicata* effect if registration of a registered judgment has been, or registration of an unregistered judgment could be, set aside on one or more of the following grounds: the foreign court lacked "international jurisdiction"; the judgment-debtor had no notice of the foreign proceedings; the judgment was obtained by fraud; the judgment has been set aside in the foreign country; an enforcement of the judgment would be contrary to public policy.

D. Relationship to the Common Law Rules

Compared to the position at common law, the FJA benefits judgment-creditors by facilitating the recognition, and in particular enforcement, of foreign judgments within the scope of the FJA. The question arises whether a judgment-creditor may forego the advantages of the FJA and rely on the common law rules instead. This is addressed by s 10(1) and s 12(3) of the FJA.

Section 12(3) provides: "Nothing in this section prevents any Australian court from recognising a judgment as conclusive of any matter of law or fact decided in the judgment if that judgment would be recognised as conclusive under the common law". In other words, even though the judgment has been, or can be, registered under the FJA, its preclusionary effect is not necessarily confined to *res*

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[233] Foreign Judgments Act 1991 (Cth), s 6(8); Service and Execution of Process Act 1992 (Cth), s 3(1) (definition of "judgment").

[234] Foreign Judgments Act 1991 (Cth), s 6(9).

[235] E. Campbell, Res Judicata and Decisions of Foreign Tribunals, 16 *Sydney Law Review* 311 (1994), p. 339.

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judicata pursuant to s 12(1) but will also include issue estoppel[236] and *Anshun* estoppel if the judgment is entitled to recognition at common law.

Section 10(1) provides: "No proceedings for the recovery of an amount payable under a judgment to which this Part applies, other than proceedings by way of registration of the judgment, are to be entertained by a court having jurisdiction in Australia". In other words, the registration procedure is the only permitted method of recovering money under a judgment that can be registered under the FJA. Thus, even if the judgment is entitled to recognition at common law, the judgment-creditor cannot bring an action for debt and plead the judgment as the source of the debt,[237] at least if the judgment-debtor objects.[238] It is unclear whether s 10(1) also precludes a fresh action on the underlying claim (for breach of contract or tort, for example) combined with a plea of *res judicata* based on the judgment.[239]

IV. Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth)

Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth) ("TTPA") governs the recognition and enforcement of judgments *in personam* (and certain judgments *in rem*) given by any court of New Zealand on or after 11 October 2013.[240] Ignoring a number of details, the basic features of that regime in relation to judgments *in personam* are the following. A New Zealand judgment that is "final and conclusive" may, generally within six years from the date on which it was given, be registered in any superior Australian court and in any inferior Australian court that has the power to give the relief that is in the judgment.[241] This is not confined to money judgments. The term "final and conclusive" seems to have the same meaning as at common law and under the FJA.[242]

Normally within 30 working days from receiving notice of the registration, the judgment-debtor may apply for registration to be set aside.[243] In stark contrast to the FJA, the Part 7 of the TTPA permits (and mandates) the setting aside in only three categories of case: enforcement of the judgment would be contrary to public

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[236] E. CAMPBELL (note 235), at 339.

[237] *Martyn v Graham* [2003] QDC 447 at [15].

[238] In *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218, (2010) 79 NSWLR 425 at [18]-[19], a common law action on a registrable judgment was allowed to proceed, but the judgment-debtor did not plead the Act.

[239] Preclusion is supported by N. TADMORE (note 14), at 173-174. Preclusion is rejected by E. CAMPBELL (note 235), at 340; M. TILBURY/ G. DAVIS/ B. OPESKIN (note 60), at 189-190.

[240] Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010 (Cth), sch 1, s 6.

[241] Trans-Tasman Proceedings Act 2010 (Cth), s 67.

[242] See Trans-Tasman Proceedings Act 2010 (Cth), s 66(3).

[243] Trans-Tasman Proceedings Act 2010 (Cth), s 72(2).

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policy;[244] the judgment was registered in contravention of the TTPA; the subject matter of the judgment is immoveable property situated outside New Zealand.[245] Registration cannot be set aside on any other ground,[246] in particular lack of "international jurisdiction" on the part of the New Zealand court. This is the consequence of the partial harmonisation of the two countries' jurisdiction rules by prescribing the same test of *forum non conveniens* as between the two countries.[247]

A registered New Zealand judgment has the same force and effect, and may be enforced in the same manner, as if it had been given by the registering court.[248] Thus, the preclusionary effects of a registered New Zealand judgment in Australian proceedings are the same as those of a comparable Australian judgment, whether or not the New Zealand judgment has equivalent effects under the law of New Zealand. However, a registered New Zealand judgment can be enforced in Australia only if, and to the extent that, it can be enforced in New Zealand.[249] Enforcement may commence as soon as the judgment-debtor is notified of the registration,[250] even if the period for impeaching registration has not expired. Where the registered judgment has been, or may be, appealed, enforcement may be temporarily stayed on conditions.[251]

Section 65(1) of the TTPA provides that a registrable New Zealand judgment "cannot be enforced in Australia" unless it is registered under the TTPA. This excludes a common law action on the judgment and probably also excludes a fresh action on the underlying claim. Section 65(1) does not preclude reliance on a registrable (but unregistered) New Zealand judgment for purposes other than enforcement. It should thus be possible to rely on such a judgment for the purpose of preclusionary effects at common law, provided that the judgment is entitled to recognition at common law.

V. Conclusion

Australian law has three different regimes for the recognition and enforcement of foreign *in personam* judgments in general matters of private law: the common law rules, the Foreign Judgments Act 1991 (Cth) and Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth). Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth) applies to New Zealand judgments given on or after 11 October 2013. The

[244] This ground cannot be used to refuse an enforcement of New Zealand public law: Trans-Tasman Proceedings Act 2010 (Cth), s 79(2). It is unclear whether this ground can be used in the case of an incompatible prior judgment.

[245] Trans-Tasman Proceedings Act 2010 (Cth), s 72(1).

[246] Trans-Tasman Proceedings Act 2010 (Cth), s 72(3).

[247] Trans-Tasman Proceedings Act 2010 (Cth), s 19.

[248] Trans-Tasman Proceedings Act 2010 (Cth), s 74(1).

[249] Trans-Tasman Proceedings Act 2010 (Cth), s 75.

[250] Trans-Tasman Proceedings Act 2010 (Cth), ss 73, 74(2).

[251] Trans-Tasman Proceedings Act 2010 (Cth), s 76.

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Foreign Judgments Act 1991 (Cth) applies to certain judgments from a limited number of countries. All other judgments are governed by the common law rules.

At common law, there are three prerequisites for the recognition of a foreign judgment *in personam*, to be established by the judgment-creditor: Australian law regards the foreign court as competent to adjudicate upon the matter; the judgment is final and conclusive; there is an identity of parties. Where those requirements are satisfied, the judgment-debtor may resist recognition by establishing a defence, for example that the recognition would be contrary to Australian public policy. In order to enforce a foreign judgment entitled to recognition, the judgment-creditor needs to obtain an Australian judgment based upon the foreign judgment, either by an action on the judgment (which has traditionally been restricted to money judgments) or an action on the original claim.

The Foreign Judgments Act 1991 (Cth) does not differ significantly from the common law in relation to the circumstances in which a foreign judgment is entitled to recognition. But the Act greatly facilitates enforcement by providing for the registration of foreign judgments in an Australian court and the enforceability of a registered judgment as if it had been given by the registering court.

Part 7 of the Trans-Tasman Proceedings Act 2010 (Cth) provides for a similar registration procedure, but it also effects the recognition of more foreign judgments than the other two regimes do, in particular because it does not generally require that Australian law regards the foreign court as competent to adjudicate the matter.

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THE RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS IN QUÉBEC

Gérald GOLDSTEIN*

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I. Introduction[1]

One of the most important reforms in Québec law relates to the rules governing the effect of foreign judgments. These rules were originally based on distrust and considerably harmed Québec's international relations. The new law, implemented in 1994 after Québec adopted its new Civil Code[2] [thereafter: C.c.Q.], excludes that approach and clearly reflects Québec's modern international orientation.[3]

The basic aims of this study are to give foreign lawyers and academic researchers a relatively precise overview of Québec rules dealing with foreign decisions while highlighting some specific and interesting questions, mainly dealing with international jurisdiction, from a comparative law perspective.

II. General Rules and Principles

The new modern approach in Québec to the recognition and enforcement of foreign decisions is given concrete expression in a general principle that foreign judgments must be recognized or enforced unless they fail to meet the conditions exhaustively listed in articles 3155 and 3156 C.c.Q. Such a principle has to be

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[1] N.B. In this article:

"A.C." stands for "Appeal Court reports [England]"; "Ann. Can." stands for "Annuaire Canadien [droit international]"; "c." stands for "chapter"; "C.A." stands for "Cour d'appel [Québec]"; "C.Q." stands for "Cour du Québec"; "C.S." stands for "Cour supérieure [Québec]"; "CSC" stands for "Supreme Court of Canada report"; "Can. Bar Rev." stands for "Canadian Bar Review"; "Can. Bus. L.J." stands for "Canadian Business Law Journal"; "D.L.R." stands for "Dominion Law Reports"; "LRQ" stands for "Lois refondues du Québec"; "QCCA" stands for "Recueil des arrêts de la Cour d'appel du Québec"; "QCCS" stands for "Recueil des arrêts de la Cour supérieure du Québec"; "R.D.F." stands for "Revue de droit de la famille [Québec]"; "R.J.Q." stands for "Recueil de jurisprudence du Québec"; "RSC" stands for "Revised Statutes of Canada"; "RSQ" stands for "Revised Statutes of Québec"; "S.C.R." stands for "Supreme Court [of Canada] Reports".

[2] LRQ, c. C-1991, available at <http://www.canlii.org/en/qc/laws/stat/lrq-c-c-1991/latest/lrq-c-c-1991.html>.

[3] See: J.A. TALPIS/ G. GOLDSTEIN, The Influence of Swiss Law on Québec's 1994 Codification of Private International Law, *YPIL* 2009/XI, p. 339 *et seq.*; G. GOLDSTEIN, *Commentaires sur le Code civil du Québec, Le droit international privé, vol. 1, Conflit de lois: dispositions générales et spécifiques (art. 3176 à 3133 C.c.Q.)*, Cowansville 2011; *Idem*, *Commentaires sur le Code civil du Québec, Droit international privé, vol. 2, Compétence internationale des autorités québécoises et effets des décisions étrangères (art. 3134 à 3168 C.c.Q.)*, Cowansville 2013. See also H.P. GLENN, Recognition of Foreign Judgments in Québec, (1997) 28 *Can. Bus. L.J.* 404; *Idem*, Droit international privé, in *La réforme du Code civil*, vol. 3, Québec, 1993, p. 760 *et seq.*, Nos 100 *et seq*; J.A. TALPIS, / J.-G. CASTEL, Le Code civil du Québec: Interprétation des règles du droit international privé, in *La Réforme du Code civil,* vol. 3, Presses de l'Université Laval, 1993, p. 911 *et seq.*, Nos 466 *et seq.*; C. EMANUELLI, *Droit international privé québécois*, Montréal, 2ème éd. 2006, p. 128 *et seq.*, p. 142 *et seq.*

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understood in the context of a whole new set of general principles guiding Québec rules relating to the recognition and effect of foreign decision (A.). In accordance with those principles, new limitations to the powers of Québec courts have been implemented in dealing with such decisions (B.). Besides, a growing trend would even allow recognition *de plano* of some type of decisions, without any judicial proceedings (C.).

A. General Guiding Principles

The general principles now governing recognition of foreign decisions in Québec are:

(1) openness to international relations (private and public international interests);

(2) maintenance of the coherence of the legal system recognizing a foreign decision (public interests);

(3) concern for the proper administration of justice (public interests);

(4) adherence to procedural fairness (private interests); and

(5) adherence to constitutional requirements.

Those principles are expressed in a policy that opposes forum shopping – fraud on the court – and a multiplicity of proceedings relating to the same dispute.

Openness to international relations is expressed in the rules of indirect jurisdiction, based generally on bilateral principles in relation to Québec's international jurisdiction (article 3164 C.c.Q.), respect for forum selection and arbitration clauses (articles 3165 and 3168 C.c.Q.) and recognition of prior foreign decisions (3155(4) C.c.Q.).

Maintenance of the coherence of the legal system recognizing a foreign decision is expressed in the requirement that the foreign decision be consistent with public policy in both procedural and substantive terms (article 3155(3) and (5)) and the requirement that there not be a Québec decision constituting *res judicata* in the same dispute (3155(4)).

Concern for the proper administration of justice is expressed in the requirement that the foreign court have authority based on a real and substantial connection, as set out in the Code (3155(1), 3164, 3165, 3168 C.c.Q.), in the requirement that the foreign decision be final (3155(2) C.c.Q.) and in the requirement that there be no decision that is *res judicata* in Québec or elsewhere (3155(4) C.c.Q.).

Adherence to procedural fairness and the policy against forum shopping and fraud on the court is expressed in the requirement for real and substantial jurisdiction as set out in articles 3164 to 3168 and the requirements that the foreign decision not be contrary to procedural and substantive public policy (3155(3) and (5) C.c.Q.).

Finally, *concern for constitutional requirements* is expressed in the criteria for the jurisdiction of foreign courts set out in articles 3164 to 3168 C.c.Q. and

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particularly in the requirement that there be a substantial connection between the court and the dispute (3164 C.c.Q.).

We will review some of these rules in the following sections, the first of which deals with the powers of Québec courts in proceedings to recognize a foreign decision.

B. Powers of Québec Courts in Recognition Proceedings

The new openness seen in Québec's private international law is reflected in the elimination of two powers that had become outmoded:

(1) review on the merits; and

(2) the requirement that the foreign judge has applied the law designated by the Québec conflict rule.

1. Exclusion of Any Power to Review on the Merits

Until the new Civil Code was adopted, a foreign (non-Canadian) judgment that met the requirements for recognition and enforcement could still be challenged, even on the merits, under articles 178ff. of the *Code of Civil Procedure* [thereafter: C.P.C.[4]]. Article 178 C.P.C. allowed all of the defences that had or could have been raised before the original court under the law applied by the foreign court to be raised anew before the judge in the recognition proceedings. This power of review on the merits allowed Québec judges to review the applicable law, even if it was foreign law.[5] However, under articles 179 and 180 C.P.C., if the judgment came from another province of Canada, defences that could have been raised in the original action could not be raised anew unless there had been no personal service in that province and the defendant had not appeared.

Article 3158 C.c.Q. eliminates the power to review foreign decisions on the merits. It is therefore not possible to vary the disposition in the foreign decision, for example, by changing the quantum of damages awarded to an accident victim under a foreign law. This prohibition reflects the requirements of international comity; however, the principle should not prevent a judge from considering circumstances arising after the decision or even a new claim.

[4] RSQ, c. C-25, available at <http://www.canlii.org/en/qc/laws/stat/cqlr-c-c-25/latest/cqlr-c-c-25.html>.

[5] See G. GOLDSTEIN/ E. GROFFIER, *Traité de droit civil. Droit international privé*, vol. 1, *Théorie générale*, Cowansville 1998, No. 153 *et seq*.

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2. No Requirement of Compliance with Québec Conflict of Law Rules

Article 3157 C.c.Q. provides:

> "Recognition or enforcement may not be refused on the sole ground that the original authority applied a law different from *the law that would be applicable under the rules contained in this Book* [emphasis added]."

This provision clearly eliminates any requirement that the foreign decision has been made in accordance with the law designated by Québec conflict rules. Such a requirement does not exist in common law systems. Although there was also nothing to imply this in the former Code, Québec decisions relating to family law had repeatedly adopted a doctrinal opinion that followed French law on this point. The 1977 draft Civil Code eliminated that requirement and the new Civil Code did the same.

This requirement was excluded since the purpose of recognition or enforcement proceedings is to give the foreign decision *res judicata* status or executory effect in the legal system of the court that recognizes it, without having to examine the rationale underlying the foreign decision. So, it does not matter which law was applied by the foreign court as long as the result of the proceedings abroad is acceptable.

In order to ascertain whether or not a foreign decision is acceptable and therefore will be given effect in Québec, such a decision has to meet positive requirements.

C. Recognition without Any Judicial Proceedings

An emerging trend would allow recognition of foreign personal status decisions without requiring any judicial proceedings. A person seeking to have her or his status of divorcee or spouse recognized in Québec would only need to go through an administrative process limited to a few proof-related formal requirements. However, such a process will not go as far as to allow *enforcement* of any rights stemming from the recognized status and it will only amount to a *prima facie* proof of such a status, subject to any contestation upon which a judicial court has then to recognize it. Several positive developments are inspired by such an approach.

First of all, article 137 C.c.Q. provides:

> "The registrar of civil status, upon receiving an act of civil status made outside Québec but relating to a person domiciled in Québec, inserts the act in the register as though it were an act drawn up in Québec. [...]"

However, the effect of the registration will be limited since article 137 C.c.Q. also states:

> "Notwithstanding their insertion in the register, juridical acts, including acts of civil status, made outside Québec retain their status as semi-authentic acts until their validity is recognized by a court in Québec. [...]"

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Moreover, the public officer has a discretionary power not to register the foreign act in case of doubts relating to its validity or authenticity.[6]

Second, when dealing with judicial proceedings, article 58 of the Québec C.P.C. allows *de plano* recognition of foreign representatives in the following terms:

> "Any person who, under the law of a foreign country, is empowered to represent a person who died or made his will there and left property in Québec, may be a party in that capacity to proceedings before any court of Québec."

Third, under article 23 of the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,*[7] any foreign adoption certified by the competent authority of the foreign State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in Québec, without judicial proceeedings. Nevertheless, under article 24 of the same Convention, such an adoption could be refused if the Québec central authority (the "Secrétariat à l'adoption internationale"[8]) requires a Québec court to declare it "manifestly contrary to its public policy, taking into account the best interests of the child".

Finally, when non-conventional adoptions were involved, a few recent cases have recognized foreign personal status decisions, or were ready to do it, without any judicial proceedings. In 2006,[9] a Québec inferior court recognized *de plano* an Algerian *kafala* (characterized as a "legal tutorship") and, accordingly, allowed the tutors of a child to move his domicile from Algeria to Québec. More recently, in 2011, the Québec court of appeal[10] declared *in obiter* that foreign "local" adoptions (*i.e.* when both adopter and adoptee were domiciled abroad at the time of the adoption) must be recognized without judicial proceedings until any contestation relating to the validity or the effects of such a status, since it was deemed necessary to respect "the principle of stability due to personal status". Thus, the actual domain of such a trend remains undecided but could potentially include any status (personal or not) decision. However, it would certainly not cover any enforcement of a foreign decision or any dispute relating to a status.

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[6] Article 138 C.c.Q. states: "Where there is any doubt as to the validity of an act of civil status or a juridical act made outside Québec, the registrar of civil status may refuse to act until the validity of the document is recognized by a court in Québec."

[7] *Recueil des Conventions (1951-2003)*, Conférence de La Haye de droit international privé, Bureau permanent, La Haye, p. 354; implemented in Québec since February 1st 2006 (*An Act to implement the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*), RSQ c M-35.1.3, available at <http://canlii.ca/t/hb8t>.

[8] See: <http://adoption.gouv.qc.ca/home.phtml>.

[9] *Adoption (En matière d')*, [2006] R.J.Q. 2286, [2006] R.D.F. 897 (C.Q.).

[10] *Adoption — 111*, 2011 QCCA 38.

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III. General Requirements for Foreign Decisions to Have Effect in Québec (3155 C.c.Q.)

In modern law, the purpose of reviewing a foreign decision is not to restart a trial that took place abroad; rather, it is to determine whether or not to accept a foreign judgment. Although that judgment in no way constitutes an acquired right in the place where recognition is sought, it has given rise to such a situation in the jurisdiction of origin. Because it is based on different reasoning, the decision might be different from a local decision. Nevertheless, for various reasons (for instance, harmonization of results, giving effect to the parties' expectations, stability in the status of persons), it is thought advisable to accept it and thereby supplement its effects in its place of origin with similar effects in Québec. This policy is, however, subject to certain conditions since the foreign judgment must comply with certain essential standards and not jeopardize the coherence of the legal system into which it is adopted. For this reason, Québec courts have the power to ensure that the foreign court that made the decision had jurisdiction (referred to as "indirect" international jurisdiction), that the decision is effective abroad, that the underlying procedure was acceptable and that the decision complies with public policy in the receiving state (Québec). Those requirements are set out in article 3155 C.c.Q., which reads as follows:

> "A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> 1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title;
>
> 2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
>
> 3) the decision was rendered in contravention of the fundamental principles of procedure;
>
> 4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec;
>
> 5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
>
> 6) the decision enforces obligations arising from the taxation laws of a foreign country."

However, one should mention that, in addition to these substantial requirements, several procedural conditions have to be fulfilled.

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First, article 786 C.P.C. adds that any party who wishes to have a foreign judgment recognized or enforced in Québec must produce a copy of the decision together with an attestation emanating from a competent foreign public officer stating that this decision in no longer subject to ordinary remedy abroad and that it is final or enforceable there. Those documents must also be accompanied with a translation authenticated in Québec if they are drafted in any other language than French or English. Québec courts also require proof that rights stemming from the foreign judgment are not prescribed under the foreign procedural law.[11] Finally, one should also be aware that, under article 65 C.P.C., "A plaintiff or plaintiff-appellant who does not reside in Québec must give security for the costs which may be incurred in consequence of his suit".

We shall now review the most important substantial requirements under article 3155 C.c.Q.

A. Indirect International Jurisdiction of the Foreign Authority

Discouraging the *multiplicity of proceedings* is a principle underlying the rules governing the international jurisdiction of the Québec courts.[12] Therefore, rules must allow for *review to determine the existence of a real and substantial connection* between the foreign court and the dispute. The Supreme Court of Canada, in the *Morguard*[13] and *Hunt* decisions,[14] held that this connection is a *sine qua non* condition at the interprovincial level pursuant to an implicit constitutional principle that full faith and credit will be given to the decisions of the other provinces.

Accordingly, article 3164 C.c.Q. provides:

> "The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case."

As a general rule, therefore, the same requirements in respect of jurisdiction apply to foreign courts and to Québec courts; in addition, a *substantial connection* between the foreign court and the dispute is also required.

This additional requirement serves two purposes. First, it incorporates the decisions that followed *Morguard*, *by adopting the real and substantial connection requirement*. A Québec court could therefore refuse to recognize the decision of a foreign court if there is no substantial connection between the decision and the dispute, even when the foreign court is considered to have jurisdiction pursuant to the first part of article 3164 C.c.Q. Second, the requirement expresses the policy of discouraging forum shopping.

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[11] *Minkoff* c. *Society of Lloyd's*, (25 juin 2004), Montréal 500-09-014284-046 (C.A.).

[12] See G. GOLDSTEIN/ J.A. TALPIS, Les perspectives en droit civil québécois de la réforme des règles relatives à l'effet des décisions étrangères au Canada (2e partie), (1996) 75 *Can. Bar Rev*. 115, 116 *et seq.*

[13] *Morguard Investments Ltd. v. DeSavoye*, [1990] 3 S.C.R. 1077.

[14] *Hunt v. T&N plc,* [1993] 4 S.C.R. 289.

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However, because some rules of indirect international jurisdiction are not based on the principle of bilateralizing Québec jurisdictional rules (commonly called the "mirror" principle) set out in the first part of article 3164 and are instead express (for example, in articles 3168 and 3165 C.c.Q.), the question arises whether the policy against forum shopping in the second part of article 3164 also applies in relation to personal actions of a patrimonial nature, to which articles 3168 and 3165 C.c.Q. relate. In other words: should the substantial connection test in article 3164 also apply in cases subject to articles 3165 and 3168 C.c.Q.? In *Cortas Canning,*[15] the Superior Court answered that question in the affirmative. Even though a Texas court had jurisdiction under article 3168 C.c.Q., because a fault had been committed and damage had been caused in that state, the Court nonetheless sought to determine whether there was a substantial connection between the Texas court and the dispute, pursuant to article 3164 C.c.Q. This position has been very clearly endorsed, first by the majority of the Québec Court of Appeal[16] and more recently by the Supreme Court of Canada,[17] in two disputes involving the recognition of a multijurisdictional class action.

Thus, as a rule, the jurisdictional rules that apply to Québec courts also apply in respect of foreign courts and the courts of the other provinces. This results from the application of the mirror principle, which freed the codifiers from having to set out rules, expressly in the Code, for the jurisdiction of foreign courts. Pursuant to article 3164 C.c.Q., in determining the rules relating to foreign courts, it is sufficient to read the corresponding provision for Québec courts, *as long as the threshold of a substantial connection is passed in the circumstances of the case*.

There is, however, another limit to this principle. In some cases, the foreign rules differ from those relating to Québec courts. Accordingly, the Code contains a few express rules relating to indirect international jurisdiction. It is therefore necessary to first ascertain whether such an express rule exists before applying the general bilateral principles set out in article 3164 C.c.Q. This requires comment.

1. Express Rules

Several indirect jurisdiction rules have been expressly stated since the mere bilateralisation of the Québec rules would have resulted in a solution that would have been either too narrow or too broad.

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[15] *Cortas Canning and Refrigerating Co*. v. *Suidan Bros. Inc*., [1999] R.J.Q. 1227 (Sup. Ct.).

[16] *Hocking v. Haziza*, 2008 QCCA 800, (April 30, 2008), Québec 500-09-016435-067 (C.A.) [*Hocking*].

[17] *Société canadienne des postes* c. *Lépine*, [2009] 1 RSC 450, 304 D.L.R. (4th) 539; J.-G. CASTEL, Giving Effect to Out-of-Province Judgments in Class Action, *Ann. Can. de Droit international* 2008, 397; G. SAUMIER, Competing Class Actions Across Canada: Still at the Starting Gate after *Canada Post* v. *Lépine*, (2010) 48 *Can. Bus. L.J.* 462.

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a) Article 3166 C.c.Q.

Under article 3166 C.c.Q., the jurisdiction of a foreign authority is recognized in Québec in matters of filiation where the child or either of his parents is domiciled in that country or is a national thereof. Such a rule has been adopted since a simple bilateralisation of the criteria giving jurisdiction to a Québec court (domicile of the child or either of his parents in Québec[18]) was considered too restrictive in view of the many civil law countries whose rules are based on the nationality of the parties. It is to be presumed that article 3166 C.c.Q. should cover filiation by adoption.

b) Article 3167 C.c.Q

Article 3167 C.c.Q. states:

> "The jurisdiction of a foreign authority is recognized in actions relating to divorce if one of the spouses had his or her domicile in the country where the decision was rendered or had his or her residence in that country for at least one year before the institution of the proceedings, or if the spouses are nationals of that country or, again, if the decision has been recognized in that country.
>
> In actions relating to the dissolution of a civil union, the jurisdiction of a foreign authority is recognized only if the country concerned recognizes that institution; where that is the case, its jurisdiction is recognized subject to the same conditions as in matters of divorce."

In its previous version, article 3167 C.c.Q. dealt only with divorce, but it was extended in 2002 to cover the dissolution of civil unions. Both paragraphs require separate comments.

i) Divorce

The first paragraph of article 3167 was inspired from article 2 of the June 1st 1970 *Hague Convention on the Recognition of Divorces and Legal separations*[19] and from the first paragraph of article 65 of the 1987 Swiss law.[20]

However, in Canada, jurisdiction relating to divorce belongs to the federal government. Article 22 of the federal law on divorce[21] states that a foreign divorce will be recognized in Canada if either former spouse was ordinarily resident in the country of origin of the judgment for at least one year immediately preceding the commencement of proceedings for the divorce. Since article 3167 C.c.Q. seems to

[18] There is no Québec nationality.

[19] Available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=80>.

[20] *Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP)*, R.O. 1988.1776, R.S. 291, available at <http://www.admin.ch/ch/f/rs/c291.html>.

[21] *Divorce Act*, RSC 1985, c. 3 (2nd Supp.), available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-3-2nd-supp/latest/rsc-1985-c-3-2nd-supp.html>.

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extend the indirect rules of jurisdiction in matters of divorce, there is an ongoing debate about its constitutional validity.[22] In any case, its rules seem very reasonable and its jurisdictional "renvoi" could even be interpreted as an acceptance of the modern and daring coordination method exposed by Prof. Picone.[23]

ii) Dissolution of Civil Union

Since Québec law adopted civil union as an alternative to marriage, it was also deemed necessary to include in the Civil Code new conflict of law rules dealing with such a matter. As a result, article 3167 C.c.Q. was amended in 2002 to allow for recognition of foreign decisions relating to the dissolution of civil unions and, because of its close similarity with marriage, at least under Québec law, the same jurisdictional factors as dissolution of marriage were extended to the new institution.

However, in order to favour it, it was deemed useful to add a condition that the dissolution of the civil union was not exclusively due to the hostility of the foreign jurisdiction towards registered partnerships, civil unions and similar institutions. Therefore, it is required that the jurisdiction of a foreign authority is recognized only if the country concerned *recognizes that institution* before dissolving it. Nevertheless, it is not clear whether or not such an institution should be recognized under the local law of the foreign jurisdiction or under the law applicable according to its conflict of law rules. In light of the liberal spirit of the rule, it is suggested that it would be sufficient that the local law of the foreign court "recognizes" or simply knows the institution or a comparable type of union.

c) Article 3165 C.c.Q

Under article 3165 C.c.Q., there are five cases where Québec courts will not recognize the jurisdiction of foreign courts if another judicial or arbitration court has exclusive jurisdiction. Article 3165 C.c.Q. provides:

> "The jurisdiction of a foreign authority is not recognized by Québec authorities in the following cases:

[22] *Droit de la famille* — 2054, [1997] R.J.Q. 1124 (C.S.), aff. by C.A. (6 mai 1998), Montréal, 500-09-004701-975, J.E. 98-1237. However, since article 22 did not abolish the previous case-law on divorce, and since Canadian courts have already followed the broad jurisdictional criteria of a *real and substantial connection* adopted by the House of Lords (*Indyka* v. *Indyka*, [1969] 1 A.C. 33), it seems that the factors allowed under article 3167 C.c.Q. do not derogate from such a broad rule. Besides, article 3167 C.c.Q. has not been judicially declared unconstitutional so it still could be invoked in court.

[23] P. PICONE, La méthode de la référence à l'ordre juridique compétent en droit international privé, *Recueil des Cours* vol. 197 (1986), p. 229 *et seq.*; Les méthodes de coordination entre ordres juridiques en droit international privé, *Recueil des Cours* vol. 276 (1999), p. 9 *et seq*.

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(1) where, by reason of the subject matter or an agreement between the parties, Québec law grants exclusive jurisdiction to its authorities to hear the action which gave rise to the foreign decision;

(2) where, by reason of the subject matter or an agreement between the parties, Québec law recognizes the exclusive jurisdiction of another foreign authority;

(3) where Québec law recognizes an agreement by which exclusive jurisdiction has been conferred upon an arbitrator."

i) Arbitration Clauses

The last case (3165(3)) is easily explained by the need to respect arbitration clauses under the 1958 New York Convention. Incidentally, in order to implement an arbitration clause, such a clause must be considered valid by Québec judges according to Québec conflict of law rules.[24]

ii) Exclusive Jurisdiction Clauses

Similarly, respecting choice of foreign jurisdiction clauses (3165(1) and (2)) stems from the imperatives of modern commercial transactions. In both cases, such clauses must *clearly* and *imperatively* give *exclusive* jurisdiction[25] to a court other than the one having rendered the decision presented for recognition or enforcement in Québec.

iii) Exclusive Subject Matter Jurisdiction

Finally, exclusive jurisdiction by reason of subject matter, given either to Québec (3165(1)) or to foreign courts (3165(2)), is a more debatable topic.

Traditionally, local courts everywhere have been reluctant to share jurisdiction *in rem* over immovables. The same approach applies in Québec, since article 3152 C.c.Q. gives jurisdiction to Québec courts when *in rem* disputes involve immovables or even movables situated in Québec. Article 3152 is similarly extended by article 3164 C.c.Q. to foreign courts when property is situated abroad, in the jurisdiction of such courts. These rules seem to logically assume exclusive jurisdiction situations. However, when matrimonial property or succession disputes

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[24] Article 3121 C.c.Q. provides: "Failing any designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the country where arbitration takes place." See G. GOLDSTEIN, *vol. 1* (note 3), at Art. 3121 No. 550.

[25] *STMicroelectronics Inc.* c. *Matrox Graphics Inc.*, 2007 QCCA 1784 (clauses according to which the parties *attorn* to the jurisdiction of one country are not exclusive).

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are involved, articles 3154[26] and 3153 C.c.Q.[27] recognize alternative foreign jurisdictions even if immovables are concerned.

Article 3142 C.c.Q., stating that Québec authorities have jurisdiction to rule on the custody of a child provided he is domiciled in Québec, might also provide implicit exclusive jurisdiction to Québec or even foreign courts in the same situation.[28]

In any case, the only express exclusive jurisdiction given to Québec courts by reason of the subject matter stems from article 3151 C.c.Q., which provides such jurisdiction in matters of civil liability for damage suffered in or outside Québec as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec. Thus, in 2004, the Québec court of Appeal refused to enforce a New York judgment dealing with asbestos produced in Québec, considering that it did not, according to article 3151 C.c.Q., come from a court having jurisdiction.[29] The underlying idea behind such a rule was the avoidance of high level damages, granted under a foreign (mainly U.S.) law and condemning Québec producers of asbestos, to the exclusive benefit of Québec law, as applied by Québec courts and considered as laws of immediate application by article 3129 C.c.Q. Obviously, the adoption by the Québec legislator of such an air-tight defensive scheme is highly debatable.[30]

d) Article 3168 C.c.Q.

Factors allowing Québec courts to be seized of personal actions of a patrimonial nature (contractual and extra-contractual matters) are enunciated by article 3148 C.c.Q. These factors allow for a broad jurisdiction in circumstances where the use of the *forum non conveniens* doctrine (article 3155 C.c.Q.) could be involved. Since such a limit does not expressly apply to the jurisdiction of foreign courts, it was deemed relevant to adopt specific, indirect jurisdiction rules, which would be

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[26] Article 3154 provides: "A Québec authority has jurisdiction in matters relating to a matrimonial or civil union regime in the following cases: (1) the regime is dissolved by the death of one of the spouses and the authority has jurisdiction in respect of the succession of that spouse; (2) the object of the proceedings relates only to property situated in Québec. In other cases, a Québec authority has jurisdiction if one of the spouses has his or her domicile or residence in Québec on the date of institution of the proceedings".

[27] Article 3153 provides: "A Québec authority has jurisdiction in matters of succession if the succession opens in Québec, the defendant or one of the defendants is domiciled in Québec or the deceased had elected that Québec law should govern his succession. It also has jurisdiction if any property of the deceased is situated in Québec and a ruling is required as to the devolution or transmission of the property".

[28] See G. GOLDSTEIN, *vol. 2* (note 3), at Art. 3142 No. 560.

[29] *Worthington Corp.* c. *Atlas Turner*, (September 1st 2004), Québec 200-09-004379-035 (C.A.).

[30] See P. GLENN, La guerre de l'amiante, *Rev. crit. dr. int. pr.* 1991/80, p. 41 *et seq.*; G. GOLDSTEIN, *De l'exception d'ordre public aux règles d'application nécessaire*, Montréal 1996, p. 471, No. 1048.

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more restrictive than the direct rules relating to Québec courts. As a consequence, article 3168 C.c.Q. provides:

> "In personal actions of a patrimonial nature, the jurisdiction of a foreign authority is recognized only in the following cases:
>
> (1) the defendant was domiciled in the country where the decision was rendered;
>
> (2) the defendant possessed an establishment in the country where the decision was rendered and the dispute relates to its activities in that country;
>
> (3) a prejudice was suffered in the country where the decision was rendered and it resulted from a fault which was committed in that country or from an injurious act which took place in that country;
>
> (4) the obligations arising from a contract were to be performed in that country;
>
> (5) the parties have submitted to the foreign authority disputes which have arisen or which may arise between them in respect of a specific legal relationship; however, renunciation by a consumer or a worker of the jurisdiction of the authority of his place of domicile may not be set up against him;
>
> (6) the defendant has recognized the jurisdiction of the foreign authority."

Although article 3168 C.c.Q. expressly states that its factors are exclusive of any others,[31] Québec courts seem ready to accept additional factors, according to a reasoning which will be addressed in the following paragraph and based on a bilateral reading of article 3164 C.c.Q. (also called the "mirror principle").

Those factors are inspired from article 10 of the 1971 *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*[32] and from article 49 of the 1987 Swiss law.[33] Since most factors have been adopted by many countries, they reflect common agreements over what does not constitute exorbitant jurisdiction. Therefore, they do not deserve specific comments.[34]

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[31] See article 3168 (our emphasis): "[…] the jurisdiction of a foreign authority is recognized *only* in the following cases […]".

[32] Available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=78>.

[33] *Loi fédérale du 18 décembre 1987 sur le droit international privé (LDIP)*, R.O. 1988.1776, R.S. 291, available at <http://www.admin.ch/ch/f/rs/c291.html>.

[34] Some of those factors have been applied in courts: *Cortas Canning and Refrigerating Co.* v. *Suidan Bros. Inc.*, [1999] R.J.Q. 1227 (Sup. Ct.); *Labs of Virginia Inc. c. Clintrials Bioresearch Ltd.*, (2003-04-09) QCCS 500-05-064242-017, available at <http://www.canlii.org/qc/jug/qccs/2003/2003qccs11751.html>; *Hocking v. Haziza*, 2008 QCCA 800, (April 30, 2008), Québec 500-09-016435-067 (C.A.); *Société canadienne des postes* c. *Lépine*, [2009] 1 SCR 450, 304 D.L.R. (4th) 539 ; see G. GOLDSTEIN, *vol. 2* (note 3), at Art. 3168 Nos 565 - 590.

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However, it is worth mentioning that, according to article 3168(5), a consumer or a worker cannot be forced to renounce to the jurisdiction of his or her domicile by an exclusive choice of forum or by an arbitration clause. Therefore, if a judge or an arbitrator exclusively chosen through a clause has been using such a clause as a basis of jurisdiction, his or her decision will not be recognized in Québec[35] and the worker or consumer can still sue the other party in the country of his or her domicile, even though he or she has signed the clause.

Of course, in order to benefit from such a rule, the consumer or worker must prove the nature of the contract. Hence, in *Facebook* c. *Guerbuez,*[36] a Québec court enforced a California judgment condemning a Québec domiciliary to pay around a billion dollars to Facebook because he had fraudulently used the addresses of other users to try to sell them forbidden materials over the Internet, an action which severely damaged Facebook's reputation worlwide. Although the Québec court does not discuss jurisdiction of the Californian courts, it is a well known fact that Facebook users have to accept a clause giving exclusive jurisdiction to the courts of California and Québec judges have decided that such types of contracts are not consumer contracts, since the user does not pay a fee.[37] Therefore, the foreign jurisdiction clause was respected and M. Guerbez could not plead in Québec that 3168(5) should have come into play.

In a similar way, in *LVH Corp. (Las Vegas Hilton) c. Lalonde,*[38] a Québec court enforced a Nevada judgment condemning a Québec domiciliary to pay 900,000 dollars owed to a casino in Las Vegas, since gaming contracts have not been characterized as consumer contracts and the player had recognized the jurisdiction of the Nevada court according to 3168(6) C.c.Q.

2. Scope of the Principle of "Mirror" Recognition of Jurisdiction (3164 C.c.Q.)

Article 3164 C.c.Q. was adopted in the final stages of the enactment of the new Civil Code of Québec. As a result of last minute drafting, the article lacks precision and this has given rise to surprising interpretations. It bears repeating the wording of the article:

> "The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the country whose authority is seised of the case."

The reference to Title Three of the book of the Civil Code on private international law is complete and unlimited. In this respect, Title Three includes both specific

[35] See *Dent Wizard International Corp*. c. *Mariano*, (May 26th 2004), Montréal 500-17-014919-032 (C.S.).

[36] [2010] R.J.Q. 2373 (C.S.).

[37] *St-Arnaud* c. *Facebook inc*., 2011 QCCS 1506.

[38] (2003-04-03) QCCS 500-05-072961-020, available at <http://www.canlii.org/qc/jug/qccs/2003/2003qccs11599.html>.

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rules (such as articles 3141 to 3154 C.c.Q.) and general rules: articles 3134 to 3140 C.c.Q.[39] The general rules, which incorporate relatively broad discretionary powers, can ultimately alter the outcome of the determination of the jurisdiction of Québec courts because they can extend jurisdiction, for example, under article 3136 C.c.Q. to prevent denials of justice and under article 3140 C.c.Q. in cases of emergency. They can also allow the court to decline to exercise jurisdiction under the *forum non conveniens* doctrine in article 3135 C.c.Q. As a result of the broad wording of article 3164 C.c.Q., the general rules also form part of the rules governing the jurisdiction of *foreign* courts! Consequently, once it has been determined that the foreign court has (or does not have) jurisdiction under a specific rule, for example, the rule governing real actions, under the bilateral recognition rule in article 3164 C.c.Q., consideration must still be given, pursuant to the mirror principle, to applying the general jurisdictional rule that could cast doubt on the prior analysis.

For instance, if foreign court A did not have jurisdiction under article 3152 C.c.Q. with the bilateral effect as assigned by article 3164,[40] for the purposes of its decision being recognized in Québec, because the property was not situated within its jurisdiction but was in fact situated within the jurisdiction of court B, a decision by court A regarding the property could still be recognized in Québec, if court A made its decision in the context of an emergency; in such circumstances, court A would have jurisdiction under section 3140 C.c.Q.

In the alternative, if the foreign court was considered to have jurisdiction in Québec under a specific rule, for example article 3168 C.c.Q., and had in fact exercised that jurisdiction, a Québec court could decide (relying on the mirror effect conferred by article 3164 C.c.Q.) not to recognize the decision of the foreign court on the ground that, in the same circumstances, a Québec court would have declined jurisdiction under article 3135 C.c.Q. This disconcerting prospect became reality in *Cortas Canning,*[41] a decision of the Superior Court. In *Hocking,*[42] a decision of the Court of Appeal, Justice Bich, writing for the majority, did not rule out such an outcome, but expressed doubts about the logic of such reasoning. Indeed, it might be difficult to find circumstances where, after having first decided that article 3168 C.c.Q. plainly gives jurisdiction to a foreign court and second that, according to all the circumstances, such jurisdiction passes the threshold of a substantial connection test included in the second part of article 3164 C.c.Q., the

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[39] LRQ, c. C-1991, available at <http://www.canlii.org/en/qc/laws/stat/lrq-c-c-1991/latest/lrq-c-c-1991.html>.

[40] Such an implied rule (3152 plus 3164) provides: "A foreign authority has jurisdiction over a real action if the property in dispute is situated within its jurisdiction to the extent that the dispute is substantially connected with such country whose authority is seised of the case".

[41] *Cortas Canning and Refrigerating Co.* v. *Suidan Bros. Inc.*, [1999] R.J.Q. 1227 (Sup. Ct.).

[42] *Hocking v. Haziza*, 2008 QCCA 800, (April 30, 2008), Québec 500-09-016435-067 (C.A.).

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foreign court should nevertheless have declined jurisdiction on the basis of article 3135 C.c.Q.[43]

Moreover, in addition to requiring a familiarity with the rules of private international law that is rarely encountered in practice, this interpretation gives rise to unpredictability, which is particularly unfortunate, as it extends beyond the specific jurisdictional rules stemming from the mirror effect in articles 3152 C.c.Q. and 3164 C.c.Q. to the express rules of foreign jurisdiction in article 3168 C.c.Q.

Taking these arguments into consideration, the Supreme Court of Canada held in *Société canadienne des postes* c. *Lépine*[44] that Québec courts will not extend the mirror principle set out in article 3164 to article 3135 C.c.Q. As a result, it will not be possible to refuse to give effect to a foreign judgment in Québec on the basis that the foreign authority should have declined its jurisdiction in the circumstances of the case where a Québec court would have so declined. However, it is still possible to accept the jurisdiction of a foreign court on the grounds that a Québec court would have taken jurisdiction in the same circumstances (out of necessity, for instance, according to article 3136 C.c.Q., in order to avoid a denial of justice). The new policy of openness towards foreign judgments probably warrants such a solution, despite its unpredictable result.

B. Final Nature of the Foreign Decision

Under article 3155(2) C.c.Q., a foreign decision must not be "subject to ordinary remedy" and must be final and enforceable "at the place where it was rendered". This requirement exists because it would be improper to recognize a decision that would alter *res judicata* in Québec or to attribute more effect to a foreign decision than it has or will have in its country of origin.

The first sub-requirement, that the foreign decision must no longer be subject to ordinary remedy, must have been met when the recognition proceedings are instituted in Québec. Such ordinary remedies include an appeal.

The second sub-requirement, that it be a *final* decision, means that it must put an end to the dispute, that is, that it must not be subject to review *by the court that made it*. As a consequence, in order to allow the enforcement of support awards, which are susceptible to review depending on the means of the debtor and the needs of the creditor, article 3160 C.c.Q., inspired from the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, provides:

> "A decision rendered outside Québec awarding periodic payments of support may be recognized and declared enforceable in respect of both payments due and payments to become due."

Finally, the requirement that the foreign decision be *enforceable* means that it must *not* be *interlocutory*, that is, it must not have been made during a proceeding prior

[43] *Ibid*. at para. 180; see also G. SAUMIER, The Recognition of Foreign Judgments in Québec – The Mirror Crack'd?, (2002) 81 *Can. Bar. Rev*. 677, 691-694.

[44] [2009] SCR 450, 304 D.L.R. (4th) 539.

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to final judgment (for example on an objection to evidence). It is to be expected that a foreign decision of that kind could not have effect in Québec, since it is not part of the disposition, which is the only aspect of the judgment that can have the status of *res judicata* in Québec.

C. No Contradiction with Procedural and Substantive Public Policy

1. Procedural Public Policy

As a general rule, it is the foreign judgment itself, and not its underlying rationale, that eventually acquires the status of *res judicata*. Nonetheless, review of the judgment extends to the procedure that led to it being made. However, because it must be accepted that a foreign judge has applied his or her own procedural rules without ascertaining that the judge complied with his or her own law, the Québec court is limited to requiring compliance with the "fundamental principles" of its procedure, pursuant to article 3155(3) C.c.Q. The scope for review is therefore narrow, but it affects basic principles to which no exceptions will be made. Unlike the situation for substantive public policy, it does not seem that the procedural public policy in issue in article 3155(3) C.c.Q. is different from the local public policy.

Québec courts have applied article 3155(3) C.c.Q. in parallel multijurisdictional class action disputes in order to deny recognition to Ontario judgments approving settlements where Québec residents were involved, since the information proceedings in Ontario were insufficient and confusing, therefore in contradiction with Québec fundamental procedural principles.[45]

Particular risks arise if the foreign decision was rendered by default. Article 3156 C.c.Q. therefore provides:

> "A decision rendered by default may not be recognized or declared enforceable unless the plaintiff proves that the act of procedure initiating the proceedings was duly served on the defaulting party in accordance with the law of the place where the decision was rendered. However, the authority may refuse recognition or enforcement if the defaulting party proves that, owing to the circumstances, he was unable to learn of the act of procedure initiating the proceedings or was not given sufficient time to offer his defence".

Such a provision is found in most international conventions and in modern legal systems.

[45] *Hocking v. Haziza*, 2008 QCCA 800, (April 30, 2008), Québec 500-09-016435-067 (C.A.); *Société canadienne des postes* c. *Lépine*, [2009] 1 SCR 450, 304 D.L.R. (4th) 539.

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2. *Substantive Public Policy*

In regards to substantive public policy, the issue is whether the solution provided by the judgment can be incorporated harmoniously into the legal system of the forum. This classical requirement, which applies, in theory, even to decisions originating in another Canadian province, does not call for much in the way of general comment. The approach is concrete and article 3155(5) C.c.Q. provides that it is the outcome of the judgment that must be inconsistent with public policy. This must therefore be determined when recognition is sought and not as of the date when the foreign decision is made. However, a Québec Superior Court[46] was ready to recognize a foreign unilateral repudiation (*talaq*), even though it was given according to a discriminatory law, since, according to the judge, there was no sufficient link with Québec because the repudiation had been given at a time when neither of the spouses were resident in Québec, although the wife had been resident there for more than a year at the time of the recognition proceedings.[47]

D. No *lis pendens* or *res judicata* in Québec or Elsewhere

Article 3155(4) C.c.Q., which imposes this requirement, is complex and somewhat ambiguous. It provides:

> "Art. 3155. A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> […](4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec."

Article 3155(4) C.c.Q. can thus give rise to at least three scenarios.

First, a decision rendered in Québec is *res judicata*. Obviously, a foreign decision, the effect of which would be to overturn the Québec decision, cannot be recognized. Even if the foreign decision simply confirms the Québec one, it is pointless to recognize it.

Second, a proceeding is pending in Québec when the application is made for recognition of a foreign judgement in respect of the same dispute. In order to discourage forum shopping, the foreign judgment will not be recognized *if the Québec court was the first seized* of the case.[48] This requirement has been interpreted in a class action context where an action had been certified in Ontario

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[46] *Droit de la famille – 072464*, 2007 QCCS 482.

[47] See G. GOLDSTEIN, *vol. 2* (note 3), at Art. 3155 No. 620 (criticizing such an application of the *Binnenbeziehung* theory in those circumstances).

[48] In this regard, the English version of article 3155(4) C.c.Q. is incomplete since it fails to translate the words *première saisie* found in the French version.

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while a paralel proceeding had been previously started in Québec. The Supreme Court of Canada held[49] that it was sufficient to deny recognition to the Ontario decision giving effect to a settlement reached outside of Québec since Québec courts had been first seized of the dispute when the class action was filed there, even though, according to Québec procedural law but contrary to the law of Ontario, a class action does not start before it is authorised by the court.

The first scenario, in which a decision has already been rendered in Québec when recognition of a foreign decision is sought, unlike the second scenario, does not require that the Québec court be the *first seized*. If, when the Québec court is the second seized, one of the parties has not used the international *lis pendens* provisions, under article 3137 C.c.Q., then that party will not be allowed to challenge the Québec decision that is *res judicata* in Québec.

Third, there is another foreign decision, elsewhere, relating to the same dispute, that could be recognized in Québec, *even though recognition has not yet been sought*. That rule, whose object is to manage jurisdictional conflicts between foreign decisions, is modeled on the 1968 Brussels Convention.[50]

IV. Specific Rules

A. Foreign Adoptions

Additional rules apply when international adoption is involved. Article 574 C.c.Q. requires :

> "The court, where called upon to recognize a decision granting an adoption made outside Québec, ascertains that the rules respecting consent to adoption and eligibility for adoption have been observed and that the consents have been given for the purposes of an adoption resulting in the dissolution of the pre-existing bond of filiation between the child and the child's family of origin."

According to Québec conflict of law rules, consent to adoption and eligibility for adoption are governed by the law of the domicile of the adoptee. So, in addition to the requirements under article 3155 C.c.Q., Québec courts have to make sure that the foreign decision has respected the rule of the law of the domicile of the adoptee relating to consent to adoption and eligibility for adoption. However, that may not always be the case, since the conflict of law rule of the foreign judge may be different and the court may have applied the law of the adopted person's nationality instead.

In any case, a foreign decision granting an adoption will not be recognized if the consents have only been given to an adoption which keeps a bond of filiation

[49] *Société canadienne des postes* c. *Lépine*, [2009] 1 SCR 450, 304 D.L.R. (4th) 539.

[50] *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 27 September 1968, *OJ* L 299 of 31 December 1972 (see now the *Brussels Regulation* (EC) No 44/2001).

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between the adoptee and his or her family of origin. Such a rule has been adopted under the influence of the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.*[51] It is also in keeping with article 3092 C.c.Q., which states that the effects of adoption will be governed by the law of the domicile of the adopter (usually, the adopter is domiciled in Québec), and with article 577 C.c.Q., which provides that adoption confers on the adoptee a filiation which replaces his or her original filiation. Therefore, when adoption is granted by a Québec court, the adoptee ceases to belong to his or her original family and will only belong to the family of the Québec adopter and the same effect will flow from the recognition of a foreign judgment under article 581 C.c.Q.

B. Foreign Arbitration Awards

Under Québec law, an arbitration award, being foreign (that is made outside Québec) or even rendered in Québec, must be homologated if a party wants to enforce it in Québec. When foreign awards are involved, articles 948 and 949 of the Civil Code of Procedure provide specific rules that are directly inspired from the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. They state the following requirements:

> "Art. 949. An arbitration award shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Québec and if its recognition and execution are not contrary to public order."
>
> "Art. 950. A party against whom an arbitration award is invoked may object to its recognition and execution by establishing that
>
> (1) one of the parties was not qualified to enter into the arbitration agreement;
>
> (2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of the place where the arbitration award was made;
>
> (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement;
>
> (5) the manner in which the arbitrators were appointed or the arbitration procedure did not conform with the agreement of the parties

[51] *Recueil des Conventions (1951-2003)*, Conférence de La Haye de droit international privé, Bureau permanent, La Haye, p. 354.

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or, if there was not agreement, with the laws of the place where the arbitration took place; or

(6) the arbitration award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the place or pursuant to the laws of the place in which the arbitration award was made."

These requirements are similar to the ones relating to the recognition of foreign decisions, since they basically involve an inquiry into the jurisdiction of the arbitrator, the respect of the substantive and procedural policy of Québec and the finality of the award. In addition, article 951.1 C.P.C. will obviously not allow a Québec court examining an application for recognition and execution of an arbitration award to inquire into the merits of the dispute.

It is worth mentioning that Québec and Canadian authorities usually follow a growing favourable trend towards arbitration, even when public policy rules are involved.[52]

V. Conclusion

In principle, Québec rules relating to the recognition and enforcement of foreign decisions are modern and favourable to international relationships since it is not overly difficult to have such a foreign decision recognized or enforced in Québec. Québec courts show a new openness in most cases. They dutifully respect exclusive jurisdiction or arbitration clauses and usually do not claim exclusive mandatory jurisdiction (liability stemming from raw materials produced in Québec being an unfortunate exception) and very moderately invoke public policy. Nevertheless, when basic procedural or substantive principles are at stake, they do not hesitate to use such arguments even when judgments from other Canadian provinces are involved, as recent multijurisdictional class action disputes aptly show.

[52] See *Dell Computer Corp*. c. *Union des consommateurs*, 2007 CSC 34 (class action by Québec consumers sent by the Supreme Court of Canada to New York arbitration).

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE CANADIAN COMMON LAW PROVINCES

Geneviève SAUMIER[*]

I. Introduction
II. General Principles
A. The Condition of Appropriate Jurisdiction
B. The Condition of Fair Process
C. Defences to Recognition and Enforcement
D. Other Issues
III. Conclusion

I. Introduction

The principles and rules governing the recognition and enforcement of foreign judgments[1] in the common law provinces of Canada find their source in judicial decisions. Indeed, there is no federal legislation dealing with this issue and most common law provinces have not enacted statutory instruments in this field.[2] Still, there is remarkable uniformity in the treatment of foreign judgments across the

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[1] I restrict my comments largely to judgments for money awards in patrimonial matters, that is, excluding family law orders which are typically not accorded the same recognition, except for foreign divorces that are recognized under the federal *Divorce Act*, RSC 1985, c 3 (2nd Supp), art. 22. Foreign arbitral awards are enforced throughout Canada under the regime of the New York Convention and are not dealt with in this note. For more detailed treatment of recognition and enforcement issues see J. WALKER, *Canadian Conflict of Laws* (6th ed.), Markham 2005; S.G. PITEL/ N.S. RAFFERTY, *Conflict of Laws*, Toronto 2012.

[2] Although the Canadian Constitution is silent with regards to private international law, it is generally accepted that it is within the legislative competence of the provinces. As such, there is no federal power to enact uniform legislation applicable to all provinces and territories. Nevertheless, a general constitutional obligation of mutual recognition of judgments between provinces has been established by the Supreme Court of Canada (see *Hunt v. T&N plc*, [1993] 4 SCR 289). Only one province, Saskatchewan, has enacted legislation on the recognition and enforcement of foreign judgments: *The Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121 – it essentially reproduces the common law regime created by *Morguard* & *Beals*, see *infra.*

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common law provinces, largely owing to two leading Supreme Court of Canada decisions on point.[3]

II. General Principles

The general principle in the Canadian common law provinces is that foreign judgments should be recognized and enforced so long as the foreign decision was "issued by a court acting through fair process and with properly restrained jurisdiction".[4] The principle of recognition in the face of appropriate exercise of jurisdiction and fair process is said to accord with two fundamental principles of "order and fairness" posited by the Supreme Court of Canada's landmark decision in *Morguard Investments Ltd. v. De Savoye*. That judgment jettisoned the previously applicable regime for recognition that had adopted the English common law position according to which recognition could be granted only those judgments rendered against parties who had been served in the jurisdiction of the rendering court or who had consented to its jurisdiction. The Supreme Court of Canada rejected that dogmatic position, saying that it was obsolete and no longer reflected modern notions of sovereignty informed by comity. In its place, the Court preferred a generous approach that was intended to replicate for judgments the existing mobility of people and capital across borders, both between provinces and internationally.

This initial recasting of the general principle took place within the national context, as *Morguard* involved the recognition of an Alberta judgment in British Columbia, where the judgment-debtor had assets. It took thirteen years for the Supreme Court of Canada to confirm that the principle of *Morguard* also extended to truly foreign judgments, that is, judgments from outside Canada brought for recognition and enforcement in a Canadian province. In *Beals v. Saldanha*,[5] the Court held that the general principle of *Morguard* was applicable with respect to foreign judgments on the same general condition, namely that the jurisdiction of the rendering court was appropriate according to the standards of the Canadian court hearing the request for recognition and enforcement. As a result of *Beals*, therefore, there is uniformity in the treatment of foreign judgments, at least at the level of principle, across the common law provinces. It is worth noting that the Court in *Beals* specified that provincial legislatures had the authority to adopt particular regimes given their constitutional competence over private international law. Only one common law province has acted in that regard, essentially legislating the standard put forward by the Supreme Court in *Beals*.[6]

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[3] These are *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 [hereinafter "*Morguard*"] and *Beals v. Saldanha*, [2003] 3 S.C.R. 416 [hereinafter "*Beals*"]. All judgments cited herein are available free online at <www.canlii.org>.

[4] *Morguard*, *ibid.* at 1103.

[5] [2003] 3 S.C.R. 416 [hereinafter "*Beals*"].

[6] *The Enforcement of Foreign Judgments Act*, SS 2005, c E-9.121 (Saskatchewan).

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A. The Condition of Appropriate Jurisdiction

The greatest challenge arising from the *Morguard* and *Beals* decisions relates to the condition of appropriate jurisdiction and the identification of criteria to support its finding in a particular case. Both cases involved jurisdiction exercised over a foreign defendant (a British Columbia resident in an Alberta court in *Morguard* and an Ontario couple as defendant in a Florida court in *Beals*). In that context, the court held that jurisdiction in the foreign court would be admitted as appropriate where it could be said that a "real and substantial connection" existed between the rendering court and the litigation. The Court added that jurisdiction could also be considered to be appropriate in situations that were already admitted to support recognition and enforcement of foreign judgments, namely, the presence of the defendant in the jurisdiction of the rendering court or the defendant's consent to that jurisdiction. In other words, the *Morguard* and *Beals* decisions maintained the original recognition rules adopted from English law and added a new one based on the "real and substantial connection" criterion.

Since those two landmark decisions, the Supreme Court has not had any significant opportunity to reconsider the "appropriate jurisdiction" condition in the context of recognition and enforcement of foreign judgments. It has, however, had the opportunity to consider the question in relation to litigation brought before a Canadian common law court regarding transborder litigation. For example, the more recent judgment *Van Breda v. Club Resorts* involved a significant review of the method for assessing appropriate jurisdiction in litigation brought before an Ontario court in relation to personal injury suffered in Cuba.[7] Reaffirming that the traditional bases of presence and consent remained valid, the Supreme Court rejected an "ad hoc" approach to evaluating jurisdiction against a foreign defendant in terms of the "real and substantial connection". The Court held that this criterion should be the abstract source for the development of concrete presumptive connecting factors in discrete areas of law (tort in that case) and the Court proceeded to articulate a list of such factors for interstate tort actions.[8] The decision in *Van Breda* invites the development of further presumptive connecting factors in other areas of law, namely contract law. One of the principal concerns of the court in *Van Breda* was to inject greater predictability and certainty in the establishment of international jurisdiction. Only time will tell whether this proves to be the case. Finally, while the *Van Breda* case relates to the jurisdiction of Canadian common law courts, there is no doubt that it is equally applicable to assess the jurisdiction of foreign courts. Indeed, the Supreme Court has not established any distinction between the evaluation of jurisdiction for the purpose of adjudicating a transborder dispute and for recognition of a foreign judgment.[9]

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[7] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 ["*Van Breda*"].

[8] The factors listed by the Court are (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province.

[9] It should be noted that three common law provinces have enacted legislation concerning jurisdiction over transborder cases (B.C., Saskatchewan and Nova Scotia). This means that *Van Breda* is not binding on courts in those provinces with regard to the manner of assessing jurisdiction. On the statutory scheme see V. BLACK/ S. PITEL/ M. SOBKIN,

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B. The Condition of Fair Process

In the *Morguard* decision, the Supreme Court of Canada posited the condition of fair process for the recognition and enforcement of foreign judgments but deemed that it was not a concern within the Canadian context. This indicates that the condition is essentially reserved for truly foreign decisions coming from outside Canada. Because *Morguard* was not such a case, the Court did not elaborate on the condition. The *Beals* case did, however, raise the question of fair process as the judgment-debtors were attacking the process before the Florida court as a defence to the recognition of the judgment from that court.

Interestingly, the Supreme Court did not consider the fairness of the process as a condition for recognition but rather as a defence. This may not have had any implications for the outcome but it could be relevant with respect to the burden of proof. If a condition, one might expect that the judgment-creditor would be charged with proving that the rendering court provided a fair process. If a defence, then the burden would be on the judgment-debtor to demonstrate the unfairness of the process before the foreign court. In any event, the Florida judgment was recognized and declared enforceable in *Beals*, suggesting that the burden of proof may not have changed the result in that particular case. It remains to be seen whether the "fair process" condition is indeed one or whether it may more meaningfully be considered within the existing defences to recognition that involve denials of justice or fraud.

The question may be considered in the pending case concerning the recognition of an Ecuadorean judgment in the famous *Chevron* litigation.[10] In that case, the US company is alleging breaches of procedural justice and fraud in the obtention of the judgment in Ecuador and given contradictory evidence on that issue, the burden of proof question may well be relevant there.

C. Defences to Recognition and Enforcement

While *Morguard* and *Beals* revolutionized the law governing recognition and enforcement of foreign judgments in the Canadian common law provinces, they did so in relation to the conditions regarding the jurisdiction of the foreign rendering court and not with respect to the available defences. Those remain the defences traditionally available, namely denial of justice, fraud and public policy. Because those defences are so narrow and so rarely invoked successfully, it is not worth expanding on them significantly.

As noted earlier, the first defence is related to issues of fair process and typically seeks to ensure that the defendant had notice of the proceedings and was afforded the opportunity to respond. Claims of judicial bias or corruption of the

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Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act – CJPTA, Toronto 2012.

[10] *Yaiguaje v. Chevron Corporation*, 2013 ONCA 758 (CanLII), reversing 2013 ONSC 2527 (CanLII), holding that the Ontario court could hear the plaintiff's motion for enforcement despite the fact that the defendant may have no assets in the province. Leave to appeal to the Supreme Court of Canada was granted 4 April 2014.

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judiciary may come under this category of defence or under the more general public policy exception.[11] The Supreme Court defined the defence in the following terms in *Beals*:

> "The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness."[12]

The defence of fraud involves rather some action of the judgment-creditor in the prosecution of the case before the foreign court. There is some overlap between this and violations of procedural justice and again, its chances of success are remote.

Finally, the commonplace defence of public policy is also available in the Canadian common law provinces and follows the typical reference to judgments that would offend fundamental principles of the forum and the admonition to apply it narrowly.[13] One illustration of the Canadian common law courts' approach to this defence is provided by a B.C. court's refusal to excise a treble damages award from a US judgment, holding that the unavailability of such damages under B.C. law and even its incompatibility with principles of compensation in private law were insufficient to meet the high threshold for a violation of public policy in relation to recognition of foreign judgments.[14]

D. Other Issues

Recognition and enforcement of a foreign judgment in a common law province will also typically require that the judgment be final in the jurisdiction of the rendering court. The classic requirement that the judgment be for money was tempered in recent years with the admission that foreign injunctions may also be subject to enforcement, subject to certain conditions.[15]

The usual rules regarding State immunity also apply, giving such parties the ability to resist the enforcement of foreign judgments where the State party benefits from immunity of prosecution or enforcement under Canadian law. In this case, the law is federal[16] and provinces cannot derogate from it by creating different

[11] *Oakwell Engineering Ltd. v. Enernorth Industries Inc.,* [2006] O.J. No. 2289 (Ont. C.A.).

[12] *Beals* at 448-9.

[13] See *Beals* at 451-2.

[14] *Old North State Brewing Co. Inc. v. Newlands Services Inc.,* 1998 CanLII 6512 (BC CA)

[15] *Pro Swing Inc. v. ELTA Golf Inc.* [2006] 2 SCR 612.

[16] *State Immunity Act,* R.S.C. 1985, c. S-18.

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immunity regimes. In a recent decision, *Kuwait Airways Corp. v. Iraq*,[17] the Supreme Court of Canada granted recognition and enforcement to an English judgment against Iraq, holding that the State did not benefit from immunity because the English judgment involved commercial and not sovereign activity. In so doing, the Supreme Court held that the characterization of the activity as commercial by the English court was binding on the Quebec court before which the judgment was brought for enforcement.[18]

An exception to State immunity in enforcement proceedings has recently been provided by the *Justice for Victims of Terrorism Act*, a federal statute adopted in 2012.[19] Article 5 of the Act provides as follows:

> "A court of competent jurisdiction must recognize a judgment of a foreign court that, in addition to meeting the criteria under Canadian law for being recognized in Canada, is in favour of a person that has suffered loss or damage [as a result of terrorist acts that would be punishable under Part II.1 of the *Criminal Code*]. However, if the judgment is against a foreign state, that state must be set out on the list referred to in subsection 6.1(2) of the *State Immunity Act* for the judgment to be recognized."[20]

This provision has already supported enforcement proceedings in Nova Scotia and Ontario.[21]

III. Conclusion

Foreign judgments are typically recognized and enforced by courts in the Canadian common law provinces with a minimum of scrutiny. A generous jurisdictional condition coupled with narrow and exceptional defences means that foreign judgment-creditors are likely to find a hospitable terrain for their enforcement procedures. Given the provincial competence over civil procedure and private international law, however, foreign parties should be careful to treat provinces as separate jurisdictions for the purpose of recognition and enforcement in Canada. The absence of a uniform federal regime may appear surprising to foreign parties but it is an inescapable aspect of the legal landscape in Canada.

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[17] 2010 SCC 40.

[18] The fact that the case came from Quebec does not detract from its relevance for common law provinces given that the issue of immunity arises under federal, not provincial law.

[19] S.C. 2012, c. 1, s. 2

[20] This list is provided by the Order Establishing a List of Foreign State Supporters of Terrorism SOR/2012-170 and currently includes the Islamic Republic of Iran and the Syrian Arab Republic.

[21] See for example *Edward Tracy v. The Iranian Ministry of Information and Security*, 2014 ONSC 1696.

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RECOGNITION OF FOREIGN JUDGMENTS IN CHINA: THE ESSENTIALS AND STRATEGIES

Wenliang ZHANG*

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I. Introduction: A Global or National Cause?

The recognition of judgments across borders has theoretical and practical significance. Continuous efforts have been devoted to creating a favourable environment for recognition of judgments at different levels: global, regional, bilateral and national. Unfortunately, but understandably, the reality has fallen short of our

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hopes for the establishment of an efficient global mechanism for the "free" circulation of judgments. Apart from regions such as the European Union, where recognition of judgments among Member States has witnessed great achievements, the recognition of judgments at the international level is still more of a lasting anticipation. Against this background, it is believed that endeavours to make progress in the recognition of judgments must be made nationally. It is submitted at the outset that – although the role of bilateral, regional and global cooperation should never be ignored, especially the remarkable part played by the Hague Conference on Private International Law – possible progress in the field of global recognition of judgments can only be made in a favourable national legal environment.

China has become the world's second largest economy. The burgeoning of mass interconnections between China and the rest of the world has led to a significant increase of civil and commercial disputes involving Chinese parties. Since, in some cases, the resolution of ensuing disputes cannot bypass litigation in foreign jurisdictions, recognition of the resulting judgments in China appears unavoidable. Despite the value of cross-border movement of judgments, Chinese practice in this respect demonstrates that, for the time being, recognition of foreign judgments in China is far from an easy task. Although it is not completely impossible to have foreign judgments recognised in China, the chance for successful applications is indeed quite limited.[1] Over the past several decades, there has been little progress in Chinese national law with respect to the recognition of foreign judgments. Fortunately, relevant bilateral treaties have gained prominence in this field.[2]

Knowledge of China's legal and judicial system can increase the successful recognition of foreign judgments in China, especially since a large percentage of the applications are refused due to the parties' or foreign courts' ignorance of the relevant Chinese legal structure and judicial practice. What's more, knowledge of the Chinese legal system and its judicial practice regarding the recognition of foreign judgments in China can help parties to resolve disputes more efficiently and strategically even before the emergence of the disputes. With such knowledge, foreign countries can also better arrange for judicial cooperation with China. There indeed exists some literature on various issues concerning recognition of foreign

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[1] There actually exist conflicting opinions among scholars on the circulation of foreign judgments in China. Two groups of scholars are distinctly observable. One group of Chinese scholars believe that there is hardly any possibility of having foreign judgments circulated in China, while the other group of Chinese scholars boast about the existence of a mechanism for free circulation of foreign judgments in China. With respect to the former, see, *e.g.*, M. ZHANG, Civil Litigation in China: A Practical Analysis of the Chinese Judicial System, (2002) 25 *B.C. Int'l & Comp. L. Rev.* 59; A.A. YUAN, Enforcing and Collecting Money Judgments in China from A U.S. Judgment Creditor's Perspective, (2004) 36 *Geo. Wash. Int'l L. Rev.* 757; P. TAYLOR, If you want your money, arbitrate, (2009) *China Law & Practice*, November 2009; P.J. BLAZEY/ P.S. GILLIES, Recognition and Enforcement of Foreign Judgments in China, (2008) 1 *International Journal of Private Law* 333-342. With respect to the latter, see, *e.g.*, Z. HU, Recognition and Enforcement of Foreign Judgments in China: Rules, Interpretation and Practice, *Netherlands International Law Review*, vol. 6, 1999, p. 291-311.

[2] Meanwhile, there is some progress in China's accession to the relevant international conventions concerning circulation of foreign judgments, but the role of these conventions should not be exaggerated. For more information in this regard, see *infra* II.A.

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judgments in China, but a systematic analysis is still urgently needed and above all, there is a need for strategic investigation into China's legal regime and judicial practice in this regard.

The primary purpose of this article is to investigate China's legal regime and judicial practice on recognition of foreign judgments. It summarises the requirements for recognition of foreign judgments in China and provides clear guidelines for interested parties. An examination of Chinese judicial practice in this regard allows for an analysis of the strategies used to apply for recognition of foreign judgments. The analysis may serve as a basis on which parties can maximize their chances of successful debt collection and arrange for efficient dispute resolution.

II. The Legal Landscape: An Unbalanced Three-Tiered Framework

A. The Broad Picture

Since the late 1970s, China has been on a track of flourishing legislation alongside its booming economy. The development of China's legal system closely follows the West, and a relatively mature national legal system is widely believed to have been established. Above all, the "rule of law" has been enshrined as a constitutional principle,[3] although one can still reasonably doubt the supremacy of the constitution as well as the efficiency and dignity of law in practice. Nevertheless, law is more and more familiar to the common Chinese person, and legal remedies are increasingly accessible.

From the perspective of Chinese academics, the law on recognition of foreign judgments is within the scope of private international law. But in today's China, there is no private international law code containing a set of uniform rules governing recognition of foreign judgments.[4] Instead, under the current Chinese legal system, the rules on recognition of foreign judgments in China are scattered among Chinese civil procedural laws. The relevant procedural laws include Chinese Civil Procedure Law 1991,[5] Opinions of the Supreme People's Court on

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[3] See Article 5 of the Constitution of the People's Republic of China (2004 Amendment).

[4] Indeed, the Chinese legislature – the Standing Committee of National Congress passed the so-called Chinese private international law code – the Law of Applicable Laws for Foreign-related Relations in 2010; however, the code only relates to conflicts rules: the other two branches of private international law – international jurisdiction and recognition of foreign judgments are excluded.

[5] The law was promulgated in 1991 by National People's Congress of the PRC. Even since its promulgation, it has been amended twice, in 2007 and 2012 respectively; however, no single amendment was made to the rules on circulation of foreign judgments in China. Since National People's Congress is the supreme Chinese legislature, its laws

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Some Issues Concerning the Application of the CCP 1991,[6] Regulation of the Supreme People's Court on Relevant Questions Concerning the Handling of Applications for the Recognition of Foreign Divorce Judgments by People's Courts 1999,[7] Regulation of the Supreme People's Court of Procedural Issues on Chinese Citizens' Applications for the Recognition of Foreign Divorce Judgments 1991[8] and other relevant rules passed by the Supreme People's Courts. Moreover, in the Chinese Enterprise Bankruptcy Act 2006, special legal provisions are set out for the recognition of foreign bankruptcy judgments in China. It can thus be seen that Chinese national legislation on the recognition of foreign judgments refers to a piecemeal approach.[9]

Besides the above-mentioned national laws on the recognition of foreign judgments in China, there are also some Sino-foreign bilateral treaties providing for the recognition of foreign judgments. According to the Ministry of Justice of the PRC, as of the end of June 2009, China had 107 bilateral treaties with 63 countries on judicial co-operation, of which 75 were in force. These 75 treaties comprise 49 treaties on judicial assistance, 22 treaties on extradition and four treaties on the transfer and administration of convicted persons.[10] Since June 2009, a few more bilateral treaties on judicial assistance have been signed or have entered into force.[11] In addition, along with the establishment of the Shanghai Co-operation Organization ("SOC") in 2001,[12] there have been meetings among the heads of

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including the CCP enjoy supremacy over the laws passed by other legislative bodies or judicial or administrative organs. Hereinafter: "CCP".

[6] The Opinions on the CCP were passed by the Judicial Committee of the Supreme People's Court in its 528th session in 1992, and entered into force on 14 July 1992. They were meant to supplement the application of the CCP in Chinese judicial practice. Hereinafter: "Opinions on CCP".

[7] The Regulation was passed by the Judicial Committee of the Supreme People's Court in its 1090th session on 1 December 1999, and entered into force on 1 March 2000. Hereinafter: "Regulation on Foreign Divorce Judgments".

[8] The Regulation was passed by the Judicial Committee of the Supreme People's Court in its 503rd session on 5 July 1991, and entered into force on 13 August 1991. Hereinafter: "Procedural Regulation on Foreign Divorce Judgments".

[9] These different laws are intended to target different categories of foreign judgments; however, a clear demarcation line cannot be drawn in terms of the applicable scope thereof because the specific laws such as Regulation on Foreign Divorce Judgments and Chinese Enterprise Bankruptcy Act 2006 do not provide a complete system for the recognition of these two kinds of judgments, in the course of which recourse to CCP is unavoidable.

[10] See the official website of the Ministry of Justice of the PRC, available at <http://www.moj.gov.cn/>.

[11] For example, the 2010 Sino-Nigerian Treaty on Civil and Commercial Judicial Assistance, the 2009 Sino-Brazilian Treaty on Civil and Commercial Judicial Assistance and the 2010 Sino-Italian Treaty on Criminal Judicial Assistance. For more information, see W. Zhang, Reflections on Sino-Belgian Judicial Assistance in Civil and Commercial Matters, 3 *Tijdschrift@IPR.BE* (2012), p. 50-51.

[12] The SCO is a permanent intergovernmental international organization, the creation of which was proclaimed on 15 June 2001 in Shanghai (China) by the Republic of Kazakhstan, the People's Republic of China, the Kyrgyz Republic, the Russian Federation,

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Supreme Courts of the Member States to promote, *inter alia*, judicial cooperation.[13] All of these mechanisms help to create a favourable environment for the recognition of foreign judgments. However, countries such as the United States, Germany, Britain, Australia and Japan do not have bilateral treaties with China on civil and commercial judicial assistance that include arrangements regarding the recognition of judgments.[14]

Moreover, although the pace is slow, China is preparing its participation in the global cause on judicial cooperation. China has ratified some important multilateral conventions that partially address the issue of recognition of foreign judgments; these conventions include, *e.g.*, the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption[15] and the "International Convention on Civil Liability for Oil Pollution Damage 1969".[16] These two conventions[17] touch upon some issues concerning the recognition and enforcement of decisions on adoption and oil pollution respectively. China has not yet signed any multilateral conventions specifically regulating recognition of

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the Republic of Tajikistan and the Republic of Uzbekistan. As of today, it has six Member States, five observer States and two dialogue partners. These countries range from Asia to Eastern Europe.

[13] See the website of SCO, available at <http://www.sectsco.org>.

[14] In striking contrast, as regards judicial assistance in the field of criminal cases, more and more countries, not just the U.S., France, Germany, and Japan, but also third countries such as Namibia and Venezuela have requested judicial assistance from China; there are actually more foreign requests than Chinese requests with the ratio of 60% to 40%. See, *e.g.*, Y. ZHAO, Countries Having Judicial Assistance Relations with China Expand to the Whole World Cases of Sino-foreign Judicial Assistance are Characteristic of More Foreign Requests with Less Chinese Requests [in Chinese], *Legal Daily*, 13 February 2012, p. 5; L. DONG/ G. LIU, Development and Problems of International Judicial Assistance Practice in China [in Chinese], *People's Judicature*, vol. 10, 1998, p. 7-8.

[15] The Convention entered into force in 1995. China signed the Convention on 30 November 2000 and ratified it on 16 September 2005. The Convention has been in force in the whole territory of the PRC since 1 January 2006. Upon ratification, China made some declarations mainly concerning designation of a central authority to discharge the duties which are imposed by the Convention, expansion of the application of the Convention to Hong Kong and Macao, and non-application of Article 39, paragraph 2. Hereinafter: the "Adoption Convention"

[16] The Convention was adopted on 29 November 1969, and it entered into force on 19 June 1975, but it was replaced by the 1992 Protocol. China ratified the 1992 Protocol, and denounced the CLC 1969 as required by the 1992 Protocol. Hereinafter: the "CLC".

Available at <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx>. From 16 May 1998, parties to the 1992 Protocol ceased to be parties to the 1969 CLC due to a mechanism for compulsory denunciation of the "old" regime established in the 1992 Protocol. However, there are a number of States which are party to the 1969 CLC and have not yet ratified the 1992 regime – which is intended to eventually replace the 1969 CLC.

[17] There is another prominent international convention which indirectly touches upon cross-border circulation of judgments, namely Article 31 of the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19 May 1956. But China has not yet acceded to this convention.

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foreign judgments such as the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters or the Convention of 30 June 2005 on Choice of Court Agreements.

Based on the above-mentioned three groups of Chinese laws on recognition of foreign judgments, three channels are found to be available for the recognition of foreign judgments in China, namely the "national rules-based" channel, the "bilateral treaties-based" channel and the "multilateral conventions-based" channel.[18] Given the rarity of Sino-foreign bilateral treaties and China's accessions to international conventions, most foreign judgments seeking circulation in China must resort to the "national rules-based" channel, which serves as the first and foremost channel. Moreover, the "bilateral treaties-based" channel and the "multilateral conventions-based" channel rely heavily on the first channel. Therefore, the following discussion focuses on the "national rules-based" channel, while the other two channels will be considered only when necessary.

B. The Relevant Legal Provisions[19]

1. Articles 281 and 282 of the CCP

The CCP is an act passed by the National People's Congress of the PRC (hereinafter: "NPC"), and it serves as the most fundamental law for the recognition of foreign judgments in China. Under the CCP, there are two articles that directly govern the issues on recognition of foreign judgments in China, namely Articles 281 and 282.[20] These two articles are included in Chapter 27 of the CCP, which is entitled "Judicial Assistance".
The two articles are as follows:

> Article 281:
>
> If a legally effective judgment (Panjue) or ruling (Caiding) delivered by a foreign court entails the recognition and enforcement before the People's Courts of the PRC, the party concerned may directly apply to the intermediate People's Courts of the PRC having the jurisdiction over the cases for the recognition and enforcement, or [as an alternative],[21] a foreign court may, according to the provisions of the international treaties concluded or acceded to by the PRC or based

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[18] See also W. ZHANG, Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity", (2013) 12 *Chinese Journal of International Law* 149.

[19] All the Chinese laws and Sino-foreign bilateral treaties cited in this article are translated by the author.

[20] Prior to the 2012 amendment, the two Articles had been numbered as Articles 265 and 266 in 2007, and Articles 267 and 268 in 1991. But the rules prescribed in these two Articles have remained completely intact ever since the promulgation of the CCP in 1991.

[21] The words in the square brackets "[]" throughout the article are added by the author, and they are merely for the purposes of fluency of the texts and a better understanding of the relevant rules.

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> on the principle of reciprocity, request the People's Courts to recognise and enforce its judgments.
>
> Article 282:
>
> After a People's Court of the PRC reviews an application or request for the recognition and enforcement of a legally effective judgment (Panjue) or ruling (Caiding) delivered by a foreign court according to the international treaties concluded or acceded to by the PRC or based on the principle of reciprocity, if [the People's Court] considers that such a judgment or ruling neither contradicts the basic principles of the laws [of the PRC] nor violates the national sovereignty, security, and social and public interests of the PRC, [the People's Court] shall make a ruling to recognise its effects. Where the enforcement is of necessity, [the People's Court] shall issue an order to enforce the foreign judgment according to the relevant provisions of the present law. If a legally effective judgment or ruling delivered by a foreign court contradicts the basic principles of the law [of the PRC] or the national sovereignty, security, social and public interests of the PRC, the People's Courts shall refuse to grant the recognition and enforcement.

The recognition of foreign judgments in China is based on these two provisions. Each provision serves a different function. More specifically, Article 281 gives the interested parties and foreign courts the right to submit applications or requests before the relevant People's Courts of the PRC.[22] This article amounts to a solemn declaration that China is willing to recognise and enforce foreign judgments, but it is merely set to regulate the procedural issues regarding the recognition of foreign judgments in China. Distinct from Article 281, Article 282 is designed to set forth the basic requirements with regard to recognition of foreign judgments in China.

At least from the wording of the two provisions, it appears somewhat arbitrary to jump to a conclusion that China is parochial in treating foreign judgments. Indeed, there are not as many preconditions or defences to recognition of foreign judgments in China as compared to other countries; the two provisions are seemingly in favour of recognition of foreign judgments in China and their wording does not reveal any unreasonable or harsh requirements. Undeniably, as was even admitted by foreign scholars,[23] in comparison with the 1982 version of the CCP (trial implementation),[24] the current CCP and the Opinions on the CCP (see below) definitely made positive strides in improving the procedure on the recognition of

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[22] However, in the case of requests for recognition of foreign judgments in China by foreign courts, Article 265 of the CCP does not entitle foreign courts to directly apply for the recognition or enforcement before the intermediate People's courts; instead, the request must be made by way of diplomatic channels.

[23] See R.E. Reyes, The Enforcement of Foreign Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know, (1997) 23 *Brook. J. Int'l L.* 241, 268.

[24] The CCP 1982 was promulgated by the Standing Committee of the 5th NPC on 8th March, 1982 and it was repealed by the CCP in 1991.

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foreign judgments. Nevertheless, it will be shown in the following analysis that the changes appear to be more of a linguistic conjuring, and the removal of the harsh language used in the past should not automatically lead to the conclusion that the present-day Chinese law really promotes recognition of foreign judgments in practice.

2. *Articles 306, 318 and 319 of Opinions on the CCP*

The Opinions on the CCP were passed by the Supreme People's Court of the PRC for promoting the appropriate application of the CCP in judicial practice. According to this text, three provisions are directly relevant to the recognition of foreign judgments in China. The relevant provisions include:

> Article 306:
>
> As to the cases over which both the People's Courts of the PRC and foreign courts have jurisdiction, if one party chooses to sue before the foreign courts and the other party chooses to sue before the People's Courts of the PRC, the People's Courts should entertain the cases. Once judgments are delivered [by the People's Courts], if the foreign courts request or the parties apply for the recognition and enforcement of the judgments and rulings [made by the foreign courts], no recognition is to be granted; exceptions exist when the international conventions mutually acceded to or signed by the two sides provide otherwise.
>
> Article 318:
>
> When the parties apply to the jurisdictionally qualified intermediate People's Courts of the PRC for the recognition and enforcement of the "legally effective" judgments rendered by foreign courts, if there is no bilateral treaty concluded or international convention mutually acceded to by China and the foreign country concerned, or neither is there established the "reciprocal relationship", [the application for recognition of foreign judgments cannot be satisfied]; [instead], they may bring an action before the People's Courts and the jurisdictionally qualified Chinese courts will deliver a judgment that will be enforced.
>
> Article 319:
>
> If the courts of the countries having no agreements on judicial assistance or the "reciprocal relationship" with China request judicial assistance from the People's Courts without recourse to diplomatic channels, the People's Courts should return their requests and explain to them the reasons.

These three provisions complement the CCP; they are mainly, if not completely, aimed to address the procedural issues surrounding the recognition of foreign judgments in China. Specifically, Article 306 furnishes a legal basis for Chinese courts

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to address possible concurrent proceedings; Article 318 reaffirms the absolute necessity of the treaty or convention or reciprocity-based relationship for recognition of foreign judgments in China; and Article 319 explains how to handle the requests for recognition of foreign judgments in China submitted by foreign courts in the absence of a treaty, convention or reciprocity-based relationship. These three provisions may easily be abused by the relevant parties, especially as far as the provision of concurrent proceedings is concerned; thus, litigation strategies may play an important role in the course of recognition of foreign judgments in China.[25]

3. *Article 5 of the Bankruptcy Act*

As a special section of Chinese law, the Bankruptcy Act lays down some special rules on circulation of foreign bankruptcy judgments in China. Since it is a special law as opposed to the general law, its application is presumed to pre-empt that of the CCP. There is only one relevant article for our purposes in the Act:

> Article 5:
>
> The bankruptcy proceedings initiated pursuant to the present law shall have binding force over the debtor's assets beyond the territory of the PRC.
>
> If a legally effective judgment or ruling rendered by a foreign court in a bankruptcy case involves the debtor's property in the territory of the PRC and an application or request is made to a People's Court for the recognition and enforcement [thereof], the People's Court shall conduct an examination in accordance with the international treaties concluded or acceded to by the PRC or according to the principle of reciprocity; and if [the People's Court] holds that [the foreign judgment] does not contradict the basic principles of the laws of the PRC, does not impair state sovereignty, security and social and public interests, and does not jeopardise the lawful rights and interests of the creditors that are in the territory of the PRC, [the People's Court] shall recognise and enforce [the foreign judgment].

This unique provision furnishes a supplementary legal basis for circulation of foreign *bankruptcy* judgments in China. Its content closely follows that of the CCP. However, it only touches upon the substantive aspects of circulation of foreign bankruptcy judgments in China, and as a consequence, the related procedural issues must be dealt with by the CCP and other Chinese laws.

4. *The Rules on Recognition of Foreign Divorce Judgments*

In Chinese judicial practice, most recognition cases are actually related to foreign divorce judgments. With respect to recognition of foreign divorce judgments in

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[25] See *infra* V.

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China, there are two special acts, namely the aforementioned 1991 Regulation on Foreign Divorce Judgments and the 1999 Regulation on Foreign Divorce Judgments. The two acts were both promulgated by the Supreme People's Court with the aim of introducing more specific rules and guidelines for Chinese courts to handle applications for the recognition of foreign divorce judgments in China.

Compared with other relevant laws on the recognition of foreign judgments in China, these two acts introduce a more detailed legal framework. To be more specific, the 1991 Regulation on Foreign Divorce Judgments contains 22 articles altogether; they deal with the scope of application,[26] the procedure for parties to institute recognition proceedings, the procedure for the requested Chinese courts to address applications for recognition,[27] and the grounds for refusal.[28] The 1999 Regulation echoes and complements the 1991 Regulation. Under the 1999 Regulation, there are three provisions in total, and the Regulation is aimed to clarify several ambiguities surrounding the recognition of foreign divorce judgments in China.[29]

The scope of the two regulations deserves special attention. The 1991 Regulation is only meant to deal with applications submitted by Chinese citizens; it neither applies to the division of matrimonial property, nor to spousal and child maintenance. The application of the 1991 Regulation is further limited in that it purports to only regulate the recognition of the divorce judgments originating from the countries having no agreements with China on judicial assistance. The 1999 Regulation on Foreign Divorce Judgments appears to clarify and broaden the scope of cases in which foreign divorce judgments can be recognised in China but without any concrete provisions. An application can be made to Chinese courts for the

[26] Articles 1 and 2 of the 1991 Regulation on Foreign Divorce Judgments.

[27] Articles 3-11, 13-14 and 17-22 of the 1991 Regulation on Foreign Divorce Judgments.

[28] Article 12 of the 1991 Regulation on Foreign Divorce Judgments.

[29] These three articles are as follows:

Article 1: "When Chinese citizens apply before the People's Courts for the recognition of foreign divorce judgments, the People's Courts should not refuse to entertain [their applications] based on the fact that they did not marry in China; if Chinese citizens apply for the recognition of foreign divorce judgments rendered in default of their appearance, [they] should simultaneously submit to the People's Courts the relevant documents certifying that the foreign courts had legally summoned them."

Article 2: "When foreign citizens apply before the People's Courts for the recognition of foreign divorce judgments, if their ex-spouses with whom the applicants are divorced [pursuant to the foreign divorce judgments] are Chinese citizens, the People's Courts should entertain [the applications]; if their ex-spouses with whom the applicants are divorced [pursuant to the foreign divorce judgments] are foreign citizens, the People's Courts should not entertain [the applications], but may inform them to apply for registration of re-marriage before the marriage registration organ [of China]."

Article 3: "If the parties [of foreign proceedings] apply before the People's Courts for the recognition of the effects of foreign divorce settlements reached under the intervention of foreign courts, the People's Courts should entertain [the application] and review [the foreign divorce settlements] according to the 1991 Regulation on Foreign Divorce Judgments and deliver the rulings of recognition or non-recognition thereafter."

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recognition of foreign divorce judgments regardless of the place of the marriage or the nationality of the former spouses. According to the 1999 Regulation, foreign citizens can only apply for recognition of foreign divorce judgments where one of the former spouses is Chinese.[30]

5. Other Relevant Provisions

Besides the most important laws discussed above, there are also some rules in various forms[31] that have been passed, mostly by the Supreme People's Court for facilitating the recognition of foreign judgments in China. Although the legal importance and the frequency of application of such rules are not on an equal footing with the abovementioned rules, they provide useful guidance regarding ambiguous rules.

In 1995, the Supreme People's Court issued the "Reply on Whether the People's Courts Should Recognize and Enforce the Japanese Judgments Containing Creditors' Claims and Obligations".[32] Following the Reply, it is widely believed that a "real reciprocity test" was established for the recognition of foreign judgments in China.[33] For the circulation of Taiwanese judgments in Mainland China, the Supreme People's Court made the "Reply to Whether People' Courts Should Entertain Applications for Recognition of Civil Settlements Made by Taiwanese Courts or Conciliation Agreements Presented or Confirmed by the Relevant Institutions" in 1999,[34] and the "Reply to Whether People's Courts Should Entertain Applications for Recognition of Payment Orders Made by Taiwanese Courts" in 2001.[35] Through the two replies, the Supreme People's Court opined that

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[30] Such a design may be based upon the presumption that the divorce judgment of two foreign citizens has no significance in China; however, this is not always the case. When property-related effects of foreign divorce judgments are connected with China, there are strong justifications to have them recognized or enforced in China regardless of the parties' nationalities. The regulation unreasonably restricts foreign citizens' rights to apply for the recognition of foreign divorce judgments in China, which actually deviates from the relevant articles of the CCP that equally entitles Chinese citizens and foreigners to apply for the recognition of foreign judgments.

[31] In most cases, the Supreme People's Court promulgates its rules as "regulations"; but sometimes, the Supreme People's Court may use the terms "Reply", "Interpretation" or "Opinion".

[32] Reply on Whether the People's Courts Should Recognise and Enforce the Japanese Judgments Containing Creditors' Claims and Obligations, (1995) Min Tazi No. 17.

[33] See, *e.g.*, W. LI , The Principle of Reciprocity in the Requirement of Recognition and Enforcement of Foreign Judgments [in Chinese], *Tribune of Political Science and Law*, vol. 2, 1999, p. 93.

[34] Reply to Whether the People' Courts Should Entertain Applications for the Recognition of Civil Settlements Made by the Taiwan Courts or the Conciliation Agreements Presented or Confirmed by the Relevant Institutions 1999, Fa Shi (1999), No. 10.

[35] Reply to Whether the People's Courts Should Entertain Applications for the Recognition of Payment Orders Made by the Taiwan Courts 2001, Fa Shi (2001) No. 13.

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civil settlements, conciliation agreements and payment orders could be circulated in Mainland China.

Attention should also be drawn to the relevant arrangements or declarations made between Mainland China and the other three jurisdictions of the PRC, namely Taiwan, Hong Kong and Macao. Although there is an absolute necessity to distinguish between these three jurisdictions and foreign countries,[36] a significant similarity exists between the recognition in Mainland China of the judgments from the other three jurisdictions and those from foreign countries. In Chinese judicial practice, unless special arrangements or provisions exist between China and the other three jurisdictions, the judgments from these jurisdictions will be treated like foreign judgments. To date, between Mainland China and Taiwan, there are no mutual agreements regarding recognition of judgments. However, the Supreme People's Court has unilaterally issued some declarations in this respect. On 15 January 1998, the Supreme People's Court promulgated the Regulation on Recognition of the Civil Judgments Rendered in Taiwan.[37] Moreover, on 24 April 2009, the Supreme People's Court passed another interpretation regarding recognition of Taiwanese judgments, namely the Supplementary Regulation on the Recognition of the Civil Judgments Rendered by the Courts in Taiwan.[38] These Regulations offer an efficient and guaranteed channel for recognition of Taiwanese judgments in Mainland China.

The only instrument on the circulation of Hong Kong judgments in Mainland China is the Arrangement on Reciprocal Recognition and Enforcement of the Judgments in Civil and Commercial Matters by the Courts of Mainland China and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned,[39] but the Arrangement is rather

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[36] The reasons may lie in that, *e.g.*, these three jurisdictions are under the same sovereignty with Mainland China, while foreign countries are not; the central government of the PRC tends to promote more favorable policies for practice in resolving the issues concerning the four jurisdictions which unavoidably influences the circulation of foreign judgments among the four jurisdictions.

[37] The Regulation on the Recognition of the Civil Judgments Rendered in Taiwan, Fa Shi (1998) No. 11. This regulation entered into force on 16th May 1998.

[38] The Supplementary Regulation on the Recognition of the Civil Judgments Rendered by the Courts in Taiwan, Fa Shi (2009) No. 4.

[39] After a long consultation starting from 2002, the Arrangement was finally signed on 14 July 2006. Its application in Mainland China is in the form of a judicial interpretation by the Supreme People's Court; and Hong Kong promulgated the Arrangement in the form of an ordinance, namely the Mainland Judgments (Reciprocal Enforcement) Ordinance. The date of the entry into force of the Arrangement was 1 August 2008. The analysis in this article is conducted in accordance with the version of judicial interpretation by the Supreme People's Court, as this is also the only official version. Where necessary, reference is made to the Ordinance. Hereinafter: "Mainland China-Hong Kong Arrangement".

As a prominent Chinese scholar has pointed out, the Arrangement is a breakthrough in the establishment of a regime of cross-border judicial assistance between the Hong Kong SAR and Mainland China under the "one country, two systems" principle. However, given that the Arrangement is a developing product with tough compromises, at the outset its use may be very limited and the operation of its rules needs to be tested in practice. The current legal conditions of the two sides will inevitably raise many more difficult issues in the

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narrow in its scope of application and practice demonstrates that reliance on the Arrangement is rare. Between Mainland China and Macao, there exists the Arrangement on Mutual Recognition and Enforcement of the Civil and Commercial Judgments;[40] this arrangement has a broad scope of application and covers almost all the civil and commercial judgments. The conclusion of the two arrangements provides a relatively more effective and guaranteed legal framework for circulation of Hong Kong and Macao judgments in Mainland China.

III. The Requirements and Shortcomings of Recognition of Foreign Judgments in China

A. Preliminary Considerations

This section explores the requirements that must be satisfied before foreign judgments can be recognised in China, as well as the shortcomings residing in such requirements. The requirements are divided into two aspects: the conditions for the recognition of foreign judgments and the defences raised to prevent the recognition of foreign judgments. A distinction is thus made between the conditions and defences: the conditions are meant to set the basic threshold which an applicant must meet in order to make a successful claim, while the defences are reserved for the respondents requesting denial of the effects of foreign judgments. This distinction is, unfortunately, not clearly made under Chinese law (*e.g.*, Article 282 of the CCP).

The analysis in this section follows the aforementioned Chinese laws, and Chinese judicial practice is referred to only when necessary to clarify how the laws are interpreted.[41] Pursuant to the laws introduced above, the conditions for recognition of foreign judgments in China are twofold:

(1) foreign judgments must be legally effective, and

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operation of the Arrangement. See X. ZHANG/ P. SMART, Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR, (2006) 36 *Hong Kong L. J.* 553, 584.

[40] This Arrangement was signed on 28 February 2006 and entered into force on 1 April 2006. Hereinafter: the "Mainland China-Macao Arrangement"

[41] In China case law is not a primary source of law but has been gaining a more prominent role. Some scholars believe that the selected cases published by the Supreme People's Court in its official gazette play a role that is similar to case law to some extent. See, *e.g.*, Y. XIAO, Proof and Application of Case Laws of Common Law Countries [in Chinese], (2006) 5 *China Legal Science* 115. As a rather important step, the Supreme People's Court officially established a case tracking system as of 1 January 2014, where almost all Chinese cases are supposedly accessible by the public. The website is available at <http://www.court.gov.cn/zgcpwsw/>.

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(2) there must be a reciprocal relationship between the state of origin and China.

A respondent may request the denial of recognition where the judgment

(1) contradicts the basic principles of Chinese law, or

(2) is contrary to Chinese public policy.

Indeed, the relevant laws are slightly different from each other in stipulating these conditions and defences, and in some instances, specific laws may introduce some conditions or defences unknown to other laws.[42] The following discussion will predominantly revolve around the CCP due to the overarching role of this law.

B. Conditions for Judgment Creditors

1. Foreign Judgments Must be Final

Throughout Chinese national law, the words "legally effective" are used to define a condition relating to the maturity of foreign judgments or the "ripeness" requirement. Apparently, this term is strikingly different from seemingly equivalent terms used in other countries or international conventions, where the terms such as "final", "enforceable" and "final and conclusive" are often used. Furthermore, Chinese national law equally refers to this term to describe the maturity of *Chinese* judgments. The key in understanding the condition lies in the interpretation of the equivocal term "legally effective", but there is no explicit official clarification. Nevertheless, the equal recourse to the term in the domestic and international context leads one to reasonably presume that the term should hold the same implications in these two contexts. Absent future modification of the condition or an explicit explanation given to the term, the term should be understood uniformly throughout Chinese national law.[43]

The problem then arises that the term is not given a clear definition or clarification in its domestic context either. It is regarded by Chinese scholars as an elusive term that is plagued with ambiguities.[44] According to the CCP, for most but not all cases, judgments are not "legally effective" immediately after they have

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[42] For example, one striking defence to circulation of foreign judgments in China, which is not in the CCP or other laws but is present in the Bankruptcy Act, is that foreign judgments should not infringe upon the lawful rights and interests of creditors in the PRC.

[43] However, some Chinese scholars hold that this term enjoys different implications in the context of circulation of foreign judgments in China as compared with the rest Chinese national law. For example, Dr. Z. HU proposed that this term should be given an understanding that is quite different from that awarded to the term in the rest of Chinese national law; he proposed the inclusion of not only the ripeness requirement but also the jurisdictional requirement within the term. See Z. HU (note 1), at 294 *et seq*.

[44] See, *e.g*., W. JIANG/ J. XIAO, Comments on the effects of judgments [in Chinese], *Tribune of Political Science and Law*, vol. 5, 1996, p. 4.

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been rendered by courts of first instance;[45] instead, there is a period during which the parties are not bound.[46] Where judgments are made by the Supreme People's Court or the appellate courts or where appeals are time-barred or precluded, the judgments may be regarded as "legally effective".[47] Therefore, the term in the Chinese national law context mainly implies the non-existence or the exhaustion of the remedy of appeals.

Another critical issue is how to determine if a foreign judgment submitted for recognition in China becomes "legally effective" within the meaning of Chinese national law. For countries with similar legal systems, the ripeness requirement does not appear to raise difficulties. However, recognition of the judgments from countries with differing legal systems, *e.g.*, Common Law countries, may turn out to be problematic when the ripeness requirement is strictly interpreted. Few Common Law countries employs the term "legally effective" to describe the "maturity" of judgments and the understanding of the "ripeness" of judgments can be quite different. Two alternative solutions to these terminological difficulties should be considered: amendments to the ripeness requirement under Chinese national law or setting a uniform and clear standard to assess the maturity of judgments through bilateral or multilateral treaties. Nevertheless, in Chinese judicial practice the ripeness requirement does not play a prominent role.[48]

2. Reciprocity

The reciprocity requirement is by far the most controversial with respect to the recognition of foreign judgments in China,[49] and nowadays, it is the most

[45] But some judgments can be "legally effective" immediately upon rendition, such as the judgments made by the Supreme People's Court and the judgments delivered through some special procedures.

[46] As a matter of fact, during this period, it is improper to say that judgments do not produce any effects at all. It is quite clear that during the period, the parties are barred from initiating another lawsuits based on the same cause of action and between the same parties; and it is also true that the parties are not free any longer to argue on the merits of the cases.

[47] See the CCP, Article 141.

[48] But this is not to say that the ripeness requirement will be excluded forever. The author believes that the ripeness requirement has lost importance predominantly due to the striking role played by other requirements for circulation of foreign judgments in China, such as the principle of "reciprocity", instead of due to the generosity of Chinese courts. Following this vein, the author still suggests a cautious reading of this requirement especially in view of the fact that circulation of foreign judgments in China is still extremely rare.

[49] Chinese scholars have been zealous in discussing the condition, but the existing literature is largely from a theoretical rather than a practical perspective. See, *e.g.*, T. DU, The Principle of Reciprocity and the Recognition and Enforcement of Foreign Judgments [in Chinese], *Global Law Review*, vol. 1, 2007, p. 118-119; C. XU, Economic Globalization and the Principle of Reciprocity in the Recognition and Enforcement of Foreign Judgments [in Chinese], *Law Review of Xiamen University*, vol. 8, 2004, p. 72; W. LI, The Principle of Reciprocity as A Requirement of the Recognition and Enforcement of Foreign Judgments [in Chinese], *Tribune of Political Science and Law*, vol. 2, 1999, p. 93; M. RENG, On the

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formidable hurdle for foreign judgments to overcome before they can be recognised in China.[50] The difficulties resulting from this condition cannot be readily distinguished from those resulting from the aforementioned terminological issues.[51]

A reciprocal relationship can automatically be found if there is a bilateral or multilateral treaty between China and the country of origin. However, the scope of existing bilateral and multilateral treaties is still relatively narrow, and the majority of foreign judgments cannot enjoy the benefit of automatic satisfaction or waiver of the reciprocity requirement. On the contrary, for recognition of those foreign judgments outside the framework of bilateral and multilateral treaties, the requirement must be satisfied as stipulated by the ambiguous wording of the CCP, "based on the principle of reciprocity". This understanding of the reciprocity requirement can be considered to be the second tier of the reciprocity condition: the first tier is met with the mere existence of a bilateral or multilateral treaty to which China is a Party. Unfortunately, there is no official interpretation on the wording of the CCP;[52] therefore, Chinese judicial practice must shed light on the implications of this wording.

In Chinese judicial practice, the cases dealing with the reciprocity requirement are numerous. The most influential one is the *Gomi Akira* case occurring in 1995.[53] In this case, the applicant requested recognition in China of two Japanese judgments in accordance with Article 268 of the CCP (now Article 282 of the CCP). On request for instruction as to how to address the case, the Supreme

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Application of the Reciprocal Principle in Recognition and Enforcement of Foreign Judgments [in Chinese], *Citizen and Law*, vol. 1, 2011, p. 52-54; J. WANG, Defects of the Reciprocal Principle in Recognition and Enforcement of Judgments [in Chinese], *Journal of Yunnan University*, vol. 3, 2008, p. 169; X. XIE, The Extraterritorial Enforcement of Judgment Made by a Chinese Court in the Context of Lack of Treaty and Reciprocity Between US and China [in Chinese], *Global Law Review*, vol. 4, 2010, p. 159-160.

[50] In an early article that I wrote on the recognition of foreign judgments in China, I listed this condition as one of the two pieces of important advice for the parties seeking recognition of foreign judgments in China. See W. ZHANG (note 18), at 147 *et seq.*; see also W. ZHANG, Reflexión Sobre el Principio de Reciprocidad en el Contexto del Reconocimiento y Ejecución de Sentencias Extranjeras en China, *Anuario Español de Derecho Internacional Privado (Iprolex)* 2012, p. 773-799.

[51] It is thus easy for one to superficially infer from the CCP that foreign judgments can easily be recognised in China. See, *e.g.*, Z. HU (note 1), at 294 *et seq*.

[52] One may invoke the aforementioned 1995 "Reply on Whether the People's Courts Should Recognize and Enforce the Japanese Judgments Containing Creditors' Claims and Obligations" as a source of official interpretation of the wording, but the author argues that this Reply actually avoided a direct interpretation of reciprocity. Moreover, the Reply's legitimacy is in doubt.

[53] See Gomi Akira's Application for the Recognition and Enforcement of Japanese Judgments before the Intermediate People's Court of Dalian City, 1 *Gazette of the Supreme People's Court of the PRC* (1996), 29. The applicant in the *Gomi Akira* Case was a *Japanese* (emphasis added) citizen. He applied for the recognition and enforcement of Japanese judgments ordering a *Japanese* (emphasis added) defendant to compensate him out of the movables located in Dalian, China.

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People's Court issued a judicial interpretation,[54] which directed that the Japanese judgments should not be recognised due to the lack of a reciprocal relationship or relevant international treaties between Japan and China.[55] It can be deduced that the reciprocal relationship within the meaning of the second tier of the condition was not considered to exist in the case.

In the wake of the *Gomi Akira* case, other prominent cases arose and reaffirmed the role of the reciprocity requirement. In the *Petition of Deutsche Bank for the Recognition and Enforcement of a Frankfurt Judgment*, the Shanghai Intermediate People's Court explicitly opined in 1996 that no reciprocal relationship could be proved to exist between China and Germany, and China's sovereignty would be at stake if recognition and enforcement was granted to the Frankfurt judgment.[56] In the *Awabiya Co., Ltd.* case,[57] the No. 1 Intermediate People's Court of Shanghai Municipality refused in 2001 to recognise and enforce a Japanese judgment delivered by a Japanese court in Yokohama. The Court in this case closely followed the interpretation in the *Gomi Akira* case, and the "principle of reciprocity" equally played a crucial role. Furthermore, in a case involving an application for the recognition of an American adoption judgment,[58] the No. 2 Intermediate People's Court of Beijing Municipality refused in 2006 to recognise the American adoption judgment based on the *sole* allegation that there was no reciprocal relationship between the two countries. And in the case, *Russian National Symphony Orchestra & Altamont Co. Ltd,*[59] the same court refused in 2004 to grant recognition and enforcement to two English judgments on the ground that there was no reciprocal relationship between England and China. The court underlined that since no treaties have been concluded or acceded to mutually by

[54] Reply on Whether the People's Courts Should Recognise and Enforce the Japanese Judgments Containing Creditors' Claims and Obligations, (1995) Min Tazi No. 17.

[55] It is indeed abnormal for the Supreme People's Court to intervene in the adjudicating process of lower People's Courts, as the *Gomi Akira* Case has shown. However, in Chinese judicial practice, this is often the case especially when complicated circumstances emerge.

[56] For a summary of the Case, see Y. SHEN, *Resolution of Disputes between Foreign Banks and Chinese Sovereign Borrowers: Public and Private International Law Aspects*, London 2000, p. 159-62. For references to the case by other scholars, see, *e.g.*, Y. LIU, Rethinking the Role of the Principle of Reciprocity in the Course of the Recognition and Enforcement of Foreign Judgments – with the Berlin Higher Court to Recognize the Judgment of Wuxi Intermediate Court of the PRC as A Case Study [in Chinese], (2009) 3 *People's Judicature* 97. Hereinafter: "the *Deutsche Bank* case".

[57] Application by Awabiya Co., Ltd for Circulation of Foreign Judgments in China, (2001) Hu Yi Zhong Jing Chuzi No. 267. For a discussion of the case, see, *e.g.*, M. REN, On the Application of the Principle of Reciprocity in Recognition and Enforcement of Foreign Judgments, (2011) 1 *Citizen and Law* 54.

[58] WANG Qingfang's Application for the Recognition of an American Adoption Judgment, The No. 2 Intermediate People's Court of Beijing Municipality, (2006) Er Zhong Min Tezi No. 10319.

[59] Application by Russian National Symphony Orchestra & Altamont Co. Ltd for the Recognition and Enforcement of English Judgments, The No. 2 Intermediate People's Court of Beijing Municipality, (2004) Er Zhong Min Tezi No. 928.

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China and England, and since the "principle of reciprocity" has not been established, the preliminary judgment rendered by the High Court [of England & Wales] on 3 October 2002 and the final judgment rendered on 27 February 2003 do not meet the requirements for recognition of foreign judgments in China. The more recent *Oliver Otto Dufek v. Siegmund Kahlbacher*[60] case relates to the application for the recognition and enforcement of two other English judgments in China. In this case, the requested court *merely* referred to Article 282 of the CCP (then Article 266 of the CCP), and held in 2010 that there were no available international treaties, and thus no reciprocal relationship between China and England.

The above cases indicate that in judicial practice Chinese courts adopt the recognition facts-based reciprocity; to put it another way, only if Chinese judgments have already been recognized or enforced in the original country the reciprocity requirement is deemed to be met.[61] It thus seems that for satisfying the requirement the judgment creditors have to present before the requested Chinese courts the proofs of the relevant cases where Chinese judgments were recognized and enforced in the original country.[62]

3. International Jurisdiction

International jurisdiction is generally a first precondition for the cross-border movement of judgments in both international instruments and national laws, and it is a condition that is commonly regarded to be capable of prevailing over all other requirements. This, however, is not the case in Chinese national law: such a requirement is not set out in the legislation, at least not explicitly,[63] and the law provides no hints as to the interpretation of this requirement. Although it has not lost importance in Chinese judicial practice,[64] the requirement of international

[60] *Oliver Otto Dufek v. Siegmund Kahlbacher*, The No. 2 Intermediate People's Court of Beijing Municipality, (2010) Er Zhong Min Tezi No. 10324.

[61] See, *e.g.,* W. ZHANG, *Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies*, Alphen aan den Rijn 2014, p. 96.

[62] *Ibid.*, at 105.

[63] See, Z. HU (note 1), at 294. In his article, Z. HU maintains that although the CCP fails to explicitly stipulate the requirement, the wording "legally effective judgment or ruling" actually means that the foreign court which rendered the judgment should have international jurisdiction; otherwise its judgment is not "legally effective". This explanation is not immune from doubt since this reasoning implies that all the requirements surrounding circulation of foreign judgments in China can be distilled into the almost omnipotent term "legally effective", which is unpersuasive. As analysed above, the term "legally effective" is merely meant to introduce the "ripeness requirement".

[64] There exist cases in which Chinese courts mention the jurisdictional requirement in a simple way. For example, in the case of Panshuo's Application for the Recognition of A Divorce Judgment Made by A California Court [(1996) Cai Ren Zidi No. 1, the Kunming Intermediate People's Court of Yunnan Province], the Kunming Intermediate People's Court ruled that "according to the American law on the jurisdiction over divorce cases, [as] the plaintiff TAN Xiaoling has resided in Miami of the state of Florida for over six months, pursuant to the America law, the Dade County Court of Florida had jurisdiction over the case." It is quite apparent that in this case, the Kunming Court referred to the American law

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jurisdiction is infrequently examined by Chinese courts in practice. It could be argued that the Chinese national law on Chinese courts' exercise of international jurisdiction as well as its domestic allocation of jurisdiction[65] can be of help to determine the scope of the international jurisdiction requirement if a foreign judgment is challenged on this point in the course of its recognition in China. But no authoritative text explains the role of these jurisdictional rules in China. Clearly, the international jurisdiction requirement should be laid down explicitly and unambiguously.

By contrast, the Sino-foreign bilateral treaties containing arrangements for the mutual recognition of judgments have unanimously and explicitly set forth the jurisdictional requirement.[66] This leads to a basic deduction that this requirement is not completely unknown to the legal framework on recognition of foreign judgments in China, and the absence of the requirement in Chinese national law can be regarded as a gap in the national legislation. A review of the existing Sino-foreign bilateral treaties containing the jurisdictional arrangements reveals the following basic points. First, the jurisdictional rules thereunder can only be classified as *indirect*, as opposed to *direct*; that is to say, these rules merely furnish a benchmark for judging how the jurisdictional requirement is considered to be satisfied rather than providing uniform heads of jurisdiction. Second, some bilateral treaties refer to a list of scenarios where the jurisdictional requirement is regarded as satisfied (positive jurisdictional requirement), while others only lay down the circumstances where the requirement is not deemed satisfied (negative jurisdictional requirement).[67] Third, these rules and Chinese national rules on (direct) jurisdiction are not well co-ordinated and this makes it difficult for Chinese courts to apply these bilateral treaties.

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to examine whether or not the American court had international jurisdiction over the case. And in another case HUA Zhuyuan's Application for the Recognition of An American Divorce Judgment, the Guiyang Intermediate People's Court of Guizhou Province opined that "HUA Zhuyuan and LIU Mingliang [the two parties of the case] live in the state of California and they are permanent citizens. The High Court of the Alameda City of the state of California has the jurisdiction over the case of divorce initiated by HUA Zhuyuan against LIU Mingliang." In this case, the Guiyang Court did not clearly state which country's law was actually referred to for determining the jurisdiction of the American court. Except for the rare examination of the jurisdictional requirement in the cases mentioned here, Chinese courts hardly touch on the requirement in their judicial practice.

[65] In this respect, see, *e.g.*, G. TU, Forum Non Conveniens in the People's Republic of China, (2012) 11 *Chinese JIL* 342-345.

[66] See, *e.g.*, Article 22(1) of 1987 Sino-French Bilateral Treaty on Civil and Commercial Judicial Assistance, Article 21(1) of 1991 Sino-Italian Bilateral Treaty on Civil Judicial Assistance, and Article 23(2) of 2009 Sino-Brazilian Bilateral Treaty on Civil and Commercial Judicial Assistance.

[67] On the jurisdictional requirement, there are three basic approaches. For a discussion of these approaches, see Z. HU (note 1), at 295 *et seq.*

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C. Defences Available to Judgment Debtors

1. *Chinese Basic Law Principles*

The CCP and other relevant Chinese national laws explicitly provide that "contravention to Chinese basic law principles" is a defence to recognition of foreign judgments in China. This is a defence that has no equivalent in other countries, and has attracted little, if any, attention from scholars.[68] However, the defence still deserves due consideration.[69] Although there are no reported Chinese cases in which the defence has been invoked,[70] the defence is considered as relevant for the recognition of foreign judgments in China.

The "basic principles" of *Chinese* law are undefined and far from clear. In fact, the concept can be used as an all-inclusive refusal ground in the same way the "public policy" exception is normally used. The concept of "basic principles" here is comprised of two aspects: procedural and substantive. The procedural "basic principles" can be mainly understood within the terms of the CCP; more specifically, there are thirteen provisions relating to procedural principles including, *e.g.*, the principles of exercise of judicial power by courts,[71] independent trial of cases,[72] equality of the parties' litigation rights,[73] same litigation rights and obligations for foreigners,[74] voluntariness and lawfulness of court mediation,[75] as well as the principles of argument[76] and disposition.[77] The sources of law containing "substantive basic principles" of Chinese law include, *inter alia*, the General Principles of

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[68] The limited literature on the analysis of this refusal ground normally treats this refusal ground as one aspect of the public policy exception. And there are some scholars who hold that this refusal ground is within the "public policy" exception and also embodies the elements of the "due process" exception. See, *e.g.*, Z. HU, *Chinese Perspectives on International Jurisdiction and the Enforcement of Judgments in Contractual Matters: A Comparative Study of the Relevant Provisions of Chinese, Swiss and US law, of the European Conventions and of Other International Treaties*, Zurich 1999, p. 314.

[69] The CCP and other relevant Chinese national laws give a special position to this refusal ground, which renders it worthwhile for an investigation; it should not be taken as the constituent part of the public policy exception. And under the Sino-foreign bilateral treaties, there is no mention of the defence.

[70] It is believed that the rare recourse to this defence is not due to its unpopularity, but rather to the more easily demonstrable defences or conditions of "reciprocity" and "due service".

[71] See Article 6 (1) CCP.

[72] See Article 6 (2) CCP.

[73] See Article 8 (1) CCP.

[74] See Article 5 CCP.

[75] See Article 9 CCP.

[76] See Article 12 CCP.

[77] See Article 13 CCP.

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Civil Law,[78] the Contract Law[79] and the Property Law.[80] Chinese scholarship is divided regarding the delimitation of the substantive basic principles. The prevailing opinion is that there are five basic principles underlying Chinese civil law,[81] namely the principles of equality,[82] voluntariness,[83] fairness,[84] good faith,[85] and public order and good customs.[86] It is difficult to justify a defence to recognition of foreign judgments based on the equivocal term "basic principles" and it is also difficult to refer to the national concepts when judging foreign adjudication. It would, nevertheless, be problematic if judgment debtors were to refer to this defence in a broad sense, as the recognition process would be delayed. The real problem appears to be the arbitrary use of the defence; it would be acceptable if the defence were based on widely accepted legal principles.

2. *Chinese National Sovereignty, Security and Public Interests*

The defence of Chinese national sovereignty, security and public interests is comprised of two different but closely interconnected concepts, which include, on one hand, the infringement of "sovereignty" and "national security", and on the other hand, the infringement of "social and public interests".[87] The defence is set out not only in the CCP, but also in Bankruptcy Act and the Procedural Regulation on Foreign Divorce Judgments.

It is rare to find under either national laws of a country or international instruments that the infringement of a country's "sovereignty" and "security" is *explicitly* set forth as a refusal ground although such considerations may fall within the broad public policy exception. The explicit reference to these two concepts highlights the clear emphasis in Chinese law on the "sovereignty" or "security" of

[78] The General Principles of Civil Law of the PRC were adopted at the Fourth Session of the Sixth NPC and promulgated by Order No. 37 of the president of the PRC on 12 April 1986, and became effective as of 1 January 1987.

[79] The Contract Law of the PRC was adopted at the Second Session of the Ninth NPC on 15 March 1999, and came into force as of 1 October 1999.

[80] The Property Law of the PRC was adopted at the 5th session of the tenth NPC on 16 March 2007, and entered into effect as of 1 October 2007.

[81] See, *e.g.*, J. MA/ Y. YU, *The Theory of Civil Law* [in Chinese], Beijing 2010, 4th edn, p. 32-47; L. WANG (ed.), *Civil Law* [in Chinese], Beijing 2010, 5th edn, p. 25-35.

[82] See Article 3 of the General Principles of Civil Law.

[83] See Article 4 of the General Principles of Civil Law.

[84] *Ibid*.

[85] *Ibid.*

[86] See Article 6 of the General Principles of Civil Law.

[87] Chinese scholars usually choose to disregard the "sovereignty" and "security". In any case, Chinese courts can refer to these two aspects when special circumstances arise.

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China, especially since territorial sovereignty is still a rather sensitive and significant problem.[88]

The term "social and public interests" is used to bring in the commonly-known "public policy exception". Although there is much debate among Chinese scholars about the differences between the two terms: "social and public interests" and "public policy",[89] the starting point and the presumed legislative intention underlying the two should be identical: to furnish a catch-all ground for refusal of the recognition of foreign judgments in extreme circumstances.[90] As a defence of an amorphous nature, it is meant to be left undefined; in Chinese law, no single rule defines this defence.[91] Moreover, there is unfortunately no restriction to the use of this defence. In practice, the defence of "social and public interests" is seldom used by Chinese courts.[92]

3. *Other Possible Defences*

The only two defences that are drawn from the CCP have been discussed above. Other possible defences relating to "due process" and "irreconcilable judgments" are not covered in the CCP. It is, therefore, reasonable to ask whether the two defences mentioned above are exclusive. As discussed in the following section, the relevant Chinese court practice shows that the defences to the recognition of foreign judgments in China are not confined to these two grounds.[93] Moreover, the Sino-foreign bilateral treaties containing the provisions on recognition of judgments also touch upon other defences.[94] Indeed, based on the wording of the law, Chinese courts are prohibited from referring to these treaties in addressing applications for the recognition of foreign judgments that are not covered by these treaties. However, the absence of relevant Chinese national rules is likely to lead Chinese

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[88] As is well known, the Taiwan issue, the "Diaoyu Island" issue and other similar issues are still quite acute and provocative. It is argued that the legislature's consideration of such issues leads to the addition of this aspect to the defense.

[89] Indeed, recourse to the term "Social and Public Interests" to denote the "public policy exception" is not immune from problems. Chinese scholars generally hold that such a term cannot define the public policy exception and therefore the term "public policy" should be used. For a discussion of the term, see, *e.g.*, Y. XIONG, Review of Chinese Law on Public Policy [in Chinese], *Contemporary Law Review*, vol. 4, 2005, p. 60-69.

[90] As noted by scholars, the public policy defence has been applied by Chinese courts in the international context but not in the recognition of foreign civil and commercial judgments. See, *e.g.*, Y. XIAO/ Z. HUO, Ordre Public in China's Private International Law, (2007) 53 *American Journal of Comparative Law* 660-672.

[91] Neither the Chinese Supreme Court nor the legislature has given any interpretation of the concept of public policy. See Z. HU (note 68), at 309.

[92] See W. ZHANG (note 18).

[93] See *infra* IV.

[94] A natural presumption is that since bilateral treaties are intended to offer more guarantees and favourable requirements for recognition of judgments, there is no strong justification for Chinese courts not to consider these defences in recognising judgments from countries without such bilateral treaties.

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courts to unconsciously borrow ideas from these treaties, and therefore, there is a need to briefly consider other possible defences to recognition of foreign judgments in China in view of the Sino-foreign bilateral treaties. Chinese judicial practice has proved this point.

Under these bilateral treaties, denial of "due process" is the most prominent ground for denying the effects of foreign judgments;[95] the fact that the losing party or the incapable party was not legally summoned in foreign proceedings offers a good defence to recognition of the judgment.[96] It is interesting to note that the "due process" defence can only be used by the losing party or the incapable party. Yet, it is difficult to justify that only parties falling within one of these two categories should be entitled to refer to the defence. A party whose claims are partially or wholly upheld can also be deprived of its due process rights, and it is not always easy to determine whether a party is a winning or losing party. The special protection granted to weak parties such as incapable persons is indeed preferred; however, it is doubtful whether the category of weak parties should only include incapable persons. The benchmark in the treaties for testing whether there has been a denial of "due process" is linked to whether the party was "legally summoned". However, it is unclear how this should be interpreted. Is the standard to be found in the law of the country of origin or the requested country? Or is it meant to be a neutral standard? The elaboration of an independent standard for testing "due process" could be particularly useful.

The other popular defence under Sino-foreign bilateral treaties is the defence of "parallel proceedings", or "prior recognition of third country judgments", or "irreconcilable judgments". This is a defence that is not prescribed uniformly throughout these treaties. Some bilateral treaties simply refer to the "delivery by the requested country of a judgment" on the same cause of action or prior recognition of a third country judgment on the same cause of action as a defence;[97] some bilateral treaties enlarge the scope of the defence by embracing the "ongoing handling of the same case" by the requested country;[98] and some bilateral

[95] The "due process" defence mentioned here should be distinguished from the aforementioned "due service" requirement although the latter is embraced within the former. The "due process" defence is seen in the Sino-foreign bilateral treaties, and it focuses on the legal summons on the losing or incapable party; by contrast, the "due service" requirement is drawn from Chinese court practice where the focus is on service of judicial documents, *inter alia*, foreign judgments.

[96] See, *e.g.*, Article 22(3) of the 2011 Sino-Algerian Treaty on Civil and Commercial Judicial Assistance, Article 23(3) of the 2009 Sino-Brazilian Treaty on Civil and Commercial Judicial Assistance, Article 23(3) of the 1996 Sino-Greek Treaty on Civil and Criminal Judicial Assistance, and Article 21(3) the 1991 Sino-Italian Treaty on Civil Judicial Assistance.

[97] See, *e.g.*, Article 22(6) of the 1987 Sino-French Treaty on Civil and Commercial Judicial Assistance.

[98] See, *e.g.*, Article 20(4) of the 1992 Sino-Russian Treaty on Civil and Criminal Judicial Assistance, Article 21(5) of the 1991 Sino-Italian Treaty on Civil Judicial Assistance. But there are also some differences among the treaties in this regard. For example, the 1991 Sino-Italian Treaty mandates that recourse to the defense should be

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treaties explicitly point out that there must be an "irreconcilability" between foreign judgments and the judgments of the requested country or the recognised judgments of a third country.[99] Theoretically speaking, such a defence is quite necessary for the practice of recognition, but diversity in the design of the defence is difficult to justify. If these treaties took a relatively uniform stance on the defence and if the applicability of this defence were clarified in the context of recognition in China of foreign judgments beyond bilateral treaties, this would be very useful.

IV. An Overview of Chinese Judicial Practice

A. General Considerations

As discussed, the Chinese legal system on recognition of foreign judgments is not fully developed. On the one hand, the absence of a clear and well-defined legal system with respect to the recognition of foreign judgments unavoidably affects Chinese judicial practice. On the other hand, practice reveals that Chinese courts cannot find a way forward towards recognition of foreign judgments and it is almost impossible for Chinese courts to take the initiative to recognise foreign judgments.

There is no single reported case recognising a foreign pecuniary judgment in China through the first channel, namely according to Chinese national rules. Yet, there are at least two reported cases in which recognition was awarded pursuant to Sino-foreign bilateral treaties[100] and a great number of foreign divorce judgments have been recognised by Chinese courts. Nevertheless, recognition of judgments from most foreign countries is still difficult if not impossible. An examination of the available cases on point reveals that Chinese courts place particular emphasis on two requirements, namely, the "principle of reciprocity" and the "due service requirement". Rather significantly, almost all the applications for recognition of foreign judgments in China were refused based on these two grounds.[101]

B. Case Study

It is useful to consider the practice of a specific Chinese court that frequently deals with applications for recognition of foreign judgments. For various reasons, the

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restricted to the situation where the trial proceedings of the same case in the requested country are initiated earlier in time.

[99] See, *e.g.*, Article 23(5) of the 2009 Sino-Brazilian Treaty on Civil and Commercial Judicial Assistance.

[100] Regarding the two cases, see W. ZHANG (note 18), at 161-162.

[101] *Ibid.*

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number of such applications is relatively low in China,[102] and the majority are submitted to courts in Beijing and Shanghai, the two largest municipalities in China.

In this section, the fifty cases decided by the Beijing No. 2 Intermediate People's Court between 2006 and 2011 are examined. Broadly speaking, these fifty cases can be divided into three groups. More specifically, there are four cases on foreign pecuniary judgments, forty-five cases on foreign divorce judgments, and one case on a foreign adoption. Clearly, within these fifty cases there are far more applications for recognition of foreign divorce judgments.[103]

In each of the fifty cases studied, a three-judge panel was formed as required by the CCP,[104] and the recognition proceedings were all instituted by the interested parties, rather than foreign courts. The judgments originated in countries such as the United States, England, Canada, and Australia, and with regard to the results of the applications, all forty-five foreign divorce judgments were recognised,[105] whereas the one application for the recognition of a foreign adoption and all four applications for the recognition of foreign pecuniary judgments were denied.[106]

It is also noteworthy that among these fifty applications, the vast majority of the applicants held Chinese nationality, and the applications submitted by foreigners were very exceptional. Since Chinese courts make no distinction between Chinese and foreign applicants and look only at the origin of judgments, we assume no partiality in this respect. However, we must caution that when recognition of foreign divorce judgments is pursued, Chinese law mandates that at least one of the former spouses be Chinese.

In the Beijing Court, applications can be submitted any time after the foreign judgment takes effect. This is consistent with the relevant Chinese law.[107]

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[102] This is in no way a sign of limited need for circulation of foreign judgments in China; instead, the most likely reason is that the judgment creditors who foresee the difficulty in having foreign judgments recognised in China simply give up. But it is believed that such a situation will probably change, if foreign countries start to respect Chinese judgments and Chinese courts follow subsequently.

[103] At the minimum, two reasons can be offered for such a phenomenon: (1) in practice, there are indeed many foreign divorce judgments demanding recognition; (2) there may also be a lot of foreign pecuniary or other categories of foreign judgments calling for recognition and enforcement, but no such proceedings have ever been commenced due to considerations regarding the current difficulties if not the impossibility of having them recognised or enforced in China.

[104] See Article 39 CCP.

[105] It must be recalled that these divorce judgments were recognized only as far as the dissolution of the marital relationship was concerned. See *infra* II.B.4.

[106] One of the applications for the recognition and enforcement of a foreign pecuniary judgment was withdrawn by the applicant. The applicant applied again on the same claim in a second case, but was unsuccessful.

[107] Clearly, the aforementioned Art. 281 of the CCP imposes no time limit for submission of applications for the recognition of foreign judgments in China. Although it may be argued that the time limit for enforcement of Chinese judgments applies to recognition cases by analogy, this interpretation does not stand well.

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For applicants the time costs in such cases can be a significant consideration, and the Beijing Court has usually delivered its decisions on recognition within two months, which is relatively fast as compared to decisions on domestic cases.[108] It takes longer for the Beijing Court to address applications for the recognition of foreign pecuniary judgments, but the decisions are generally rendered within one year. Litigation fees charged by the Beijing Court range from 70 RMB to 500 RMB, which is relatively low.

The Beijing Court does not provide detailed reasoning for its decisions; instead, a simple description of the case and a mere citation of the CCP are routine. For refusing to recognise an American adoption judgment, the Beijing Court only referred to one ground: there was no reciprocal relationship between the United States and China confirmed by international conventions, bilateral treaties or prior recognition practice. With respect to applications for the recognition and enforcement of foreign pecuniary judgments, the Beijing Court's analyses have been relatively longer. For example, in *Hukla Matratzen GmbH v. Beijing Hukla Ltd*,[109] an applicant sought recognition of a German judgment in China. After a detailed description of the applicant's claims, the Beijing Court found that the "due service" requirement was not met. In *Ant. A. Nicolaides Sanitools Co., Ltd v. Beijing Guanghua Times Textile Import & Export Inc.*,[110] the Beijing Court set out the applicant's claims and the judgment debtor's defences, and subsequently, referred to the Sino-Cypriot bilateral treaty only to deny recognition of the Cypriot judgment for inappropriate service of judicial documents. No other reasoning or grounds for refusal were provided. Based on these cases, it would appear that recognition of foreign divorce judgments is almost automatic, while it is very difficult to obtain recognition for foreign pecuniary judgments.

V. Strategies and Possible Ways Forward

The foregoing presents a broad picture of the recognition of foreign judgments in China. Although the requirements seen under the Chinese legal system for recognition of foreign judgments in China are not strenuous, the judicial practice does not seem to favour recognition. Chinese courts tend to follow the simple, general legal rules in a parochial way, especially in terms of the "reciprocity requirement". An examination of Chinese judicial practice demonstrates that, with the exception of foreign divorce judgments, few foreign pecuniary judgments have been recognised

[108] There is a six-month period within which Chinese courts of first instance must decide domestic cases; however, in cases with foreign elements, including applications for the recognition and enforcement of foreign judgments, no time limit appears to be explicitly imposed. See Articles 149, 176 and 270, the CCP.

[109] *Hukla Matratzen GmbH v. Beijing Hukla Ltd*, The No. 2 Intermediate People's Court of Beijing Municipality, (2010) Er Zhong Min Tezi No. 13890.

[110] *Ant. A. Nicolaides Sanitools Co., Ltd v. Beijing Guanghua Times Textile Import & Export Inc.*, The No. 2 Intermediate People's Court of Beijing Municipality, (2008) Er Zhong Min Renzi No. 01674.

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in China.[111] Indeed, there is much to do to improve Chinese legislation and judicial practice in this regard.

In the meantime, foreign countries should seek to promote a legal environment that encourages the recognition of foreign judgments in China. As discussed, the "reciprocity requirement" presents a high threshold requirement for the recognition of judgments from countries without such bilateral treaties. Foreign countries should, thus, consider Sino-foreign bilateral treaties in this regard.[112] Foreign courts can also be encouraged to recognise Chinese judgments, as a German and an American court have done.[113] Encouragingly, in the case *Giant Light Metal Technology (Kunshan) Co Ltd v. Aksa Far East Pte Ltd*,[114] the High Court of Singapore recognized a Chinese pecuniary judgment first in its history, without any prior practice of Chinese courts' recognition of Singapore judgments.

Knowledge of Chinese law and practice also seems important. Indeed, very few foreign pecuniary judgments have been recognised in China, and the ignorance of parties as well as foreign courts of the relevant Chinese legal system and judicial practice is actually an important contributing factor. This is especially true as far as the "due service requirement" is concerned. Furthermore, as mentioned above, there are some Chinese rules such as Article 306 of Opinions on the CCP that may easily contribute to the abuse of process by judgment debtors, and this also hinders the recognition of foreign judgments in China.[115]

In view of the current situation, a forward-looking arrangement of dispute resolution methods by the parties is an important strategic consideration if future collection of debts is possible on the assets found in China. At least the following implications can be drawn:

(a) when a party deals with its counterpart who has its assets located mainly in China, the party should bear in mind the risks in relation to debt collection

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[111] Note that foreign divorce judgments cannot be recognised as a whole. The abovementioned foreign divorce judgments are recognised only insofar as dissolution of the marriage is concerned; recognition of foreign divorce judgments beyond this effect is subject to the same scrutiny as recognition of foreign pecuniary judgments. This practice is based on Article 2 of the 1991 Regulation on Foreign Divorce Judgments.

[112] It may be argued that to persuade China to accede to the relevant international conventions is also a viable way; however, despite China's increasingly active involvement in the activities surrounding such conventions, China still appears reluctant to sign such conventions as the 2005 Hague Choice of Court Convention.

[113] These two cases are the *German Zublin* Case and *Hubei Gezhouba Sanlian Industrial Co., Ltd. & Hubei Pinghu Cruise Co., Ltd. v. Robinson Helicopter Company, Inc.* Case. In the former, the Court of Appeal of Berlin recognized in 2006 a Chinese judgment invalidating an arbitration clause. The latter case relates to the recognition and enforcement by Californian courts in 2009 of a Chinese judgment ordering an American defendant to pay damages in a tort case. For further discussion regarding the two landmark cases, see W. ZHANG (note 18), p. 169-170.

[114] *Giant Light Metal Technology (Kunshan) Co Ltd v. Aksa Far East Pte Ltd*, [2014] SGHC 16.

[115] See *supra* II.B.2.

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and should foresee the best strategy for the resolution of eventual disputes, including litigation, arbitration or settlement;

(b) if litigation is anticipated: only when the specific foreign countries have bilateral treaties with China relating to the recognition of foreign judgments is the party advised to litigate in these foreign countries. Otherwise, it appears wise to litigate in China or in another country which has such treaties with China. To be more certain, the parties can make a choice of court agreement designating the court of a country which has a bilateral treaty with China;

(c) if the approach discussed above (b) is not possible, the party is strongly advised to resort to arbitration as the dispute resolution method. China has acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[116] and recognition in China of foreign arbitral awards pursuant to the Convention is almost automatic.[117]

It is likely that only when foreign judgments are handed down that prevailing parties become aware of the necessity as well as the difficulty of having foreign judgments recognised in China. Two scenarios follow: (i) if reciprocity is guaranteed, due attention must be paid to the aforementioned requirements for the recognition of foreign judgments in China, *inter alia*, the "due service" requirement; (ii) if reciprocity is not guaranteed, there will be no chance for the recognition of foreign judgments in China. Then, efforts can seemingly be made by out-of-court settlements or luck can be tried to involve the Chinese government. To illustrate, when a German judgment was refused recognition by a Chinese court, a subsequent settlement was reached in light of the involvement of the local Chinese government.[118]

VI. Conclusion

It is not easy for a judgment creditor to obtain a favourable judgment. When a judgment cannot be enforced in the country of origin, the judgment creditor will inevitably seek recognition of the judgment before the courts where assets can be

[116] China ratified the Convention on 22 January 1987, and the Convention entered into force in China as of 22 April 1987. Hereinafter: "1958 New York Convention".

[117] It is very rare for Chinese courts to refuse the recognition and enforcement of foreign arbitral awards pursuant to the 1958 New York Convention. This is due to various guarantees introduced by the Supreme People's Court for the implementation of the Convention. It was reported that during the period from early 2000 to September 2011, there were only 21 refusals of the recognition and enforcement of foreign arbitral awards under the Convention. See G. LIU/ H. SHEN, Survey of China's Judicial Practice of Recognition and Enforcement of Foreign Arbitral Awards [in Chinese], *Beijing Arbitration*, vol. 1, 2012, p. 4.

[118] See *Petition of Deutsche Bank for the Recognition and Enforcement of a Frankfurt Judgment*. See Y. SHEN (note 56), at 159 *et seq*.

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tracked or located, which usually turns out even more difficult. As far as recognition of foreign judgments in China is concerned, there are three basic channels: the "national rules-based" channel, the "bilateral treaties-based" channel and the "multilateral conventions-based" channel; and the "national rules-based" channel is the most fundamental one since judgments from most countries must rely on this channel. However, hardly any foreign pecuniary judgments are recognised when this channel is used.

China's legal structure for recognition of foreign judgments is quite general, and there is no codified law specifically regulating this issue. A thorough knowledge of the scattered rules in this regard is the starting point. Although it is of great significance, a mere understanding of the rules is not enough, as practice plays a significant role and there are no detailed rules to follow. Chinese judicial practice demonstrates that courts tend to apply rules in a parochial way. Moreover, they are mostly concerned with the "reciprocity requirement" and the "due service requirement". For achieving recognition of foreign judgments in China, these two requirements must be met.

The status of China's legal structure and judicial practice has some significant strategic implications. It is vital for parties to plan strategically in case of dispute resolution in light of the impediments to recognition of foreign judgments in China. In the long run, constructive measures must be taken by foreign countries and courts. It is recommended that foreign countries seek to establish bilateral treaties with China and recognise Chinese judgments in order to satisfy the deeply-embedded reciprocity requirement. In addition to a review of the "reciprocity" requirement, there is scope for improvement of the current state of the law in China. And the other commonly-considered "due service requirement" also deserves special attention when reciprocity is guaranteed.

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THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN HONG KONG

Song LU / Kun FAN*

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I. Introduction

Hong Kong, a part of People's Republic of China (hereinafter "PRC" or "China") and once a colony of the United Kingdom of the Great Britain and Northern Ireland ("UK") from 1842 to 1997, is a special administrative region and a separate legal jurisdiction of the PRC, which enjoys a high level autonomy in the field of the region's legislative, administrative and judicial affairs.

Hong Kong Special Administrative Region ("HKSAR" or "Hong Kong"), as it is officially called, which includes Hong Kong Island, Kowloon, and the New Territories, was established on 1 July 1997 when the UK handed its former colony and the adjacent leased land back to China who resumed sovereignty over that territory under the Hong Kong Basic Law of the PRC. While the legal system in Mainland China is more akin to the European continental law tradition, Hong Kong is a common law jurisdiction.

Court judgments made in the civil proceedings in other jurisdictions can be recognised and enforced in Hong Kong (i) pursuant to the Hong Kong statutory law, particularly the Foreign Judgments (Reciprocal Enforcement) Ordinance, Chapter 319 of the Laws of Hong Kong, which applies to judgments made by the courts in a limited number of countries, as well as (ii) under the common law regime in Hong Kong, which applies to judgments given by the courts in most other jurisdictions. A bilateral arrangement between Hong Kong and Mainland China is applicable to the recognition and enforcement of certain judgments made in the two jurisdictions.

II. Legal Status of HKSAR

A. Legal Status

HKSAR is an autonomous territory that falls within the sovereignty of the PRC, yet maintains a legal system different from that of the Mainland China. The legal basis for the establishment of HKSAR, unlike the administrative divisions of Mainland China, is provided for by Article 31 of the Constitution of the People's Republic of China of 1982, which reads:

> "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions."

On 19 December 1984, after a long negotiation on the issue of Hong Kong, the Sino-British Joint Declaration ("Joint Declaration") was signed. In the Joint Declaration, the PRC Government stated that it had decided to resume the exercise of sovereignty over Hong Kong (including Hong Kong Island, Kowloon, and the New Territories) with effect from 1 July 1997, and the UK Government declared that it would hand over Hong Kong to the PRC with effect from 1 July 1997. The

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PRC Government also declared its basic policies regarding Hong Kong in the Joint Declaration, giving a high degree of autonomy of the HKSAR, including to a great extent the handling of foreign affairs on their own autonomy.

In accordance with the "one country, two systems" principle agreed between the UK and the PRC, the socialist system and policies of the PRC would not be practised in the HKSAR, and Hong Kong's previous capitalist system and its way of life would remain unchanged for a period of 50 years until 2047. The Joint Declaration provides that these basic policies should be stipulated in the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Basic Law"), which serves as the constitution of Hong Kong.

The legal system in Hong Kong is similar to the common law system in force in England and Wales, owing to the fact that Hong Kong had been governed by the UK in its history for one and half century. Article 8 of the Hong Kong Basic Law stipulates that all laws in force before 1997, including "the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." It is this legal system that governs the recognition and enforcement of foreign judgments in Hong Kong.

B. Concept of "Foreign Judgment"

In Hong Kong, section 2 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance Chapter 46 of the Laws of Hong Kong ("Cap 46") provides that: "judgment" (判決) means any judgment or order (by whatever name called) given or made by a court in any civil proceedings; "overseas country" (海外國家) means any place outside Hong Kong.

Pursuant to the above definitions, under Hong Kong law, any judgments or order given or made by a court at any place outside Hong Kong will be considered "foreign judgements." This includes judgments, which are awarded in the courts of Mainland China and Macau.

III. Legal Basis for Recognition and Enforcement of Foreign Judgments in Hong Kong

In respect of the recognition and enforcement of foreign judgments in Hong Kong, there is a statutory regime and a common law regime. The statutory regime applies to a limited scope of foreign judgments and the common law regime is applicable to all foreign judgments that are not subject to the statutory regime.

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A. Statutory Regime

There is a statutory registration scheme for foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Ordinance ("Ordinance"), Chapter 319 of the Laws of Hong Kong ("Cap 319") to facilitate the recognition and enforcement of judgments on the basis of reciprocity.

Under the statutory regime, a judgment creditor under a judgment to which the provisions of this Ordinance may, at any time within 6 years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, apply to have the judgment registered in the Court of First Instance provided that the relevant requirements as set out in Cap 319 are met.[1]

On any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Ordinance, order the judgment to be registered, provided that a judgment shall not be registered if at the date of the application:

(a) It has been wholly satisfied; or

(b) It could not be enforced by execution in the country of the original court.[2]

There is a judicial remedy available to the judgment debtor against the recognition and enforcement of the foreign judgment in Hong Kong, namely that the judgment debtor may apply to the court to set aside the registration on a number of grounds within a period of time in accordance with the relevant provisions of Cap 319.

It should be noted that the scope of application under the statutory regime is limited:

First, the Ordinance does not apply to judgments of all foreign courts. The statutory regime only governs judgments from "superior courts" in a small number of foreign countries, which have reciprocity relationship with Hong Kong. The foreign countries under the statutory regime include the Commonwealth countries (Australia, Brunei, Canada India, Malaysia, New Zealand, Singapore etc.). It also includes some EU countries, such as Belgium, Germany, France, Italy, Austria, and The Netherlands, and interestingly, it also includes one non-EU and non-Commonwealth country: Israel. Except for Australia, the statutory regime only enforces and recognizes judgments from "superior courts". The "superior courts" are defined as the courts in the receptive country which have unlimited jurisdiction over civil and criminal matters. Judgments from courts in other countries (such as the PRC, UK and US) cannot be registered under the Ordinance.

Secondly, only a foreign judgment given or made by a court in a civil proceeding or a judgment given or made by a court in a criminal proceeding for the payment of a sum of money in respect of compensation or damages to an injured party are eligible for the enforcement. A Judgment which by virtue of the Foreign

[1] Section 4(1) of the Ordinance, Cap 319.

[2] Section 4(1) of the Ordinance, Cap 319.

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Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46) cannot be recognized or enforced in Hong Kong are excluded.[3]

B. Common Law Regime

With respect to the foreign judgments that may not be registered under Cap 319, they may be enforced under common law. The common law regime is based on principles established by case law, and it governs the recognition and enforcement of foreign judgments from all courts in most countries.

Under the common law regime, a foreign judgment will not be enforced directly by execution or any other process. Instead, the judgment creditor shall, as applicant, initiate a fresh action in the Hong Kong court on the basis of the foreign judgment. The foreign judgment itself serves as the cause of action since the judgment is regarded as creating a debt between the parties to it.

> "The judgment debtor's liability arises on an implied promise to pay the amount of foreign judgment under a simple contract. Being a promise under a contract, it is subject to the usual limitation period of 6 years for such legal action."[4]

The judgment creditor has to prove that the foreign judgment is a final judgment conclusive upon the merits of the claim. Such a judgment must be for a fixed sum and must also come from a "competent" court (as determined by the private international law rules applied by the Hong Kong courts). The defences that are available to a defendant in a common law action brought on the basis of a foreign judgment include lack of jurisdiction, breach of natural justice, fraud and contrary to public policy.

With respect to its scope of application, it should be noted that a foreign judgment does not have to originate from a common law jurisdiction in order to benefit from the common law rules. Neither is reciprocity a requirement under the common law. Therefore, a judgment originating from a jurisdiction which does not recognise a HKSAR judgment may still be recognised and enforced by the HKSAR courts, provided that all the relevant requirements at common law are met.

C. Other Basis

There can be other basis for the recognition and enforcement of foreign judgments. Bilateral treaties or arrangements are one such basis. The bilateral arrangement between Mainland China and Hong Kong on the reciprocal recognition and enforcement of judgments will be discussed in Part VII below.

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[3] Section 2 of the Ordinance.

[4] Information Note for Panel on Administration of Justice & Legal Services, LC Paper No. LS25/01-02, dated 28 November 2001, available at <http://www.legco.gov.hk/yr01-02/english/panels/ajls/papers/aj1220-ls-25-e.pdf> (last accessed 1 May 2014).

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IV. Requirements to Enforce a Foreign Judgment in Hong Kong

In order for a foreign judgment to be enforced in Hong Kong, the following requirements must be satisfied:

- For enforcement under the statutory regime, the judgments is made in a civil proceeding or the judgment concerns monetary compensation in a criminal proceeding; for enforcement under the common law regime, it is for a definite sum of money;
- The foreign court that renders the judgment must have jurisdiction to hear the matter;
- The judgment debtor must have sufficient notice of the original proceedings;
- The judgment is not obtained by fraud;
- The judgment is not contrary to the public policy; and
- There is no conflicting judgment made or recognized in Hong Kong upon the same cause of action.

A. The Judgment is Final and Conclusive

According to the Ordinance, a foreign judgment must be final and conclusive in order to be enforceable in Hong Kong.[5] The Ordinance further provides that, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal is pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.[6]

An issue in debate is whether the "trial supervision" system under the PRC law renders a PRC judgment inconclusive and not final. The PRC adopts a two-tier trial system, under which only one appeal to a higher level People's Court against a judgment of a lower level People's Court can be lodged as a matter of law. At the same time, Chapter 16 of the PRC Civil Procedure Law establishes a trial supervision procedure, under which a party to a case, the relevant People's Court or the People's Procuratorate could, under specified circumstances, apply to the People's Court before whom the original trial took place or to a higher level People's Court for a re-trial of the case. Essentially, those circumstances were where the judgment was erroneous or based on insufficient evidence, where the judgment was obtained in violation of the prescribed procedure, and where the judicial officers conducting the original trial were guilty of embezzlement, corruption or other malpractice.

[5] Section 3(2)(a) of the Ordinance.

[6] Section 3(3) of the Ordinance.

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In *Tan Tay Cuan v. Ng Chi Hung,*[7] the plaintiff sought to enforce in Hong Kong a judgment from the Higher People's Court of the Fujian province of the PRC. The defendant argued that the judgment was not "final and conclusive" because, pursuant to the PRC law, there was a two-year period in which the judgment was capable of being "corrected" on "retrial or review", also referred to as an appeal. Even though no retrial or review had been ordered, the Court of First Instance in Hong Kong was not prepared to grant summary judgment, based on the two-year period still being in effect.

In *Lee Yau Wing v. Lee Shui Kwan,*[8] the Court of Appeal considered that "the issue of whether the «trial supervision» system per se rendered a PRC judgment inconclusive and not final was an issue of public importance and involved complicated legal questions that could not be determined in the absence of trial", and thus set aside the summary judgment. It is interesting to note that in the dissenting opinion, Chung J note that "the «trial supervision» system under PRC law per se did not render a PRC judgment inconclusive and not final", comparing to circumstances under which an appeal could be brought against a judgment made in a Hong Kong court under the Rules of High Court, Cap. 4A, and the power of Hong Kong courts to order re-trial, which did not render a Hong Kong judgment inconclusive and not final.

Pursuant to the Arrangement which came into effect on 1 August 2008, the trial supervision system implemented in Mainland China does not renders a judgment made in Mainland China inconclusive and non-enforceable in Hong Kong.[9] The time limit in which an application for re-trial shall be made by a party to the relevant judgment, under the amended Article 205 of the Civil Procedure Law, has changed from 2 years to 6 months.

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[7] *Tan Tay Cuan v. Ng Chi Hung*, HCA 5477/2000, 5 February 2001.

[8] *Lee Yau Wing v. Lee Shui Kwan*, CACV 159/2004, 25 October and 9 December 2005.

[9] Article 2 of the Arrangement which states: "«An enforceable final judgment» under this Arrangement means –

(1) In the case of the Mainland:

(i) Any judgment made by the Supreme People's Court;

(ii) Any judgment of the first instance made by a Higher or Intermediate People's Court or a Basic People's Court which has been authorized to exercise jurisdiction of the first instance in civil and commercial cases involving foreign, Hong Kong, Macao and Taiwan parties (a list of such courts is at Annex), from which no appeal is allowed according to the law or in respect of which the time limit for appeal has expired and no appeal has been filed; any judgment of the second instance; and any legally effective judgment made in accordance with the procedure for trial supervision by bringing up the case for a retrial by a people's court at the next higher level."

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B. For Enforcement under the Statutory Regime, the Judgment Is Made in a Civil Proceeding or the Judgment Concerns Monetary Compensation in a Criminal Proceeding; for Enforcement under the Common Law Regime, it Is for a Definite Sum of Money

According to section 2 of the Ordinance, only a foreign judgment given or made by a court in a civil proceeding or a judgment given or made by a court in a criminal proceeding for the payment of a sum of money in respect of compensation or damages to an injured party are eligible for the enforcement. A Judgment which by virtue of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46) cannot be recognized or enforced in Hong Kong are excluded.

For enforcement under the common law regime, it is for a definite sum of money, other than a sum payable in respect of taxes, penalties or multiple damages.[10]

C. The Foreign Court Must Have Jurisdiction to Hear the Matter

In order for a Hong Kong court to recognize and enforce a foreign judgment, the foreign court must have jurisdiction to hear the matter in the circumstances of the case.[11]

Section 6(2) of the Ordinance provides that,

> "For the purposes of this section, the courts of the country of the original court shall, subject to the provisions of subsection (3), be deemed to have had jurisdiction:
>
> (a) In the case of a judgment given in an action *in personam*:
>
> (i) If the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or (Amended 37 of 1985 s. 6)
>
> (ii) If the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or
>
> (iii) If the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
>
> (iv) If the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
>
> (v) If the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the

[10] *Supra,* note 4.

[11] Section 6(1)(a)(ii) of the Ordinance.

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> proceedings in that court were in respect of a transaction effected through or at that office or place;
>
> (b) In the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court;
>
> (c) In the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or (b), if the jurisdiction of the original court is recognized by the law of the registering court."

For the recognition and enforcement under common law, the foreign court have had international jurisdiction according to common law of the conflict of laws.

D. Sufficient Notice of the Original Proceedings

The judgment debtor may object to the enforcement of the foreign judgment in Hong Kong if he was not given notice of the original proceedings in the foreign court in sufficient time to enable him to defend the proceedings and did not appear.[12] This concept of reasonable notice and opportunity is at the heart of substantial justice/natural justice principle, which the Hong Kong courts follow.

E. Judgment Not Obtained by Fraud

In order for the Hong Kong courts to recognize and enforce it, a foreign judgment must not be obtained by fraud.[13]

In *WFM Motors PTY LTD v. Malcolm Maydwell,*[14] W obtained judgment against M in New South Wales and registered it in Hong Kong. M applied to set aside the registration on the ground that the underlying judgment had been obtained by fraud and in breach of the rules of natural justice. The judge set aside the registration. W appealed. The court of appeal found that there had been no breach of natural justice in the New South Wales proceedings and M failed to establish fraud to the requisite standard, and thus allowed the appeal. In reaching such conclusion, the court reasoned as follows:

> "(i) The court was not re-trying the case and the question was not whether the decision of the foreign court was correct (*Abouloff v Oppenheimer & Co* (1882) 10 QBD 295, *Vadala v Lawes* (1890) 25 QBD 310 and *Owens Bank Ltd v Bracco* [1992] 2 AC 443 considered).

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[12] Section 6(1)(a)(iii) of the Ordinance.

[13] Section 6(1)(a)(iv) of the Ordinance.

[14] *WFM Motors PTY LTD v. Malcolm Maydwell*, [1995] HKLY 1047, 7 December 1995.

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(ii) Where fraud was alleged:

(a) It was permissible in an appropriate case to examine the evidence to consider whether or not the evidence given in the foreign proceedings was fraudulent;

(b) This could be done even when the points that were being put forward in Hong Kong had already been considered and dismissed by the foreign court; and

(c) An allegation of fraud was always serious and the party making the allegation must particularise the fraud with precision and establish it to a standard commensurate with the gravity of the allegation (*Syal v Heyward* [1948] 2 KB 443 and *Svirkis v Gibson* [1977] 2 NZLR 4 applied)."

F. Judgment Is Not Contrary to Public Policy

The enforcement of the foreign judgment must not be contrary to Hong Kong public policy.[15] There are very few cases where the judgment debtor has raised this argument successfully in Common Law countries, and the authors are not aware of such reported case in Hong Kong.

G. No Conflicting Judgment in Hong Kong

In order for the Hong Kong courts to recognize and enforce it, the relevant foreign judgment must not be irreconcilable with the prior decision of the Hong Kong court in an action between the same parties.

V. Procedure for the Recognition and Enforcement of Foreign Judgments

A. Statutory Regime

An application to register a foreign judgment must be made within 6 years from the date of the judgement. The procedure is relatively simple in that the applicant shall make such application ex-parte on affidavit to a Master. If appropriate, the Master may order a summons to be issued to provide an opportunity for the judgment debtor to be heard. The Court has a register of the judgments ordered to be registered under the Ordinance. A registered foreign judgment has, for the purposes of execution, the same force and effect as if the judgment had been a judg-

[15] Section 6(1)(a)(v) of the Ordinance.

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ment originally given by a Hong Kong court and entered on the day of registration.[16]

B. Common Law Regime

The foreign court should have had international jurisdiction according to the conflict of laws rules under common law.

In this respect, every presumption is to be made in favour of a foreign judgment and the burden of proof lies on the party who seeks to impeach it.

The case law held that, for example:

(i) The defendant must be present in the country of the foreign court at the date of commencement of the proceedings;

(ii) The defendant submitted or agreed to submit to the jurisdiction of the foreign court;

(iii) The relevant foreign judgment is not irreconcilable with the prior decision of the Hong Kong court in an action between the same parties; and

(iv) The foreign judgment was not obtained in a manner that was contrary to natural or substantial justice.[17]

An action on a foreign judgment is usually begun by a writ endorsed with a statement of claim for the amount of the judgment debt and costs. Summary judgment may be given for the plaintiff unless the defendant can set up a credible defence to enforcement. No legal action at common law may be brought at all on a judgment which is registrable under the Ordinance.[18]

VI. Grounds for Refusal of Recognition and Enforcement

The requirements and conditions that shall be satisfied for the recognition and enforcement of foreign judgments in Hong Kong, taken from a negative perspective, are in fact the grounds for refusal of recognition and enforcement of the same. Since those requirements and the related case law have been discussed above, a skeleton summary of these grounds will be suffice here.

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[16] *Supra,* note 4.

[17] *Ibid.*

[18] *Ibid.*

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A. Incompetent Jurisdiction

An application for the recognition and enforcement of a foreign judgment will be refused if the original court in the foreign country did not have the jurisdiction *in personam*, *in rem* or in other kind of action, depending on the circumstances, to hear the matter under the conflict of laws rules in force in Hong Kong. It does not matter whether the foreign court is competent under its own laws.

B. Unfair Procedures

If the person against whom the foreign judgment was made had not received sufficient notice of the proceeding, or the person was not given an opportunity to state his or her case, it will be treated as a violation of the principle of natural justice and the relevant foreign judgment will not be recognised or enforced.

C. Fraud

A foreign judgment obtained by fraud will not be recognised and enforced in Hong Kong.

D. *Res judicata*

Under the statutory regime, the registration of a judgment may be set aside if the judgment deals with a subject matter that has been finally and conclusively decided by another court having jurisdiction in the matter pursuant to Hong Kong law. In case a conflicting judgment on the same cause of action has been made, recognized or enforced in Hong Kong, a foreign judgment will not be recognised or enforced based on the principle of *res judicata*.

E. Public Policy

The recognition and enforcement of a foreign judgment will be refused if it violates the public policy in Hong Kong, which can be substantive or procedural in nature.

F. Other Grounds

If the registration of the foreign judgment was made by a person in whom the rights under the judgment was not vested, the registration may be set aside.

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VII. Reciprocal Recognition and Enforcement of Judgments between Mainland China and Hong Kong

As Hong Kong being a separate jurisdiction in the PRC and the policy of "one country, two systems" is implemented, the recognition and enforcement of judgments between Mainland China and Hong Kong becomes an issue of regional conflict of laws. In reality, it has been treated similarly as an issue of private international law. A judgment rendered in Mainland China, as discussed above, is treated as a foreign judgment under the laws of Hong Kong and a Hong Kong judgment will not be enforced in Mainland China in the same way a PRC court judgment is enforced.

In order to facilitate the mutual recognition and enforcement of judgments, a bilateral arrangement entitled the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned ("Arrangement")[19] has been concluded. The Arrangement was made in July 2006, in accordance with the provision of Article 95 of the Hong Kong Basic Law and through mutual consultation between the Supreme People's Court and the Government of the HKSAR.

The Arrangement permits the mutual recognition and enforcement of monetary judgments in civil and commercial cases arising from a written exclusive jurisdiction agreement entered into on or after the Arrangement becomes effective." Amendments to the Arrangement were made in February 2008 to reflect the new provisions in the amended Civil Procedure Law of the Mainland regarding the time limit for application for execution of judgments (by extending the time limit for an applicant to apply for recognition and enforcement of a judgment from one year (if one or both of the parties were natural persons) or six months (if both parties were legal persons or any other organizations) to a standardized period of two years).

To give effect to the Arrangement, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) was enacted in April 2008 and came into effect on 1 August 2008 after the Supreme People's Court has promulgated the relevant judicial interpretation giving effect to the Arrangement in the Mainland.[20]

The Arrangement is applicable under the following conditions:

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[19] More details about the Arrangement, see *infra*, section VII. For a discussion, see, X. ZHANG/ P. SMART, Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR, 35 *Hong Kong Law Journal* 3 (2006), p. 553-584; M.D.C. KONG, Effective Mutual Recognition and Enforcement of Judgments between Mainland China and Hong Kong: Long Way to Go?, 3 *CityU Law Review* 163 (2011), p. 163-181.

[20] Judicial Interpretation No. 9 of [2008], Adopted at the 1390th Meeting of the Judicial Committee of the Supreme People's Court on 12 June 2006.

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(a) Civil and Commercial Disputes: the Arrangement will only apply to judgements issued over civil and commercial disputes, save that disputes arising from employment contracts or contracts entered into by natural persons for personal consumption, family matters and non-commercial purposes are excluded.[21]

(b) Money Judgements: only judgements of a monetary nature will be enforceable under the Arrangement.[22] Judgements or orders of a non-monetary nature, such as orders for specific performance, injunctive relief and asset preservation, are not subject to reciprocal enforcement under the Arrangement.

(c) Choice of Court: the Arrangement will only apply if the parties concerned expressly agreed in written form to designate a court of the Mainland or the HKSAR to have exclusive jurisdiction for resolving any dispute.[23] The requirement for adopting an exclusive choice of court clause by the parties aims to minimize the risk of parallel proceedings being instituted in the courts of both places.[24]

(d) Finality: the Arrangement only covers judgements that are final and conclusive. Moreover, special procedures which are generally in line with the requirements laid down by Hong Kong courts are provided in the Arrangement to address the common law requirements of finality for enforcement of money judgments.[25]

(e) Applicable Court Judgments: the Arrangement covers all Hong Kong judgments, whether they are judgments issued by the District Court, High Court (comprising the Court of First Instance and Court of Appeal) or Court of Final Appeal.[26]

In relation to Mainland judgments, the Arrangement covers judgments by (i) the Supreme People's Court; (ii) the Higher People's Court; (iii) the Intermediate People's Court; and (iv) those Basic Level People's Courts listed by way of an appendix to the Arrangement as having original jurisdiction over cases involving foreign, Hong Kong, Macau or Taiwan elements.[27]

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[21] Article 3(2) of the Arrangement. The scope of the Arrangement is narrower than the equivalent scheme entered into between the Macau SAR and the Mainland, which provides for mutual enforcement of civil and commercial judgments (including labour disputes) as well as judgments for monetary compensation arising from criminal cases.

[22] Article 1 of the Arrangement.

[23] Article 3(1) of the Arrangement.

[24] Discussion Paper of the Legislative Council Panel on the Administration of Justice and Legal Services LC Paper No. CB(2)1202/05-06(02) dated 27 February 2006, para. 11, available at <http://legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0227cb2-1202-2e.pdf> (last accessed 1 May 2014).

[25] See Part IV.A on "trial supervision" system in Mainland China.

[26] Article 2 of the Arrangement.

[27] Article 2 of the Arrangement.

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VIII. Conclusion

Hong Kong is a common law jurisdiction in which foreign judgments can be recognised and enforced. This can be done through two ways, a statutory regime and a common law regime.

The statutory regime, under Chapter 319 of the Laws of Hong Kong, applies to judgments made by courts in a limited number of countries which have reciprocity relationship with Hong Kong. The judgment creditor, as applicant, may have the foreign judgment registered with the Court of First Instance, provided the requirements for registration are satisfied and the judgment, if successfully registered, will have the legal force as a judgment rendered by a Hong Kong court. The judgment debtor may apply to the Court to have the registration of the judgment set aside upon proof that one of the grounds for the setting aside of the foreign judgment has been present.

Under the common law regime, which applies to foreign judgments that are not eligible for the recognition and enforcement under the statutory regime, the judgment creditor should institute a fresh action in the Hong Kong court with the foreign judgment as the cause of action. If the court is satisfied that applicant should be entitled to the relief awarded in the foreign judgment, it will make a judgment of its own to enforce the relief. The recognition and enforcement of foreign judgments under the common law regime does not require reciprocity.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN COMMONWEALTH AFRICAN COUNTRIES

Richard Frimpong OPPONG*

"… it is inimical to the interest of trade and commerce if judgments in foreign countries cannot be readily enforced…".[1]

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I. Introduction

The effectiveness of the judgment of a court is often territorially constrained. The sovereignty of states prevents the judgment of one country from having direct force or effect in the territory of another state. To become effective abroad, a judgment creditor must obtain the approval of a public authority, usually the courts, within the country where enforcement is sought. It is in order to facilitate this process that a regime for the recognition and enforcement of foreign judgments is an essential feature of most legal systems. The existence of such a regime is important for parties to a legal dispute – there is nothing more disconcerting than having a judgment that cannot be enforced.

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[1] *Grosvenor Casinos Ltd v. Ghassan Halaoui* [2009] 10 N.W.L.R. 309 at 338.

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There are two regimes for recognising and enforcing foreign judgments in the Commonwealth African countries under study (hereafter "countries under study").[2] These are the common law and statutory regimes. At present, none of the countries is party to any international or regional treaty on the recognition and enforcement of foreign judgments. There are provisions in some African regional economic integration treaties that could provide the legal basis for concluding such treaties.[3] However, to date, no such treaty has been negotiated.

This paper provides a broad overview of the common law regime for enforcing foreign judgments in the countries under study.[4] It examines the concept of a foreign judgment, the theoretical bases, jurisdictional and other conditions for enforcing foreign judgments, as well as defences of an action to enforce a foreign judgment. It also addresses the issue of foreign currency denominated judgments and limitation of actions.

II. The Concept of a Foreign Judgment

The issue as to what constitutes a "foreign judgment" for the purpose of an enforcement action at common law[5] seldom arises and is almost completely ignored in the leading text on the subject. The question, however, occasionally comes up. It would appear that the common law has not clearly defined where a foreign judgment should emanate from: is it restricted to a judgment from a national court? Does it encompass judgments from non-judicial, quasi-judicial and administrative institutions in a foreign country? What about judgments from regional or international courts?

In *Gathuna v. African Orthodox Church of Kenya*,[6] it was held that a judgment of the Holy Synod of the Apostolic and Patriarchal Throne of Greek

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[2] Cameroon, Mauritius, Mozambique, Rwanda, Seychelles are also part of the Commonwealth; however, they are not examined in this paper. Zimbabwe and the Gambia are not currently members of the Commonwealth but are included in this study. South Africa is part of the Commonwealth but excluded from this study as there is a special report dedicated to it in this Yearbook.

[3] *Revised Treaty establishing the Economic Community of West African States*, 24 July, 1993, 35 ILM 660, Art. 57(1); *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 UNTS I-37437, Art. 126.

[4] This paper does not cover the statutory regimes for enforcing foreign judgments or foreign maintenance orders. On the former see: R.F. OPPONG, *Private International Law in Commonwealth Africa*, Cambridge 2013, p. 353-422. On the latter, see R.F. OPPONG, Recognition and Enforcement of Foreign Maintenance Orders in Commonwealth African Countries, in P. BEAUMONT/ B. HESS/ L. WALKER/ S. SPANCKEN (eds), *The Recovery of Maintenance in the EU and Worldwide,* Oxford 2014 [forthcoming].

[5] The statutory regime for enforcing foreign judgments often defines what constitutes foreign judgment for the purpose of the Act. This will usually be the domestic courts in foreign countries.

[6] [1982] K.L.R. 1, [1982] L.L.R. 1205.

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Orthodox Patriarchate of Alexandria, sitting in Alexandria was not a foreign judgment and was not enforceable as such in Kenya. Until recently, it appears that courts in the countries under study restricted themselves to, or at least were asked to exclusively enforce judgments from foreign national courts. This conception of a foreign judgment is reflected in national legislation. For example, under Kenya's Civil Procedure Act, 1924, a foreign judgment is defined as the "judgment of a foreign court", and a foreign court is defined as "a court situated outside Kenya which has no authority in Kenya".[7]

In recent times, some courts in the countries under study have had to re-evaluate their conception of a foreign judgment. In 2013, the South African Constitutional Court had to decide whether a judgment from a regional tribunal – the Southern African Development Community Tribunal – was a "foreign judgment".[8] Courts in Ghana[9] and Zimbabwe[10] have faced a similar issue arising within the context of whether a national court is bound to enforce a judgment from an international or regional court, and if yes, which legal regime should be used to give effect to the judgment. On the one hand, a judgment from an international or regional court is a "foreign" judgment in the sense that it is given by a court which is not within the national judicial hierarchy of the enforcing forum. On the other hand, compared to a judgment from a foreign national court, an international judgment is unique in many respects, including the fact that it can be characterised as international law. Accordingly, its enforcement raises important questions about the status of international law in a national legal system and how that legal system gives effect to international law.

Indeed, as has been argued elsewhere an attempt to extend the common law regime to international judgments raises many complex questions: What should the relationship between national and international courts be, vertical or horizontal? How would that relationship, for example, affect the defences available in actions to enforce international judgments? To what extent should political considerations be important in such actions, given that enforcing international judgments may carry greater foreign policy implications than the judgments of foreign national courts? Are the principles on sovereign and diplomatic immunity enough to address the political aspects of enforcing international judgments? These, and many more, are difficult and novel questions to which no clear answers currently exist.[11] Furthermore, they are questions which the existing jurisprudence in the countries under study has not addressed.

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[7] Kenya – Civil Procedure Act 1924, s. 1. See also Tanzania – Civil Procedure Code 1966, s. 1; Uganda – Civil Procedure Act 1929, s. 2.

[8] *Government of the Republic of Zimbabwe v. Louis Karel Fick* 2013 (5) S.A. 325.

[9] *Republic v. High Court (Commercial Division) Accra, Ex parte Attorney General, NML Capital and the Republic of Argentina*, Civil Motion No J5/10/2013 (Supreme Court, Ghana, 2013).

[10] *Gramara (Private) Ltd v. Government of the Republic of Zimbabwe*, Case No: X-ref HC 5483/09 (High Court, Zimbabwe, 2010).

[11] For a useful discussion see R.F. OPPONG/ L.C. NIRO, Enforcing Judgments of International Courts in National Courts, *Journal of International Dispute Settlement* 2014, p. 344-371; E. DE WET, The Case of Government of the Republic of Zimbabwe v Louis

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III. Theoretical Basis for Enforcing Foreign Judgments

A court is not bound to enforce a foreign judgment. However, at common law, there has been a longstanding practice of courts enforcing foreign judgments. The theoretical bases for doing this have not been thoroughly discussed in judgments in the countries under study, although there have been passing references to various bases for enforcing foreign judgments. The central question is why courts enforce foreign judgments. A Kenyan court has held that the basic principle upon which foreign judgments are enforced is "reciprocity and the advantage to be gained therefrom".[12] Courts in Malawi, Tanzania, and Zambia have held that foreign judgments are enforceable on the basis of the doctrine of obligation.[13] Other courts have found more pragmatic bases for enforcing foreign judgments by emphasising their role in facilitating international trade and commerce.[14]

The quest for a theoretical basis on which foreign judgments are enforced is not an idle one as such a basis will influence the scope of the judgments that can be enforced. For example, a foreign judgment enforcement regime founded on comity or the need to facilitate international trade and commerce is more amenable to enforcing foreign judgments than one founded on reciprocity.[15] This is evident when one compares the common law regime with the statutory regimes in the countries under study. The latter are mostly founded on reciprocity and only judgments from a few designated countries come within their scope.[16] This is not the case with the common law regime, which is of general application and may be used to enforce a judgment from any country. It is submitted that the use of broad theoretical bases on which foreign judgments are enforced should continue to inform African courts in their approach to foreign judgments. The ultimate goal should be that, while the rights and interests of the judgment-debtor should be

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Karel Fick: A First Step Towards Developing a Doctrine on the Status Of International Judgements within the Domestic Legal Order, *Potchefstroom Electronic Law Journal* 2014, p. 9.

[12] *Italframe Ltd v. Mediterranean Shipping Company* [1986] K.L.R. 54 at 62. This observation was made in the context of an application to register a foreign judgment under the Foreign Judgment (Reciprocal Enforcement) Act 1984.

[13] *Heyns v. Demetriou*, Civil Cause No. of 2001 (High Court, Malawi, 2001) ("the power depends not on comity or reciprocity but on the defendant's duty to the court of the judgment and the contract"); *Willow Investment v. Mbomba Ntumba* [1996] T.L.R. 377; *Mileta Pakou v. Rudnap Zambia Ltd* (1998) Z.R. 233.

[14] *Barclays Bank of Swaziland v. Koch* 1997 B.L.R. 1294 at 1297; *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v. Horsch* 1992 N.R. 313, 1993 (2) S.A. 342.

[15] The term reciprocity is sometimes ambiguous. It could be a reference to the fact that both countries have the same bases of jurisdiction (jurisdictional reciprocity), or that both countries would in fact enforce each other's judgment, or have in fact done so in the past.

[16] R.F. Oppong, *Private International Law in Commonwealth Africa* (note 4), at 387-388.

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protected (*e.g.* through defences), rights legitimately created by foreign courts of competent jurisdiction in favour of a judgment-creditor should not be lightly defeated by constraining private international law rules, such as by limiting the bases of international competence[17] or (as discussed below) restricting enforceable judgments solely to monetary judgments.

In the countries under study, a foreign judgment constitutes a debt.[18] The judgment-debtor's liability stems from an implied promise to pay the amount of the foreign judgment.[19] The issue of whether that debt is due and payable is to be determined by the law of the place where the judgment was given.[20] A judgment creditor cannot go into direct execution in the territory of another sovereign and independent state. They can only do that after the judgment has been recognised by a court in that state. Moreover, a foreign judgment is enforceable through an action on the judgment. In Botswana, Lesotho, Namibia, Swaziland and Zimbabwe a foreign judgment may be enforced through provisional sentence summons under which the foreign judgment is treated as a liquid document.[21] In Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia, the judgment creditor has to bring an action of debt on the foreign judgment, with the foreign judgment as evidence of the debt. A foreign judgment creates a new cause of action on which the judgment creditor is entitled to sue. However, in Kenya and Tanzania, no new cause of action arises in an action on a foreign judgment.[22]

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[17] *Grosvenor Casinos Ltd v. Ghassan Halaoui* [2009] 10 N.W.L.R. 309 at 338.

[18] Once it satisfies national laws on the admissibility of foreign evidence, such as laws relating to translation and authentication, a foreign judgment is treated as adequate proof of the existence of the debt. See *T Schouten's Imports (Pty) Ltd v. Wintercom Botswana (Pty) Ltd* 1984 B.L.R 111.

[19] *National Milling Co. Ltd v. Mohamed* 1966 R.L.R. 279, 1966 (3) S.A. 22. *DTH Jethwa v. Mulji Bhanji* [1939] 6 E.A.C.A. 28 at 33; *Heyns v. Demetriou*, Civil Cause No. of 2001 (High Court, Malawi, 2001); *Willow Investment v. Mbomba Ntumba* [1996] T.L.R. 377; *Wide Seas Shipping Ltd v. Wale Sea Foods Ltd* [1983] 1 F.N.L.R. 530.

[20] *Premier Woodworking (Rhodesia) Ltd v. Hultman* 1960 R. & N. 275, 1960 (3) S.A. 174.

[21] Provisional sentence has been characterised by courts as an "extra-ordinary remedy". Accordingly, they have emphasised the need for strict compliance with procedure. *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v. Horsch* 1992 N.R. 313, 1993 (2) S.A. 342; *Barclays Bank of Swaziland v. Koch* 1997 B.L.R. 1294. A provisional sentence may also be appealed. *Jordaan v. Dijkhof*, Case No. 9967/2003 (High Court, South Africa, 2004). Foreign judgments can also be enforced by action or an application on notice of motion. See *Cosmopolitan National Bank of Chicago v. Steinberg* 1973 (4) S.A. 579.

[22] Kenya – Limitations of Actions Act 1967, s. 40(2); Tanzania – Law of Limitations Act 1971, s. 42(2). It is worth recalling here that section 40(1) of Kenya's Limitations of Actions Act 1967 and section 42(1) of Tanzania's Law of Limitations Act 1971 provide that where a foreign law bars either the right or the remedy in respect of a cause of action arising outside Kenya/Tanzania which is sued upon a Kenya/Tanzania court, the action is barred. It appears the provision that no new cause of action arises on a foreign judgement in an action in Kenya or Tanzania is meant to prevent it being argued that a cause of action arises in Kenya/Tanzania so as to circumvent a foreign rule preventing the late execution of a judgment.

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The characterisation of foreign judgment as debt has a constraining effect on the type of judgments that are enforceable.[23] Such a characterisation excludes from the scope of foreign judgment enforcement regimes any non-money judgments. It is inappropriate or fictitious to characterise an injunction, Anton Pillar order, or a judgment compelling a person to transfer assets to another person as a "debt". It is submitted that the characterisation of a foreign judgment as debt is an inappropriate legal fiction; a foreign judgment should be treated for what it is - a judgment. Abandoning this fiction would not prevent countries from instituting special regimes for enforcing foreign judgments or imposing additional requirements (beyond what is needed for domestic judgments) before enforcing foreign judgments. It would however give much needed certainty to issues such as the limitation period applicable in an action to enforce a foreign judgment.

IV. Jurisdiction to Enforce Foreign Judgments

As with any claim involving a foreign element, a court must have jurisdiction to adjudicate an action to enforce a foreign judgment. A person who seeks to enforce a foreign judgment must satisfy the enforcing court's rules on jurisdiction in international matters. In many instances, this requirement would not be difficult to meet – the defendant may have assets or may be present or resident within the jurisdiction. To varying degrees, in the countries under study, these are accepted bases of jurisdiction in international matters.[24] In Botswana, Lesotho, Namibia, Swaziland, and Zimbabwe, assets within the jurisdiction could be attached to found or confirm jurisdiction. In Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia, submission, residence and arguably, the presence of a defendant in the country are bases of jurisdiction.

In a few cases, the jurisdiction to adjudicate an action to enforce foreign judgments has been contested.[25] The need to meet this jurisdictional requirement can become particularly difficult for *peregrinus* plaintiffs in an action brought in Botswana, Lesotho, Namibia and Swaziland if the defendant, the judgment-debtor, is also a *peregrinus*. In these countries, where there is an action between two *peregrines*, unless there is a local *ratio jurisdictionis* (which is unlikely in the context of foreign judgments), the attachment of the defendant's assets to found jurisdiction is not legally permissible. Accordingly, the court will not have jurisdiction to enforce the foreign judgment. In other words, in a foreign judgment enforcement action between two *peregrines*, the mere fact that the judgment debtor has assets in the jurisdiction – the very object of the plaintiff's action – may not be

[23] It also has implications for the limitation period within which an action may be brought to enforce the judgment.

[24] R.F. Oppong, *Private International Law in Commonwealth Africa* (note 4), at 47-90.

[25] Special jurisdictional problems arise in the context of actions to enforce foreign judgments against states. On this, see R.F. Oppong, *Private International Law in Commonwealth Africa* (note 4), at 112-126 and 347-351.

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enough to give the court jurisdiction to hear the action. Furthermore, except in Botswana,[26] unless there is a local *ratio jurisdictionis* in an action between two *peregrines,* submission by the defendant – which, in any case, is unlikely in an action to enforce a foreign judgment against him or her – is not enough to give jurisdiction to courts in Namibia[27] and, perhaps, in Lesotho and Swaziland. As a Botswana court has ominously observed, "the time of the court should not be taken up with disputes, having nothing to do with Botswana, between persons neither domiciled nor resident here".[28]

This state of the law in Botswana, Lesotho, Namibia and Swaziland is inappropriate and deserves reform. A second look should be taken at the existing law – at least from the perspective of an action to enforce a foreign judgment, which by its nature is often founded on a cause of action unrelated to the country in which enforcement is sought. The foreign judgment creates a debt obligation and an action founded on that obligation is often unrelated to anything done in the enforcing forum. The focus of an action to enforce a foreign judgment is the judgment debtor's assets; the fact that the presence of such assets is not enough to give courts in these countries jurisdiction to hear the action is difficult to accept. As Forsyth has perceptively observed, "no country should be a haven for recalcitrant debtors adjudged as such by a court of competent jurisdiction, even if they and their creditors are peregrines".[29] The state of the law in Botswana, Lesotho, Namibia and Swaziland leaves room for such a haven to exist.

In Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia, where a defendant is neither present nor resident in the jurisdiction, nor prepared to submit to the jurisdiction, the only means to enable the court to assume jurisdiction is through the service of a claim form or writ on the defendant abroad. Service out of the jurisdiction is only permitted on statutorily defined grounds. At present, there is some uncertainty as to whether the service of a writ or claim form outside the jurisdiction may be allowed in an action to enforce a foreign judgment. The need for service out of the jurisdiction would be important in cases where the judgment debtor has assets within the jurisdiction (if the judgment creditor expects assets of the debtor to come within the jurisdiction), but he or she is neither resident in the jurisdiction, nor prepared to submit to it. This is because in these countries, the foundation of jurisdiction is service.[30] At present,

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[26] *MAK (Pty) Ltd v. St Paul Insurance Co. SA Ltd* 2007 (1) B.L.R. 210.

[27] *Argos Fishing Co. Ltd v. Friopesca SA* 1991 N.R. 106 at 111-112, 1991 (3) S.A. 255 at 260-261.

[28] *Pretorius v. Sweiger II* 1979-1980 B.L.R. 129 at 130. See also *Willow Investment v. Ntumba* [1997] T.L.R. 47 at 49 where, in an action to review an order enforcing a Zairian judgment, the court observed: "surely the High Court of Tanzania cannot be and should not be an international judicial tribunal to which foreign litigants, all and sundry, can resort to".

[29] C. FORSYTH, *Private International Law – the Modern Roman Dutch Law including the Jurisdiction of the High Courts*, Lansdowne 2012, p. 474.

[30] For a discussion of the difference between the approach of the common law and Roman-Dutch law countries to this issue, see R.F. OPPONG, Roman-Dutch Law meets the Common Law on Jurisdiction in International Matters, *Journal of Private International Law* 2008, p. 311-327.

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there is no specific statutory ground for allowing the service of a writ or claim form outside the jurisdiction on the basis of an action to enforce a foreign judgment. In other words, in Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia, the mere presence of assets in the jurisdiction does not afford jurisdiction to the courts to grant leave to serve a writ or claim form outside the jurisdiction.

In a recent Ghanaian case,[31] foreign creditors from Argentina sought to enforce a judgment of a US court in Ghana when the Argentine vessel *ARA Libertad* docked in Ghana. The High Court of Ghana allowed the writ to be served on the defendant abroad on the basis of a broad interpretation of a provision in the underlying agreement in which Argentina appears to have submitted to the jurisdiction of courts where the enforcement of a judgment founded on the agreement is sought.[32] The case suggests that, in the absence of an express statutory basis to allow service out in an action to enforce a foreign judgment, it would be enough if the circumstances of the claim allow the judgment creditor to come within one of the already enacted statutory grounds for service out. This situation is, however, not ideal. It is submitted that Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia should consider amending their service out laws to include a provision dealing with an action to enforce a foreign judgment.[33]

If a judgment-creditor is unable to meet the jurisdictional requirement, he or she could, arguably, bring a new action on the original cause of action. Indeed, even where the jurisdiction requirement could be met, the judgment creditor may choose to ignore the foreign judgment and bring a fresh action on the original cause of action. This prospect is founded on the common law principle that a foreign judgment does not merge with the original cause of action. In some of the countries under study, there are *dicta* suggesting that a foreign judgment does not merge with the original cause of action. It is implicit in those *dicta* that the judgment creditor retains the right to sue on their original cause of action. For example, in *Mileta Pakou v. Rudnap Zambia Ltd* it was observed: "in any event a foreign judgment constitutes a simple contract debt only and does not merge with the original cause of action. [Where such a judgment is not recognised, the judgment-creditor] will have to sue on their original cause of action, if so minded".[34] In such

[31] *NML Capital v. Republic of Argentina*, Suit No. RPC/343/12 (High Court, Ghana, 2012) (Unreported). Although the Supreme Court subsequently reversed the High Court decision, the Court did not expressly suggest that in appropriate cases, the presence of a jurisdiction agreement may serve as a basis for service out in the context of an action to enforce a foreign judgment. See *Republic v. High Court (Commercial Division) Accra, Ex parte Attorney General, NML Capital and the Republic of Argentina*, Civil Motion No J5/10/2013 (Supreme Court, Ghana, 2013).

[32] Under Ghanaian law, the court may allow service out of the jurisdiction if an action begun by writ pertains to a contract which contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract.

[33] See, *e.g.*, United Kingdom – Civil Procedure Rules, para. 3.1(10) of Practice Direction 6B; *Tasarruf Mevduati Sigorta Fonu v. Demirel* [2007] 1 W.L.R. 2508, [2007] 4 All E.R. 1014.

[34] *Mileta Pakou v. Rudnap Zambia Ltd* (1998) Z.R. 233 at 236. See also *Willow Investment v. Mbomba Ntumba* [1996] T.L.R. 377 at 380; *Steinberg v. Cosmopolitan*

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an action on the original cause of action, the jurisdiction of the domestic court must, however, be established. In addition, there may be questions of estoppel and limitation of action that could undermine the viability of bringing a fresh action.

It is worth pointing out that if a party to the foreign action merely seeks recognition of the judgment, it is unlikely that these jurisdictional requirements will pose a problem. This is because very often in such cases, jurisdiction will have been established for an underlying cause of action in which recognition of the foreign judgment – *e.g.* for the purpose of issuing estoppel - is only incidental.

V. Conditions for Enforcing Foreign Judgments

A judgment creditor's ability to establish the jurisdiction of the enforcing court for the purpose of enforcing a foreign judgment is not enough to enable him or her to secure enforcement of the judgment. In addition to this, in the countries under study, it must be established that the foreign court was internationally competent, that the judgment is for a fixed sum of money, and that it is final and conclusive. It is only when these three conditions are satisfied that, where the judgment debtor is unable to provide a defence, the court will enforce the judgment.

A. International Competence

The principle that a foreign court should be internationally competent before its judgment is enforced appears well entrenched in the countries under study.[35] The foreign court's international competence is assessed from the perspective of the private international law rules of the enforcing court. Currently, residence (arguably, presence) and submission are accepted bases of international competence.[36] In other words, jurisdiction founded on one of these bases will satisfy the requirement of international competence and take the judgment creditor a step closer to securing the enforcement of their judgment.

National Bank of Chicago 1973 (4) S.A. 564 at 577; But see also *Gabelsberger v. Babl* 1994 (2) S.A. 677 at 679 where it was observed that, where an internationally competent foreign court gives judgment, "the matter is res judicata and the debt has been novated by [the foreign] judgment".

[35] R.F. OPPONG, *Private International Law in Commonwealth Africa* (note 4), at 322-326.

[36] Some courts, citing the English case of *Emanuel v. Symon* [1908] 1 K.B. 302 have observed obiter that "being a subject of the foreign country" is a basis of international competence. Given that this basis is uncertain in English law, it remains to be seen whether, when it comes up for decision, it will be accepted. See, *e.g.*, *John Holt & Co. Ltd v. Christoph Nutsugah* (1929-1931) Div. Ct. 75 at 76; *Heyns v. Demetriou*, Civil Cause No. of 2001 (High Court, Malawi, 2001). See also *Transvaal Lewendehawe Kooperasie Bpk. v. Van Wyk* [1984-1987] 4 B.S.C. 228 at 230 ("this court probably would not recognise a foreign judgment based on a nationality principle").

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Submission can be express, such as through a jurisdiction agreement, or inferred from conduct. Appearing to defend a case on its merits and appealing a trial court's decision have been held as equivalent to submission. An aspect of submission that is not immediately evident from decided cases is whether there are specific acts that do not amount to submission. Particularly noteworthy in this regard is post-judgment conduct, which, in Uganda, has been held not to constitute submission to the jurisdiction of a foreign court.[37] The issue here is the extent to which conduct after the issuing of a foreign judgment (*e.g.* appealing the judgment or applying for a stay of execution) can amount to submission to the jurisdiction of the foreign court. The position taken by the Ugandan court appears reasonable and sound as a matter of principle: jurisdiction must exist at the time the judgment is given; it cannot be conferred thereafter. In general, the cases reveal that the assessment of whether a judgment-debtor has submitted to the jurisdiction of a foreign court is a highly factual inquiry. The courts take into account all relevant facts before coming to a decision. This is especially so when it is alleged that the judgment debtor submitted to the jurisdiction of the foreign court through his or her conduct.

It is open to questioning whether the existing recognised bases of international competence – presence, residence and submission – are adequate for the current international climate of increased international trade, movement of persons and transnational relationships. Comparatively, Canadian courts have experimented with another basis for international competence, namely real and substantial connection.[38] This basis requires that a significant connection exist between the cause of action and the foreign court. Such a connection could include the fact that the cause of action arose within, or the contract was performed within the jurisdiction of the foreign court, or that the subject matter of the dispute (*e.g.* property) was located in the foreign country. There is certainly the need for the courts to broaden the scope of the recognised bases of international competence. An expansion of such bases would bring within the scope of a judgment enforcement regime many more foreign judgments, and increase their prospects for enforcement.

In addition to real and substantial connection, an alternative way to broaden the bases for international competence is to adopt a test of jurisdictional equivalence. This test would allow the enforcement of a foreign judgment if the foreign court assumed jurisdiction on a basis similar to that which the enforcing court would have done, given the same facts. In other words, if given the same sets of facts, the enforcing court would have assumed jurisdiction, then it should recognise the jurisdiction of the foreign court.[39] The jurisdictional equivalence test can bridge

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[37] *Transroad Ltd v. Bank of Uganda* [1998] U.G.A. J. No. 12, [1998] Kam. LR 106

[38] *Morguard Investments Ltd v. De Savoye* [1990] 3 S.C.R. 1077; *Beals v. Saldanha* [2003] 3 S.C.R. 416, *Club Resorts Ltd v. Van Breda* 2012 S.C.C. 17. See generally, J. BLOM/ E. EDINGER, The Chimera of the Real and Substantial Connection Test, *University of British Columbia Law Review* 2005, p. 373. It appears this Canadian approach has not yet been adopted in case law in any other common law jurisdiction. See D. KENNY, *Re Flightlease*: The "Real and Substantial Connection" Test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland, *I.C.L.Q.* 2014, p.197-212.

[39] This is not the same as reciprocity, which requires proof that the foreign court would enforce a judgment from the enforcing court.

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the gap which currently exists between the rules on jurisdiction in international matters and those on international competence. Currently, under the laws of the countries under study, there are so many situations in which a court would assume jurisdiction, but would not recognise as internationally competent a similar assumption of jurisdiction by a foreign court. In this regard, the grounds for allowing for service out of the jurisdiction are, perhaps, the best place to look. Some cases have touched on or hinted at this possibility of accepting jurisdictional equivalence.[40] Indeed, the statutory regimes for enforcing foreign judgment in some of the countries under study recognise jurisdictional equivalence.[41] That being said, at present, the position remains that in the countries under study, the bases of international competence are not coterminous with the bases of jurisdiction in international matters.

An interesting issue raised in a couple of cases is the extent to which public policy or substantive considerations are material in determining whether a foreign court was internationally competent. At present, the existing bases of international competence look for factual relationships, which can sometimes be defeated by the conduct of defendants, such as when he or she flees the jurisdiction to avoid assertion of jurisdiction on the basis of residence. Whether public policy should look unkindly on such conduct is controversial. In two cases, it was held that a person who changed his domicile and residence with evasive intent would not be allowed to rely on his absence from the foreign country to deprive the courts there of international competence.[42]

Introducing public policy or substantive considerations into the assessment of international competence could have either a constraining or expansive effect. However, it is recommended that such an approach should not be followed. It is likely to introduce a high level of uncertainty into decisions on international competence. There is room for considering public policy or substantive considerations in an action to enforce a foreign judgment. However, it is submitted that the determination of whether the foreign court is internationally competent should not be the forum for that pursuit. The determination of international competence should be a mainly factual inquiry limited to ascertaining the connections between the foreign court, the parties and where appropriate, the cause of action.

Where the competence of the foreign court is disputed, the issue of who bears the burden of proof becomes important. In Tanzania and Uganda, it appears the burden falls on the defendant, the judgment debtor. This is because there is a rebuttable statutory presumption that a foreign court is internationally competent when a certified copy of its judgment is produced.[43] In the other countries under

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[40] *Supercat Incorporated v. Two Oceans Marine CC* 2001 (4) S.A. 27; *Grauman v. Pers* 1970 (1) R.L.R. 130.

[41] R.F. OPPONG, *Private International Law in Commonwealth Africa* (note 4), at 390.

[42] *Steinberg v. Cosmopolitan National Bank of Chicago* 1973 (4) S.A. 564; *Chinatex Oriental Trading Co. v. Erskine* 1998 (4) S.A. 1087 at 1095. The appellate court in *Erskine v. Chinatex Oriental Trading Co.* 2001 (1) S.A. 817 reversed the trial court's decision but did not comment on this issue.

[43] Tanzania – Civil Procedure Code 1966, s.12; Uganda – Civil Procedure Act 1929, s. 10.

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study, it is likely the legal burden will fall on the judgment creditor, based on the principle *ei incumbit probatio qui dicit, non qui negat* – the burden of the proof lies upon him who affirms, not he who denies.

B. Fixed Sum Judgments

There is no direct authority in the countries under study for the proposition that a foreign judgment must be for a fixed sum of money before it is enforced (hereafter judgment-for-a-fixed-sum principle). Indeed, this issue is not discussed as a separate requirement in some recent academic commentaries on the regimes in Botswana, Lesotho, Namibia, Swaziland and Zimbabwe. However, in these countries, such a requirement appears implicit in the procedure for enforcing foreign judgments through provisional sentence summons,[44] which are proceedings on liquid documents. Comparatively, apart from Kenya, all the statutory regimes for enforcing foreign judgments in the countries under study are restricted to money judgments. This may be taken as a reflection of the law in respect of the common law regime because, to a large extent, the statutory regimes codify the common law.

The only significant judicial decision on the issue appears in *Gramara (Private) Ltd v. Government of the Republic of Zimbabwe*,[45] which was an action to enforce a judgment of the now defunct, Southern African Development Community Tribunal – a regional court. It was contended that aspects of the Tribunal's judgment entailed administrative consequences and were not for the payment of a fixed sum of money.[46] The Zimbabwean High Court held that it would be "contrary to principle to restrict the scope of recognition proceedings by reference to the specific remedies enjoined by a given foreign judgment". In other words, the mere fact that a judgment did not entail the payment of money should not automatically lead a court to dismiss an application to enforce it. Whether this principle is restricted to enforcing judgments from regional courts, or extends to judgments from foreign national courts, remains to be decided.

The judgment-for-a-fixed-sum principle is open to criticism. It takes a narrow view of the different remedies that courts provide. A foreign judgment might require the payment of money, but it might also demand the performance of an action, such as the transfer of shares, delivery of property, or specific performance of a contract. Rights accruing from such judicial remedies are equally

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[44] See *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v. Horsch* 1992 N.R. 313, 1993 (2) S.A. 342 where provisional sentence was described as an "extraordinary remedy" that allows the judgment-creditor to obtain a provisional judgment speedily, and without resorting to the more expensive and dilatory machinery of an illiquid action.

[45] *Gramara (Private) Ltd v. Government of the Republic of Zimbabwe*, X-ref. HC 5483/09 (High Court, Zimbabwe, 2010).

[46] The Respondent was directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the Applicants' land, and to take all appropriate measures to ensure that no action is taken, whether directly or indirectly, by its agents or by others, to evict from or interfere with peaceful residence on the Applicants' farms.

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worthy of legal protection beyond the territorial jurisdiction of the court that ordered them. Indeed, the judgment-for-a-fixed-sum principle excludes from the scope of foreign judgment enforcement some remedies that have become very important in international commercial litigation, such as Anton Piller orders, anti-suit injunctions and worldwide Mareva injunctions.

As is the case with the bases of international competence, comparatively, some countries have recognised the restrictive nature of the judgment-for-a-fixed-sum principle and have reformed it either through legislation,[47] or through case law. Following the lead of the Supreme Court of Canada in the *Pro Swing Inc. v. Elta Golf Inc.*,[48] where the court was unanimous that the principle should be changed, courts in Jersey and Cayman Islands have abandoned it.[49] In *Pro Swing*, the court noted that a change in the judgment-for-fixed-sum principle required caution and should be carried out incrementally. It should also be accompanied by judicial discretion that enables enforcing courts to consider relevant factors, so as to ensure that the structure and integrity of their legal system are not disturbed by the enforcement of non-money judgments. To the Supreme Court of Canada, the conditions for the recognition and enforcement of non-money judgments were as follows: The judgment must be rendered by a court of competent jurisdiction, it must be final, and it must be of such a nature that the principle of comity requires the domestic court to enforce it.[50]

It is recommended that future reforms of the common law regime in the countries under study should take these developments into account. The judgment-for-fixed-sum principle is derived from technicalities of the English legal system. The principle is the product of the archaic rule that the proper action on a foreign judgment is an action *indebtatus assumpsit*. There is no reason why African courts should not be free to enforce a wider range of foreign judgments, such as orders for specific performance, injunctions and account.

C. Finality of Foreign Judgments

It makes practical sense that courts enforce only foreign judgments that are final and conclusive. The public policy of ensuring that there is an end to litigation would be undermined if a foreign judgment enforced in one state is subsequently

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[47] See, *e.g.*, New Zealand – Reciprocal Enforcement of Judgments Act 1934, s. 3B; Australia – Foreign Judgments Act 1991, s. 5(6); M. DAVIES/ A.S. BELL/ P.L.G. BRERETON, *Nygh's Conflict of Laws in Australia*, Australia 2010, p. 820-821.

[48] [2007] 273 D.L.R. (4th) 663.

[49] *Brunei Investment Agency v. Fidelis Nominees Ltd* [2008] Jersey Law Reports 337; *Miller v. Gianne* [2007] Cayman Islands Law Reports 18. See also *Davis v. Turning Properties Pty Ltd* [2006 b] 222 A.L.R. 267; *Pattni v. Ali* [2006] U.K.P.C. 51 at [27].

[50] *Pro Swing Inc. v. Elta Golf Inc.* [2007] 273 D.L.R. (4th) 663 at [31], [88]–[99]. See generally R.F. OPPONG, Enforcing Foreign Non-Money Judgments: An Examination of some recent Developments in Canada and Beyond, *University of British Columbia Law Review* 2005, p. 257; R.F. OPPONG, Canadian Courts Enforce Foreign Non-Money Judgments, *Modern Law Review* 2007, p. 670.

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re-opened – and perhaps, even over-turned – in the courts of the country where it was given. Enforcing only final and conclusive judgments also ensures that judicial resources are not wasted on judgments that are subsequently varied or modified abroad.

However, what constitutes a final and conclusive judgment is a matter of some debate. In general, a final judgment is one that is unalterable by the court that pronounced it. It may be argued that this status is not achievable by any judgment: there always remains the possibility, even if very remote, that a judgment can be altered – for example, upon the discovery of new evidence. Such a theoretical possibility should, however, not be allowed to defeat reality and the need for justice. This has been recognised by the courts. Even though there appears to be no direct authority on it, it is obvious from the decided cases that whether a foreign judgment is final or not is to be determined by the law of the foreign country. Finality is, however, assessed from the perspective of the court that pronounced the judgment and not from the perspective of the entire foreign legal system. Accordingly, the fact that the judgment may be set aside on appeal or varied by a higher court in the foreign country's legal system does not prevent the judgment from being final and conclusive.[51] In other words, the test for finality is whether the judgment is *res judicata* as to the issues between the parties to the litigation in respect of the court that granted the judgment. If the issues or judgment may be re-opened, varied, modified or otherwise dealt with by that court then the judgment is not final and conclusive.

Aside from the need to offer the defendant a hearing (a violation of this requirement affords the defendant a defence), courts in the countries under study have not prescribed that foreign courts should follow particular procedures in reaching their judgment. However, it is recommended that courts should be slow to enforce foreign judgments which have not been given on the merits of the parties' claim. Indeed, in Kenya, Tanzania and Uganda, statute obliges the courts to recognise only judgments given "on the merits of the case".[52] It has been held that a judgment is to be regarded as on the merits of the case if the matter of controversy between the parties is "the subject of direct adjudication".[53]

Default judgments pose a particular problem in terms of finality. In some countries, a defendant against whom a default judgment has been granted is entitled, either automatically or with leave of the court (often within a defined period) to apply for it to be set aside. There has been discussion in some cases whether default judgments are final. In the Namibian case of *Argos Fishing Co. Ltd v. Friopesca,*[54] it was held that an English default judgment which was amenable to being set aside by the English court, lacked finality. It is recommended that, on this subject, no rigid rules should be laid down. A common-sense approach is preferable. Accordingly, where the defendant has not demonstrated a genuine

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[51] This may, however, serve as a basis for the court to stay proceedings pending the determination of the foreign court.

[52] Kenya – Civil Procedure Act 1924, s. 9 (b); Tanzania – Civil Procedure Code 1966, s. 11 (b); Uganda – Civil Procedure Act 1929, s. 9 (b).

[53] *Singh v. Singh* [1936-1937] 17 K.L.R. 82 at 83.

[54] *Argos Fishing Co. Ltd v. Friopesca* SA 1991 N.R. 106, 1991 (3) S.A. 255.

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desire to apply for the judgment to be set aside, or where there is no defined period within which to apply for the default judgment to be set aside, it would be against the interests of justice not to enforce such a default judgment as final. It should not be open to the enforcing court to investigate whether an application to set aside a default judgment is likely to succeed, but the defence of breach of natural justice may be raised in an action to enforce a default judgment.

VI. Conclusiveness and the r*es judicata* Effect of Foreign Judgments

In addition to enforcing a foreign judgment, a party can plead the judgment as *res judicata*. Such a plea may relate to either the cause of action as a whole or a specific issue decided by the foreign court. In both instances, the argument would be that the foreign court has already determined the cause of action or issue and that the other party should be prevented (estopped) from re-litigating it.

It is a fundamental principle accepted in the countries under study that a plea of *res judicata* could be founded on a judgment pronounced by a foreign court of competent jurisdiction. However, there appears to be a degree of uncertainty as to which law determines the competency of the foreign court. As discussed above, it is well accepted in the countries under study that, in an action to enforce a foreign judgment, the enforcing court determines the competence of the foreign court under the former's private international law. The question that arises here is whether a different rule applies when a foreign judgment is pleaded as *res judicata* or when only recognition is sought. In Tanzania and Uganda, a court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that a court of competent jurisdiction has pronounced the judgment, unless the contrary appears on the record. Proving "want of jurisdiction" displaces this presumption; in other words, it is a rebuttable presumption.[55] It is unclear from the legislation whether "want of jurisdiction" should be determined from the perspective of the private international law of Tanzania and Uganda, or from that of the foreign country. One may argue that the structure of the statutory provisions appears to suggest that the jurisdiction of the foreign court should be determined from the perspective of the laws of the foreign country.

It is submitted that it is unsound to allow the internal competence of a foreign court to suffice on a plea of *res judicata* or in applications that merely seek recognition of a foreign judgment. As a matter of principle, such a position is inconsistent with the principle that, in an action to enforce a foreign judgment, the competence of the foreign court must be determined under the enforcing court's private international law. Neither does such a position afford equality of protection to the disputing parties. The bases of international competence are very limited –

[55] Tanzania – Civil Procedure Code 1966, s. 12; Uganda – Civil Procedure Act 1929, s. 10. A similar provision in Kenya's Civil Procedure Act was repealed by the Evidence Act 1963.

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there is often asymmetry between the bases of international competence and the bases of jurisdiction in international matters. For example, while at common law only residence, presence and submission suffice as bases of international competence, many more bases of jurisdiction in international matters exist. Admittedly, in instances where the foreign judgment is pleaded as a defence, the domestic plaintiff will normally have been the plaintiff in the foreign proceedings, albeit unsuccessfully. His or her submission (through instituting the foreign action) is, in the countries under study, a basis of international competence. It is in cases outside the scope of this example where the asymmetry of jurisdictional bases becomes truly material. A party that seeks to rely on a foreign judgment as *res judicata,* or that purely seeks recognition of the foreign judgment, should not be in a better position than the one who seeks to enforce it: there should be equality of treatment. In essence, a person who raises the plea of *res judicata,* or who only seeks recognition and one who wants to enforce a foreign judgment have the same thing in mind: both want to give effect to the foreign judgment. The effect of recognising a foreign judgment can be as important to the parties as enforcing it.

In a recent discussion of the subject, the Supreme Court of Ghana held that the requirements to be met before issue estoppel can be applied in Ghana and are as follows: the foreign court must be a court of competent jurisdiction; its decision must have been final and conclusive; the decision must have been on the merits; the parties to the Ghanaian and foreign litigation should be the same, or their privies, and, finally, the issue concerned must be the same and must have been necessary for the decision of the foreign court.[56] In the instant case, although the court noted the basis on which the English court had assumed jurisdiction – Argentina as defendant in the English action was served out of the jurisdiction – it did not assess whether that basis of jurisdiction was appropriate from the perspective of Ghanaian private international law. From this one may argue that where a plea of *res judicata* is founded on a foreign judgment, the competence of the foreign court will not necessarily be assessed from the perspective of the recognising court's rules of international competence. In the instant case, application of the Ghanaian rules on international competence would have prevented recognition of the judgment because service out of the jurisdiction is not a basis of international competence.

A foreign judgment that is final and which has been granted by a competent court is treated as conclusive. An instance of giving conclusive effect to foreign judgments is the principle that the enforcing court will not review the merits of the judgment. The enforcing court will neither examine the evidence upon which the foreign court has founded its judgment, nor re-assess its findings on the evidence.

However, to determine whether the foreign court was competent, the enforcing court may have to examine issues or evidence which the foreign court may also have examined. In such an instance, the enforcing court is not bound by the decision of the foreign court. Thus, a Zimbabwean court has observed, "there is ample authority that, in proceedings to enforce a foreign judgment, the defendant cannot attack the judgment on its merits. On the other hand, it would seem right in

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[56] *Republic v. High Court (Commercial Division) Accra, ex parte Attorney General and NML Capital Ltd*, Civil Motion No. J5/10/2013 (Supreme Court, Ghana, 2013).

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principle that the court which is called upon to enforce the foreign judgment should be entitled to determine for itself whether the facts upon which the jurisdiction of the foreign court is purported to be based really existed".[57] Jurisdiction is fundamental to the legitimacy of a judicial decision. Ensuring that the facts upon which it is claimed that jurisdiction is founded exist is an important and appropriate undertaking in an action seeking the recognition and enforcement of a foreign judgment. An enforcing court is not expected to merely rubber stamp the foreign judgment. To compel a judgment debtor to discharge obligations imposed by the judgment, it is appropriate that the enforcing court is satisfied that the foreign court has founded its jurisdiction to hear the claim on an appropriate basis. This should not be based solely on the terms of the foreign court or the law of the foreign country. That being said, courts have to be cautious because, in some instances, the facts upon which jurisdiction is founded may be intimately connected with the merits of the dispute. There is thus the risk of going into the merits in the process of ascertaining the jurisdiction of the foreign court.

VII. Defences against the Recognition and Enforcement of Foreign Judgments

It is open to a defendant to raise defences in an action for the recognition and enforcement of a foreign judgment. The courts have not placed a lid or cap on the grounds upon which such defences may be founded. In some countries, statute provides grounds – often imbued with nationalistic or protectionist undertones – which are not necessarily available in other countries. For example, in Kenya, Tanzania and Uganda, a foreign judgment would be denied recognition if the foreign court refused to recognise Kenyan, Tanzanian or Ugandan law as the applicable law, or the judgment was founded on an incorrect view of international law.[58] These two defences do not exist in the other countries under study.

In general, refusing to recognise an enforcing country's law as the applicable law may constitute a violation of its public policy, especially in instances where that law is considered mandatory in the country. For example, a foreign court's refusal to apply Tanzanian law to a contract which the parties have agreed should be governed by Tanzanian law may result in a decision considered inconsistent with Tanzania's public policy. Under the Kenyan, Tanzanian and Ugandan statutes, it is unclear whether the applicable law is determinable by the private international law of the country of the foreign court, or that of the enforcing country, *i.e.* Kenya, Tanzania or Uganda. In other words, should the decision whether Tanzania law governs a contract be made under the foreign country or Tanzania's

[57] *Coluflandres Ltd v. Scandia Industrial Products Ltd* 1969 (2) R.L.R. 431 at 443, 1969 (3) S.A. 551 at 560; *Maschinen Frommer GmbH v. Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) S.A. 69.

[58] Kenya: Civil Procedure Act 1924 s. 9(c); Tanzania: Civil Procedure Code 1966 s. 11(c); Uganda: Civil Procedure Act 1929 s 9(c).

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private international law rules? It is submitted that it should be determined under the foreign country's private international laws. The alternative approach would amount to nothing less than re-trying the case. The alternative approach would also require the foreign court's choice of law rules to coincide with Kenya, Tanzania or Uganda's. Although the international harmonisation of choice of law rules is a laudable objective, this is certainly not a legitimate way to pursue it. Indeed, it is submitted that this ground for not recognising foreign judgments is too broad and should be repealed. Appropriate cases could be dealt with under the public policy defence.

Refusing to recognise a foreign judgment on the basis that it is founded on an incorrect view of international law constitutes another difficult ground. It is unclear which type of international law this ground refers to – international law may be in the form of treaties, customary international law or general principles of law. Can a Kenyan, Tanzanian or Ugandan court refuse to recognise a foreign judgment on the basis that it is founded on an incorrect view of a treaty to which Kenya, Tanzania or Uganda is not party? Can a foreign judgment inconsistent with a provision in the African Charter on Human and Peoples' Rights,[59] to which all the states under study are parties, be denied recognition on the basis that it violates international law? Assessing whether a foreign judgment is founded on an incorrect view of international law may also entail going into the merits of the case. This would potentially be inconsistent with the principle that a foreign judgment should not be reviewed on its merits, and would also undermine the objective of ensuring that the process of enforcing foreign judgments is not protracted. With the spread of international human rights norms and their entrenchment in many African constitutions, this defence may become important. However, to date, it has not been invoked in any case.

Breach of natural justice is another defence in an action to enforce a foreign judgment. In general, the courts have restricted the natural justice defence to cases of procedural unfairness, such as a failure to give the defendant an opportunity to be heard or to adequately present their case. However, some judgments suggest the courts may look beyond what is strictly *procedural*. Thus, in one case, the defence was successfully used to prevent the enforcement of a judgment given to a judgment creditor who had sued two different persons in two different Zimbabwean courts on the same cause of action and sought to enforce one of the judgments in South Africa.[60] The extension of the natural justice defence to cover issues of substantive justice could be problematic. The principle that a foreign judgment shall not be reviewed on its merits necessitates, or at least renders appropriate, a restriction of the scope of the natural justice defence to cases of procedural unfairness. Apart from in exceptional circumstances, an action to enforce a foreign judgment should not be used as a forum to re-litigate a claim.

Default judgments have been a veritable object of attack under the natural justice defence. It has been suggested in a Malawian case that by submitting to the jurisdiction of a foreign court – in this instance through a jurisdiction agreement –

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[59] *African Charter on Human and Peoples Rights*, 27 June 1981, (1982) 21 I.L.M. 58.

[60] *Corona v. Zimbabwe Iron & Steel Co. Ltd* 1985 (2) S.A. 423.

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a person becomes bound by the court's procedure and judgment, even though "he may not have had notice of the proceedings".[61] It is submitted that this position is unsound. A jurisdiction agreement reflects a desire by the parties to have their disputes resolved before the designated court. It does not in any way deal with issues related to the procedures of trial. Even though linked in many respects, issues of jurisdiction and civil procedure are distinct; a jurisdiction agreement focuses solely on the former.

Although it has been invoked in a number of cases, the public policy defence has rarely succeeded. In *Gramara (Private) Ltd v. Government of the Republic of Zimbabwe*, where the defence prevailed, Justice Patel perceptively observed, "what constitutes public policy in any given country is a matter that eludes precise definition. The notion is clearly not immutable and must perforce vary with time, place and circumstance, in tandem with changing social *mores*. Antecedent case authorities are obviously highly persuasive but may not always be germane or decisive. [...] public policy must be considered not only in the closed confines of the domestic sphere but also in the larger regional and international context".[62] In general, especially in commercial cases, it is appropriate the defence is given a scope of application. Compared with subject matter, such as family and property law, national values tend not to overly dominate commercial matters.

One potential area for the successful invocation of public policy relates to foreign judgments given in breach of jurisdiction agreements. The question is whether a Ghanaian court (or a court in any other African state) should enforce a judgment given in a foreign country in breach of a Ghanaian choice of forum agreement. Because of negative perceptions of laws and judicial systems in Africa and the imbalance in negotiating positions, parties to international contracts seldom choose African courts as their preferred forums for dispute settlement. Even in the rare cases where such choice is made, it is often challenged in foreign courts in the event of a dispute. In other words, one party may sue abroad in breach of the Ghanaian jurisdiction agreement. It is important that parties are held to their bargain. Accordingly, it is submitted that an African court may decline to enforce a foreign judgment given in breach of an agreement that selected the enforcing state as the choice of forum.[63]

In future, it is likely that constitutional norms may provide defences against the enforcement of foreign judgments, or influence how existing defences are interpreted. There have been cases where the enforcement of jurisdiction agreements have been contested using constitutional provisions,[64] but with the exception of Zimbabwe, no such defence has been raised in an action to enforce a foreign

[61] *Heyns v. Demetriou*, Civil Cause No. of 2001 (High Court, Malawi, 2001).

[62] *Gramara (Private) Ltd v. Government of the Republic of Zimbabwe*, X-ref. HC 5483/09 (High Court, Zimbabwe, 2010).

[63] A similar defence exists in English law; see Civil Jurisdiction and Judgments Act 1982, s. 32.

[64] R.F. Oppong, *Private International Law in Commonwealth Africa* (note 4), at 108-109.

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judgment in the countries under study.[65] The natural justice defence is arguably just one aspect of the constitutionally entrenched right to a fair hearing.[66] Similarly, constitutional norms may shape the content of public policy.

VIII. Judgments in Foreign Currency and Limitation of Actions

Courts in Commonwealth Africa have jurisdiction to give judgment in foreign currency.[67] This jurisdiction extends to an action to enforce a foreign judgment at common law.[68] In instances where judgment creditors have requested that their judgments be enforced in foreign currency, the courts have done so. In *Barclays Bank of Swaziland* v. *Mnyeketi*,[69] it was held that, when a provisional sentence is sought on a foreign judgment for an amount in a foreign currency, the court has simply[70] to regard the foreign judgment as an obligation to pay the amount definitively quantified in the nominated currency in that judgment. The court should enter a provisional sentence for payment of a debt in the foreign currency in which the foreign judgment has quantified the debt. However, the defendant should be left free to make payment in the currency that is legal tender in the jurisdiction of the court, in this instance, South African Rand.

To order the enforcement of a foreign judgment in foreign currency does not mean that it will be executed in foreign currency. The judgment debtor may insist on discharging the debt obligation in the local currency – the legal tender of the enforcing forum. Where the judgment debtor seeks to discharge his or her obligation in the local currency, an interesting issue arises as to the date to be used in ascertaining the obligation. A number of options exist, including the date the foreign judgment was given, the date of the judgment enforcing the foreign judg-

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[65] See *Gramara (Private) Ltd v. Government of the Republic of Zimbabwe*, X-ref. HC 5483/09 (High Court, Zimbabwe, 2010).

[66] See, *e.g*., Kenyan Constitution 2010, s. 50(1) which provides, "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

[67] R.F. Oppong, *Private International Law in Commonwealth Africa* (note 4), at 154-167.

[68] The statutory regimes for the registration of foreign judgments have their own rules on foreign currency obligations. In essence, they all require conversion of the foreign currency into the local currency, but vary on the date of conversion.

[69] 1992 (3) S.A. 425.

[70] It was reasoned that it was unnecessary to enquire whether or not the foreign judgment novated the cause of action and, if not, whether the cause of action was a contract which contemplated payment in the relevant foreign currency, or a delict requiring conversion of the debt to South African rand at such a rate of exchange as may have prevailed on the date appropriate to the delictual damages.

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ment, and the date of payment or execution. Given that currencies fluctuate daily, whichever option is chosen is likely to lead to some monetary loss to one party. In Zimbabwe, it has been held that the date for ascertaining the judgment debtor's obligation is the date of the foreign judgment.[71] It is submitted that the date of payment or execution should be the preferred date. Choosing that date would ensure that the judgment creditor gets what is actually due to him or her under the foreign judgment.

As discussed above, in the countries under study, a foreign judgment is characterised as debt. In an action to enforce a foreign judgment at common law[72] this characterisation becomes significant when a judgment debtor argues that the enforcement of the foreign judgment is prescribed or statute-barred. In states where the limitation of actions or prescription are characterised as procedural, this is a matter for the *lex fori*. The statutes dealing with limitation of actions in the countries under study do not devote specific provisions to foreign judgments. In general, some courts have shown a willingness to apply the limitation period applicable to debts to foreign judgments.[73] In Kenya and Tanzania, where an action on a foreign judgment is barred in the foreign country, it is equally barred under the respective national law.[74] The unresolved question remains whether a foreign judgment which remains enforceable in the foreign country may nonetheless be barred from enforcement in Kenya and Tanzania due to exceeding a domestic limitation period.

IX. Conclusion

This paper has examined the common law regime for the recognition and enforcement of foreign judgments in selected Commonwealth African countries. It is evident from the discussion that this is still a developing area of law with many issues currently unaddressed, both in the courts' jurisprudence and in legislation. The current rules on jurisdiction in international matters remain, perhaps, the most important obstacle to judgment enforcement in the countries under study. As discussed above, in all the countries under study, the mere presence of the judgment debtor's assets in the enforcing forum may not be enough to give the court jurisdiction to hear the action and enforce the foreign judgment. This is quite ironic given that such assets are often the sole focus of the judgment enforcement action.

[71] *Cosmopolitan National Bank of Chicago v. Steinberg* 1973 (4) S.A. 579; *Cosmopolitan National Bank of Chicago v. Steinberg* 1973 (2) S.A. 279.

[72] There exist designated time-frames within which a foreign judgment can be registered under the statutory regimes.

[73] *Jethwa v. Bhanji* [1938-1939] 18 KLR 11; *DTH Jethwa v. Bhanji* [1939] 6 EACA 28; *Society of Lloyd's* v. *Romahn* 2006 (4) S.A. 23.

[74] Kenya – Limitation of Actions Act 1967, s. 40; Tanzania – Law of Limitations Act 1971, s. 42.

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Reforming the law to address this issue would be an important part of ensuring that foreign judgments are easily enforceable in these countries.

The bases of international competence remain narrowly defined: only residence, submission and perhaps presence constitute bases of international competence. This raises an important question of whether the bases of international competence should be expanded to include, for example, real and substantial connection or jurisdictional equivalence to ensure that many more foreign judgments qualify for recognition and enforcement. Expanding the bases of international competence would call for a re-think of the defences currently available to the judgment debtors. These two aspects of judgment enforcement cannot be viewed in isolation and this should be taken into account in any future reform of this subject.

Another area in need of attention is the fact that the current legal regimes are limited to the enforcement of only money judgments. With the growing importance of non-money judgments in international civil litigation, there is a need to take a second look at this issue. Indeed, the broader question is how to define "judgment" under the common law regime. Recent jurisprudence in Ghana, South Africa and Zimbabwe suggest that there may perhaps be a need to better define the concept of "foreign judgment" in order to accommodate judgments from the regional courts which currently operate in Africa and beyond. As is the case with the bases for international competence, some common law jurisdictions have taken the lead in reforming this area, and jurisprudence from those countries would certainly be useful to the countries under study.

The law on limitation of actions and foreign judgment enforcement also remains unsettled. The absence of legislation specifically dealing with this subject leaves much to be desired. There is the need for legislation that will clearly define when an action to enforce a foreign judgment would be barred in an enforcing forum. Characterising a foreign judgment as a debt and applying to it the domestic limitation period applicable to debts may not be the most appropriate course of action to take.

From the above discussion, it is also clear that there is a high degree of convergence in terms of the law in the countries under study. There are many areas where the law is the same. This convergence is largely due to the fact that the countries under study received English common law on the subject through colonisation, and they continue to draw upon mainly English cases as a source of persuasive authority. Very little attention is paid to cases from other common law countries, including sister African countries. The failure to take into account jurisprudence from other common law jurisdictions leaves much to be desired. Beyond that, it raises the question whether these countries, and indeed the entire African continent, would not benefit from a regional convention on foreign judgment enforcement akin to regimes which exist in Europe and Latin America. A robust foreign judgment enforcement regime is an important complement to any regional economic integration initiative. Currently, Africa has many such initiatives at various stages of development on the economic integration ladder. There are provisions in the founding treaties of some of the regional economic communities that could serve as a basis for negotiating regional foreign judgment enforcement conventions.

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RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS IN EGYPT

Karim EL CHAZLI*

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A. Conditions of Enforcement
B. Procedure
VIII. Concluding Remarks

I. Introduction

The purpose of this article is to study the recognition and enforcement of foreign decisions in Egypt. This subject has attracted much less interest than its neighbouring subject, which is the recognition and enforcement of arbitral awards.[1] Unlike this latter subject, writings on the enforcement of foreign decisions in foreign languages are rather rare[2] and there is certainly a need to fill this doctrinal gap.

This article is mainly practically driven. It is principally directed to foreign academics and practitioners and not to Egyptian courts. The approach will therefore be more descriptive than prescriptive. Instead of stating only what the different theories are and what the courts should do (as is the case in most Egyptian writings), it will try as far as possible to *describe what the courts do*. In other words, the study of general theories of PIL (which can be found in Egyptian and French books since Egyptian doctrine is heavily influenced by French doctrine) will be omitted and the focus will be on the peculiarities of Egyptian Law and its positive law.

In order to have a better understanding of how the enforcement of foreign decisions works in practice, it is important to consider the broader legal environment in which Egyptian judges operate. Thus, we begin with a brief overview of the Egyptian legal system and of Egyptian Private International Law (hereinafter PIL).

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[1] A specific law on Arbitration in Egypt was enacted in 1994 (Law No 27/1994. The first number refers to the number of the law *strictu sensu* and the second number refers to the year of adoption of this law). There are a huge number of writings on this law. For an overview of the recent case law, see D. HUSSEIN/ I. SELIM/ S. EL SAWAH, Chronique de jurisprudence étrangère – Egypte, *Revue de l'arbitrage* 2013, p. 191-232.

[2] See references mentioned at note 15.

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II. Overview of the Egyptian Legal System[3]

A. Sources of Law

The highest legal text in Egypt is the Constitution,[4] which stipulates that Egypt is a unitary state.[5] Thus, the same laws are applicable in all Egyptian territories. However, with regard to family laws, Egyptian Law differs according to an individual's religion. The applicable family law for Muslims is based on Islamic law.[6] Christians and Jews have their own laws.[7]

Except with regard to family and inheritance laws, the influence of Islamic law is weak. European laws, particularly French law, significantly influence all other law branches.

Like the French model, Egyptian law is highly codified and case law is not an official source of law. It is interesting to note that Article 1 of the Egyptian Civil Code[8] (hereinafter CC) – unlike Article 1 of the Swiss Civil Code, which was its main source of inspiration – does not mention case law as a secondary source of law. However, one would be mistaken to rely solely on legal texts to understand the role played by case law in a specific legal system. As in other jurisdictions, High Courts' decisions enjoy a moral authority upon lower courts and the High Courts – in order to respect the authority of their predecessors and for coherence and intellectual economy reasons – seek to follow the rules laid down in previous

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[3] The only comprehensive book on Egyptian law written in English is N. BERNARD-MAUGIRON/ B. DUPRET (eds), *Egypt and its Laws*, London/ The Hague/ New York 2002. This book consists of 20 chapters on the various branches of law including a brief chapter on Private International Law (with less than 2 pages on the issue of enforcement of foreign decisions).

[4] The Constitution entered into force on 18 January 2014. It is worth noting that there is a controversy as to know whether this Constitution is a new Constitution or a mere amendment of the 2012 Constitution. Since the 2014 constitutional text did not respect the numbering of 2012 Constitution and since the first text did replace the second one, our position is to consider that the 2014 text is a new Constitution.

[5] Article 1 of the Constitution.

[6] Mostly on the Hanafi school of law but there are also influences from the other Islamic Schools of Law.

[7] The constitutional basis lies in Article 3 Const.: "The principles of the laws of the Egyptian Christians and Jews are their main source of laws regulating their personal status, religious affairs and selection of their spiritual leaders".

It must be noted that inheritance laws (Law on Inheritance No 77/1943; Law on Wills No 71/1946), which are based on Islamic law, are applicable to the entire Egyptian population notwithstanding their faith.

[8] "Legislative provisions govern all matters to which these provisions apply in letter or spirit.

In the absence of an applicable legislative provision, the judge will decide according to custom; in the absence of custom the judge will decide in accordance with the principles of Islamic law. In the absence of such principles, the judge will apply the principles of natural justice and the rules of equity" (Our own translation).

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decisions. It is common for Egyptian High Courts' decisions to refer to "constant case law",[9] which shows that those courts take their previous rulings seriously.[10]

The importance of Egyptian law goes beyond Egypt's frontiers. Since Egyptian law influenced many Arab laws and given that hundreds of Egyptian judges are sitting in Gulf courts,[11] Egyptian case law can be used to describe laws of Arab countries when there is no relevant text or judicial decision on a specific issue in those countries.[12]

B. Egyptian Judicial System

The Court of Cassation, founded in 1931, is Egypt's highest court in civil and criminal matters. It enjoys a strong prestige and exerts influence among legal practitioners (judges as well as lawyers and legal scholars) in the Arab countries. Following the French Court of Cassation, it acts, in principle, as a judge of law (*juge du droit*) and not as a judge of fact (*juge du fait* or *juge du fond*). Its function is to verify that lower courts, namely the Courts of Appeal, have applied the law correctly and to ensure uniformity in the law's interpretation.

It must be borne in mind that one of the most important concerns of the Egyptian judicial system is its lengthy delays. The situation is particularly alarming before the Court of Cassation where a civil case can take up to 8 years.[13]

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[9] Egyptian Courts do not quote specific decisions but use expressions like "It is a consistent principle in the case law of this Court that […]" and "It is settled case law".

[10] That being said, there are some prerequisites, which enable a court to respect its own case law. The most important one is the publication of its decisions. In this regard, it must be noted that the Official Publication of the Court of Cassation called "the technical bureau collection" – where the decisions having normative importance are published and which is the equivalent of the French *Bulletin des arrêts* – did not publish decisions more recently than those rendered in 2004. As for decisions rendered during the last 10 years, some are available on the newly established site of the Court of Cassation <http://www.cc.gov.eg> and on private databases. As for lower courts, due to the huge number of cases a Judge should decide, it is doubtful that he will have enough time to undertake considerable research concerning the last case law of the Court of Cassation.

[11] In Bahraïn, Kuwait, Qatar and the UAE.

[12] For examples of ICC awards in which references to Egyptian authorities were made when an Arab law was applicable, see A. KOSHERI, L'influence exercée par le Code civil égyptien sur l'arbitrage CCI, in MINISTÈRE DE LA JUSTICE R.A.E./ AGENCE DE LA FRANCOPHONIE (eds), *Actes du Congrès du Cinquantenaire du Code civil égyptien (1948 - 1998)*, Le Caire 1998, p. 124-127. By the same token, it could be useful to refer to UAE case law in order to describe Egyptian law especially that, from a quantitative point of view, there are more PIL cases decided by the UAE courts than by the Egyptian courts.

[13] On the issue of the delays before the Court of Cassation, see T. MOUSSA/ N. BERNARD-MAUGIRON/ E. FARAG/ W. RADY (eds), *Le droit à un délai raisonnable devant la Cour de cassation d'Egypte*, Marseille 2013.

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III. Overview of Egyptian Private International Law

Unlike Switzerland, Italy or Tunisia, Egypt does not have a PIL Code. Its PIL rules lie mainly in its Civil Code and in its Civil and Commercial Procedure Code (hereinafter CCPC). Those rules were influenced by French law.

At the time of the adoption of the CC (1948) and the CCPC (1968), the PIL rules they embodied were considered modern. However, the PIL rules have not been amended in the subsequent decades despite significant evolution in PIL theories and some PIL rules now appear antiquated. Many authors are calling for a reform of the PIL rules and even for the adoption of a specific PIL code.[14]

Egypt is a member of the Hague Conference on Private International Law and it ratified the Convention of 1 March 1954 on Civil Procedure, the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.

A few words must be said about the literature available on Egyptian PIL. From a formal point of view, it must be noted that the standard text is a textbook on PIL (or a particular subject of PIL), running to several hundred pages, written in Arabic. Writings in foreign languages[15] and commentaries on decisions are rather rare.

From a substantive point of view, many Egyptian authors[16] frequently quote their French colleagues[17] and French case law in their writings. At the same time, references to Egyptian case law are quite rare.[18]

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[14] A. SALAMA, Cinquante années de règlement des conflits de lois en Egypte – Nécessité d'évolution et de spécialisation, in MINISTÈRE DE LA JUSTICE R.A.E./ AGENCE DE LA FRANCOPHONIE (eds) (note 12), at 205-218. At 215, he writes: "L'appel à la révision et l'amendement des règles de conflit de lois, énoncées dans le code civil égyptien devrait s'associer à l'appel au rassemblement de toutes les règles du droit international privé dans le « code de droit international privé égyptien », qui était et demeure l'insistante revendication de tous les fidèles savants de cette branche de loi".

[15] See, *e.g.*: M. ABDELWAHAB, L'ordre public en droit international privé égyptien de la famille, in N. BERNARD-MAUGIRON/ B. DUPRET (eds), *Ordre public et droit musulman de la famille en Europe et en Afrique du Nord*, Bruxelles 2012, p. 72-95 ; W. BISHARA, Egypt, in L. GARB/ J. LEW (eds), *Enforcement of Foreign Judgments*, Vol. 1, Kluwer 2012; A. ZAMZAM, Bankruptcy jurisdiction and enforcement of foreign bankruptcy judgments in Egypt, *Journal of Private International Law* 2010, p. 623-635; M. BERGER, Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the backdoor, *American Journal of Comparative Law* 2002, p. 555-594; I. IBRAHIM, Private International Law Egypt and its laws, in N. BERNARD-MAUGIRON/ B. DUPRET (eds) (note 3), at 209-220; A. SALAMA, Effets des jugements étrangers et sentences arbitrales en droit égyptien, *Revue égyptienne de droit international* 1998, p. 1-42; F. RIAD/H. SADEK, Les conflits de lois en droit interne et en droit international privé égyptien dans les matières de statut personnel, in J.-Y. CARLIER/ M. VERWILGHEN (eds), *Le statut personnel des musulmans. Droit comparé et droit international privé*, Bruxelles 1992, p. 67-108; A. ELGEDDAWY, *Relations entre systèmes confessionnel et laique en droit international privé*, Paris 1971.

[16] Many of whom studied in France.

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Put differently, Egyptian doctrine succeeds in its prescriptive function (by saying how the law should be)[19] but seems to fail in its descriptive function (by refraining to render an accurate account of law as it is applied by courts). This is why one cannot know the positive law (*droit positif*) by reading only textbooks; instead, an examination of case law would appear to be necessary. On certain issues – especially where there is an influence of Islamic law, such as on public policy issues[20] – some Egyptian textbooks can give a misleading picture of what the positive law is. More generally, the overreliance on French sources and the common disregard of national case law is a "phenomenon" raising many interesting questions – particularly of a sociological order.[21]

A. Conflict of Laws

Conflict of laws rules are found in the CC (from Art. 10 to Art. 28). Nationality is the main connecting factor and there is no reference to religion as a connecting factor or to Islamic law as a component of public policy. Nonetheless, courts seem to hold different views, as will be explained later.

According to Article 24, "[t]he principles of private international law should be followed when the preceding articles do not contain a provision [on a specific issue]". Although this article is inserted among conflict of laws provisions, we consider that it could reasonably be extended to the domain of enforcement of foreign decisions.

Once again, to have an accurate view of how those provisions operate in practice, the case law of the Court of Cassation must be consulted. Moreover, the Court of Cassation has clarified some important issues, which have not been dealt with in the letter of the law. One example is the procedural treatment of foreign law, in relation to which it has been decided that foreign law must be treated as a question of fact, which must be proven. The solution is justified by practical

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[17] The most quoted books seem to be those of NIBOYET, BATIFFOL and LAGARDE, MAYER and HEUZÉ.

[18] The importance given to case law varies among authors.

[19] It is assumed that references to French authorities can be linked to the prescriptive function because it offers guidance to the judge on how to interpret texts and how to fill gaps in legislation.

[20] This issue was studied in depth by M. BERGER (note 15).

[21] To analyse this phenomenon, M. BERGER (note 15), at 592, wrote: "Most probably the cause lies within the Egyptian legal tradition of private international law itself. This scholarship has in the past century been entirely based on European law. As has been observed, the Islamic system of conflicts law is quite alien to the European system. It appears that Egypt's dogmatic legal tradition lacks the leverage to incorporate Islamic conflicts law into the existing European-based legal doctrine, and attribute it the position which it already has in practice". One can add that this situation results from the fact that from a practical point of view, it is far easier to quote doctrinal opinions than to look for decisions, which are not always easily accessible. More generally, nowadays in Egypt, university is divorced from practice; Professors and judges do not have the opportunity to speak together and often evolve in two different spheres.

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considerations, which make it difficult for the judge to identify the solutions adopted by the foreign law.[22]

B. International Jurisdiction and Enforcement of Foreign Judgments

In the CCPC, one can find rules on International jurisdiction (from Art. 28 to Art. 35) as well as rules on enforcement of foreign judgments (from Art. 296 to Art. 301).[23] The CCPC talks only about enforcement and does not envisage the possibility of judgment recognition without following the enforcement procedure. However, as will be shown later, Egyptian law does not ignore the distinction between recognition and enforcement: case law accepts the recognition of foreign decisions for which no enforcement suit has been entered.

Concerning the enforcement of foreign decisions, one must bear in mind that Egypt has entered into several international treaties and that Article 301 CCPC recognises that the CCPC rules should not prevent the application of international treaties. Accordingly, the Court of Cassation has held on many occasions that, according to Article 301 CCPC, treaties must be applied even if they contradict the rules laid down by the CCPC.[24] More generally, according to Article 151 of the Constitution, treaties shall acquire the force of law upon publication.

Thus, where the enforcement of a foreign decision is sought, the first question should be whether there is an applicable treaty. It is only when the answer to this question is negative, that enforcement according to CCPC rules should be considered.

IV. Enforcement of Foreign Judgments When There Is an Applicable Treaty

In order to facilitate the enforcement of foreign judgments, it is usual to conclude specific treaties in order to decrease the enforcement conditions and to facilitate the enforcement procedure. Egypt is a party to several international treaties. Egyptian

[22] Cass. 11 February 2002, case 6216/65 (the foreign law was the Chinese law). As a general rule, the first number (6216) refers to the number of the case *strictu sensu* among cases introduced the same judicial year before the Court of cassation. The second number (65) refers to the number of the judicial year.

[23] It must be noted that Article 15 of the Commerce Code (adopted in 1999), requires that a foreign decision concerning the separation of matrimonial property should be registered in the register of commerce in order to be opposed to third parties.

[24] For example, see Cass. 14 May 2005, Case 200/66; Cass. 15 November 2001, case 5039/70. However, in some cases where the Arab Convention was applicable, reference was made to Art. 298 CCPC (enumerating the conditions of enforcement). In one case where the Arab Convention was theoretically applicable (the foreign decision was Lebanese), there was no mention to this convention and the Court founded its decision solely on the CCPC (Cass. 20 December 1988, case 1925/53).

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textbooks rarely mention the existence of those treaties even though courts more frequently apply them than the provisions of the CCPC. From the outset, it must be said that although Egypt has ratified the Hague Conference Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations,[25] this convention will not be studied here for two reasons: first, it is easily accessible for a non-Arabic speaking reader; second, we are not aware of any decisions applying this convention.

A. Multilateral Treaties: The Arab Convention of 1952

1. The Arab Convention (1952) Is still in Force in Egypt despite its Replacement by the Riyadh Convention (1983)

Egypt is a member of the League of Arab States (hereinafter LAS), which is a regional organization regrouping 22 Arab States. Under the LAS, two conventions on the enforcement of foreign judgments have been adopted.

On 14th September 1952, the council of the LAS adopted the Arab Convention of 29th August 1954 on the enforcement of judgments. It entered into force after its ratification by Egypt,[26] Saudi Arabia and the Hashemite Kingdom of Jordan.[27] This convention was ratified later by Syria (1956), Libya (1957), Iraq (1957), Kuwait (1963), United Arab Emirates (1982).[28]

This convention is a key instrument in the Egyptian system of enforcement of judgments. Egyptian courts have had the opportunity to apply this convention several times[29] since many Egyptians have personal and professional connections with Arab countries (especially the Gulf countries).

Before examining its provisions, it is important to mention that this convention – which is still in force in Egypt – has been replaced by a new convention known as the Riyadh Convention for Judicial Cooperation.[30] The Riyadh Convention, adopted by the Council of Arab of Justice Ministers on the 6th of April 1983, entered into force on the 30th October 1985. It is much more comprehensive

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[25] It entered into force on 20 June 1980 and it was published in the Official Gazette of 11 September 1980.

[26] By virtue of Law No 29/1954.

[27] Pursuant to article 11 of this convention, the convention enters into force one month after the deposit of the ratification instruments of three of the signatory states.

[28] The Court of Cassation (14 November 1989, case 1702/57) decided that Egyptian courts had to apply the Arab Convention with regard to UAE judgments even if the UAE ratified the Convention when Egypt was excluded from the LAS. Although the UAE ratified the Convention by the Law No 93/1972, it appears that it deposed its instrument ratification 10 years later.

[29] More than the half of the Court of Cassation's decisions in the matter of enforcement of foreign judgments applied this Convention.

[30] The Official Translation of this Convention can be found in COUNCIL OF ARAB MINISTERS OF JUSTICE, A Collection of the Council's Documents, No 2, Rabat, January 1988, p. 7-57 (French) and p. 96-149 (English). All the following quotes from the Riyadh Convention will be taken from this version.

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and lengthy (72 articles) than the Arab Convention of 1952 (12 articles). Its scope is not limited to the matter of the enforcement of judgments but regulates different matters of judicial cooperation as service of judicial and extrajudicial documents and extradition. Egypt did not sign this convention and, accordingly, only the Arab convention of 1952 is relevant in the Egyptian context.[31]

2. *Main Provisions of the Arab Convention of 1952*

The Convention is composed of 12 articles. Only the main provisions will be examined for the purposes of this study; these are articles 1 and 4 (scope of the Convention), 2 (conditions of enforcement), 5 and 7 (procedure of *exequatur*), 6 (value of enforcement judgments). The Convention never uses the term "recognition" but uses the term "enforcement" throughout its articles. The wording sometimes lacks clarity, probably because this Convention is one of the oldest multilateral instruments in the field of the recognition of foreign judgments.

a) Scope of the Convention

Articles 1 and 4 specify the scope of the Convention. Article 1 states that final judgments declaring civil or commercial rights, or awarding damages in a criminal court, or concerning personal status rendered by a judicial authority from one of the LAS's states shall be enforceable in all other states according to the Convention's provisions.

This article addresses two issues: the types of judgments and the subject matter covered by the Convention.

As for the types of the judgment issued, it is important to note that only final judgments can be recognised. Temporary decisions[32] and authentic instruments seem to fall outside the scope of the Convention since they do not fall under the category of a "final judgment".

The subject matter of the Convention is broad in scope since it encompasses all family law and inheritance law issues.[33]

The only exclusion of the scope of the Convention is stated in Article 4, which says that the Convention is applicable neither to the judgment, which is rendered against the State where the enforcement of this judgment is sought, nor to the judgment rendered against one of its public servants because of acts related to their functions.

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[31] For a commentary of both conventions, see H. AL MULLA, Conventions of Enforcement of Foreign Judgments in the Arab States, *Arab Law Quarterly* 1999, p. 33-56. For a commentary on the Arab Convention of 1952, see E. ABDALLAH, La convention de la Ligue arabe sur l'exécution des jugements, *Recueil des cours* 1973, p. 503-627.

[32] E. ABDALLAH, (note 31), at 564.

[33] Personal Status is an expression used in Arab countries, which encompasses Family law as well as Inheritance Law.

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b) *Grounds for the Enforcement Refusal*

After establishing that the merits of the judgment may not be reviewed (*prohibition de la révision au fond*), Article 2 sets out four situations where a judge may refuse the enforcement of a foreign judgment.[34] Under a literal interpretation of Article 2, the legislator and the judge may not refuse enforcement for reasons other than those enumerated in this article; at the same time however, it seems that they are not *obliged* to deny enforcement if one of these situations occur.

i) *Art. 2(a): Lack of Jurisdiction*

According to Article 2(a), a judgment can be denied enforcement if the court which rendered it lacked jurisdiction according to international jurisdiction rules.[35] It is settled case law that concurrent jurisdiction between the Egyptian courts and a foreign court will not prevent enforcement (at least since the jurisdiction of the Egyptian courts is not of an exclusive nature).[36]

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[34] Accurately speaking, the Arab Convention does not set the conditions for granting enforcement (*i.e*. the judgment will be enforced if certain conditions are met) but it enumerates grounds where such enforcement may be refused (*i.e.* the enforcement of the judgment will be granted unless one of the limited grounds is realised). The latter perspective – which is also the perspective of the Brussels Regulation (Art. 45) – seems to be founded on the assumption of the validity of the foreign judgment.

[35] This article mentions international jurisdiction rules without determining to which country those rules belong but it should be understood that those rules are the rules of the country of origin of the judgment.

[36] In the first case where the enforcement of a Jordanian judgment was sought (Cass. 2 July 1964, case 232/29), the Court of Cassation admitted the concurrent jurisdiction of the courts of the two countries and held that comity and appropriateness considerations as well as the needs of international transactions obliges to consider that the judgment was rendered by a court having jurisdiction. In the second case where the enforcement of an Iraqi judgment was sought (Cass. 29 June 1988, case 558/55), the Court of Cassation decided that a judgment rendered by one of the States which ratified the Convention should be enforced in Egypt even if the Egyptian courts had jurisdiction with regard to the claim settled by this judgment. The Court specified that the Arab convention did not have an article similar to Article 298 CCPC. Compared to the 1964 decision, the 1988 decision appears to be more "liberal". It bases exclusively its solution on the Arab Convention without any reference to Article 298 CCPC or to comity and appropriateness considerations. In the third case where the enforcement of a Kuwaiti judgment was sought (Cass. 27 February 1990, case 126/58), the Court of Cassation reiterated its previous position and decided that the jurisdiction of the foreign court is sufficient to fulfil the jurisdiction condition. In the fourth case where the enforcement of a UAE judgment was sought (Cass. 24 January 1998, case 2762/61), the Court of Cassation said clearly that the Arab Convention did not contain an article similar to Article 298 CCPC and thus the fact the Egyptian courts have jurisdiction cannot bar the enforcement of the foreign judgment. The reasoning of this decision is similar to the 1988 decision because it based its solution only on the Arab convention.

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ii) Art. 2(b): Irregular Service

According to Article 2(b), a judgment can be denied enforcement if the parties were not duly served. The wording of this condition is defective since it only mentions the service of process and thus fails to encompass all the due process guarantees.

As for the regularity of the service of process, the Court of Cassation has decided that it should be assessed according to the law of the country where the judgment was rendered and that the requested court should specify that the service was duly rendered according to this law.[37]

As for the notification of the foreign judgment once rendered, the Court of Cassation decided in a case where the enforcement of a UAE judgment was sought[38] that according to UAE case law the notification of the foreign judgment made in the press is an exceptional means of notification, which cannot be resorted to unless serious investigations were conducted in order to find the domicile of the person who should be notified.[39] Accordingly, the service was not duly rendered even if the seeker of the enforcement presented an official certificate from the Abu Dhabi courts stating that the judgment was notified by means of publication in an Emirati newspaper.

iii) Art. 2(c): Contradiction to Public Policy

According to Article 2(c), a judgment can be denied enforcement if it contradicts public policy or public morals in the country where its recognition is sought.[40] The article stipulates that it is up to this country to make this determination.[41] The judgment can also be denied enforcement if it contradicts a principle considered to be an international rule.[42]

This paragraph is composed of two parts. The first deals with the condition of the absence of contradiction with public policy. There is no need to discuss it here since it will be studied later as a condition required by Article 298 CCPC. It should be noted that since Arab laws are part of one *communauté de droit* and share the same legal and cultural underpinnings – notably Islamic law and culture – cases where an Arab judgment contradicts the Egyptian public policy should be

[37] Cass. 23 December 1997, Case 8837/66 (Kuwaiti monetary judgment; reference is made to the Arab Convention). The Court of Cassation based its decision on Article 22 CC which reads as follows: "Courts' jurisdiction rules and all questions of procedure are governed by the law of the country in which the action is brought, or in which the procedural acts are accomplished".

[38] Cass. 20 April 1999, case 1441/67.

[39] Which was not the case in this case.

[40] Unlike the Brussels Regulation (Art. 45), there is no requirement of "manifest" contradiction to public policy.

[41] Thus, there is no one "Arab public policy" but numerous local public policies.

[42] As pointed out previously, the wording of this convention is not its principal quality.

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rare.[43] There is no known evidence of any Egyptian judgment applying this condition in the context of the Arab Convention.

The second part of this paragraph deals with the hypothesis where the judgment contradicts a principle considered to be an international rule. The hypotheses foreseen by this part are not clear[44] and, again, there is no known evidence of any Egyptian judgment applying this condition.

iv) 2(d): Impossibility of Reconciling with a Local Judgment or the Existence of a Pending Case in the Enforcement Country

According to Article 2(d), a judgment can be denied enforcement if a court of the country where the enforcement is sought had already issued a final judgment between the same parties in the same claim. According to the same paragraph, enforcement can also be denied when, before the courts of the requested country, the same claim (same parties and same object) is the subject of a pending case brought before those courts on a date preceding the presentation of the dispute to the foreign court which rendered the judgment.

c) Procedure of Exequatur

Article 5 sets out the documents which must be presented when enforcement of the judgment is sought. Three documents are requested: an official authenticated copy of the judgment legalised by the competent authorities and endorsed by the execution formula (*formule exécutoire*) (para. 1), the original summons of the judgment or an official certificate proving that the defendant was duly served with the judgment (para. 2) and a certificate from the competent authorities attesting that the judgment is final and enforceable (para. 3). If the judgment was rendered in default, a certificate establishing that the litigants had been duly summoned must be presented (para. 4).

The Court of Cassation has quashed many decisions granting enforcement in circumstances where the claimant in the enforcement proceedings has not provided those documents.[45]

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[43] Even judgments rendered by religious courts for non-Muslims rarely contradict Egyptian public policy. For example, a judgment rendered by an Arab Catholic court applying its law, which does not allow divorce, can hardly be denied enforcement in Egypt, since in Egyptian Catholic law, divorce is not allowed.

[44] Riyadh Convention of 1983, in its Article 30(a), deleted this part: “if the judgment runs counter to the laws of the Islamic Sharia, or the Constitution, or the public order, or the ethics of the signatory to whom the request of recognition is made”.

[45] Nonetheless, the Court of Cassation was more flexible in an old decision (Cass. 28 January 1969, case 590/34). In this case, the enforcement of a Saudi judgment was sought. Although the official copy of the judgment provided by the seeker of enforcement did not have the *formule exécutoire*, the Court of Cassation accepted Saudi documents, which proved that that the judgment was executable in Saudi Arabia.

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As for the certificate attesting that the judgment is final and enforceable, the Court of Cassation decided in a case involving a Kuwaiti judgment that the Court of Appeal's decision confirming the finality of the foreign judgment by means other than those prescribed in Article 5(3) of the Arab Convention should be quashed.[46]

As for the certificate proving that parties have been duly summoned (in case of judgments rendered in default), the Court of Cassation held that the requested court should refrain from granting enforcement of the foreign judgment before verifying that the judgment had been properly served according to Kuwaiti law. The Court added that according to Article 5(4) of the Arab Convention, when a judgment was rendered in default, the party seeking enforcement must present a certificate proving that the other party had been properly served. The Court of Cassation therefore quashed the decision of the Court of Appeal, which had previously granted enforcement on the basis that the party objecting to enforcement had not proved that the judgment had not been properly served. The burden of proof of this condition was instead said to lie with the party seeking enforcement, and it is for the Court to verify that.[47]

Article 7 stipulates that foreign litigants should be treated equally with local litigants regarding legal aid and the other financial aspects of the enforcement suit.

It is worth noting that the Arab Convention did not specify the court to which the enforcement request should be presented. As the Court of Cassation said, CCPC should be applied when the Arab Convention was silent on a specific issue. Thus, the enforcement court should be the court of first instance according to Article 297 CCPC.[48]

d) Effects of the Enforced Judgment

Article 6 stipulates that when a foreign judgment is granted enforcement, it shall have, in the country of enforcement, the same effect that it has in its country of origin.

B. Bilateral Treaties

1. With Arab States

Egypt has concluded bilateral treaties with some Arab States. For example, there are treaties with Algeria,[49] Bahrain,[50] Iraq, Jordan,[51] Morocco,[52] Oman,[53] Tunisia[54] and Sudan.[55]

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[46] Cass. 18 April 1994, case 1794/54

[47] Cass. 15 November 2001, case 5039/70.

[48] Cass. 20 March 1984, case 15/53.

[49] Signed on 1 March 1964, approved by presidential decree 2320/1964.

[50] Signed on 17 May 1989, approved by decree 260/1989, applied in Cass. 11 April 2000, case 1810/69. In this case, the enforcement of a provisional measure was refused

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2. With Non-Arab States

Egypt has also concluded several bilateral treaties with non-Arab states like Cyprus,[56] Italy,[57] France,[58] Germany,[59] Hungary,[60] Romania[61] and Turkey[62].

V. Enforcement of Foreign Judgments When There Is No Applicable Treaty

When no treaty is applicable, the CCPC's provisions will be applied.

A. The Reciprocity Condition

Article 296 CCPC provides that a judgment rendered in a foreign country can be granted enforcement in Egypt under the same conditions required by that country for the enforcement of an Egyptian judgment. In other words, the reciprocity condition means that a foreign judgment shall be accorded the same treatment in Egypt as an Egyptian judgment would be in the country where the foreign judgment was rendered.

Practically speaking, it is only when the foreign country has stricter enforcement conditions than Egypt (conditions set out in Article 298 CCPC) that the reciprocity condition comes into play. In this case, the Egyptian judge will borrow the stricter foreign rules and apply them to the foreign judgment. On the other hand, where the foreign country has less strict regulation than Egypt or equivalent rules to it, the reciprocity condition will not feature and the enforcement of the foreign judgment will only be governed in accordance with conditions set out in Article 298 CCPC.

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because Article 24 of the treaty stipulated explicitly that this treaty does not cover such measures.

[51] Signed on 16 June 1989, approved by presidential decree 267/1989.

[52] Signed on 25 May 1998, approved by presidential decree 81/1999.

[53] Signed on 13 May 2002, approved by presidential decree 272/2002.

[54] Signed on 9 January 1976, approved by presidential decree 407/1976.

[55] Signed on 17 May 1902; applied in Cass. 6 May 1969, case 231/35.

[56] Signed on 8 July 1992, approved by presidential decree 391/1992.

[57] Signed on 3 December 1977, approved by presidential decree 293/1977.

[58] Signed on 15 March 1982, approved by presidential decree 331/1982, entered into force in 7 august 1983; applied by Cass. 14 May 2005, case 200/66.

[59] Signed on 22 May 1969, approved by presidential decree 1536/1969.

[60] Signed on 26 March 1996, approved by presidential decree 251/1996.

[61] Signed on 7 August 1976, approved by presidential decree 938/1976.

[62] Signed on 4 April 1988, approved by presidential decree 223/1989.

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Reciprocity should be understood to be of a legislative nature (what the conditions required by the text are) and need not be of a diplomatic nature (by concluding a treaty) or a factual nature (how law is applied in practice). This interpretation has been confirmed in a case where the enforcement of a Yemeni judgment was sought. The Court of Cassation[63] held that the Egyptian legislator only required the legislative reciprocity and that there is no need for diplomatic reciprocity.[64] It added that the enforcing Court must verify, on its own initiative, the existence of the legislative reciprocity.

B. The Standard Conditions

Article 298 CCPC provides that enforcement cannot be granted unless it has been verified that six conditions are met. The wording of this Article suggests that the judge should take an active role in ascertaining the fulfilment of these conditions even where the parties have not contested the issue.

1. Egyptian Courts' Lack of [Exclusive] Jurisdiction

The first condition (Art. 298(1)) is that the Egyptian courts lack jurisdiction over the dispute settled by the foreign judgment. In the past, this condition raised serious problems of interpretation. The Egyptian doctrine was divided on how the Egyptian courts' lack of jurisdiction should be construed and whether a judgment could be enforced if a concurrent jurisdiction existed between foreign and Egyptian courts. If a literal interpretation militates in favour of denying enforcement of a judgment whenever Egyptian courts have jurisdiction, appropriateness considerations require that denying enforcement occurs only when Egyptian courts have exclusive jurisdiction.

This doctrinal debate seems to be settled by a Court of Cassation's decision of 1990.[65] In a case where the enforcement of a Yemeni decision was sought, the Court of Cassation decided that the Egyptian courts' lack of jurisdiction should be understood as the lack of *exclusive* jurisdiction. In a case where there is concurrent jurisdiction between Egyptian courts and foreign courts, the foreign judgment can be granted enforcement.

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[63] Yemen did not ratify the Convention of 1952 but did ratify the Riyadh Convention of 1983 (which Egypt did not ratify, as mentioned previously).

[64] Cass. 28 November 1990, case 1136/54.

[65] Cass. 28 November 1990, case 1136/54. Yemeni courts had jurisdiction because the contract was entered to in Yemen and Egyptian courts had jurisdiction because the contract was performed in Egypt.

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2. *Jurisdiction of the Foreign Court*

The second condition (Art. 298(1)) is that the foreign court that rendered the judgment had jurisdiction over the dispute according to its own rules of international jurisdiction.

The Court of Cassation held that the enforcement court should not verify whether the foreign court had jurisdiction according to its rules of local jurisdiction (*compétence interne*) or not.[66]

3. *Procedural Correctness Condition*

The third condition (Art. 298, para 2) is that the parties should have been properly served with the judgment and given access to proper representation. The wording of this paragraph is not comprehensive enough to encompass all due process requirements.[67] Thus, it may legitimately be asked whether a judgment rendered in violation of the adversarial principle or by partial judges would be recognized.
The correctness of the service of process and more generally the procedural aspects are governed by the law where the judgment was rendered and not according to Egyptian law. The Court of Cassation arrives at this solution from Article 22 CC. Thus, a Sudanese judgment, which did not contain reasoning, could be granted enforcement in Egypt notwithstanding the fact that reasoning in Egypt is mandatory.[68]

The Court of Cassation decided that the enforcing court must verify that the service of process was duly followed but where the legislator has not imposed certain requirements on how this may take place, the enforcing court is free to base its decision on the determinations of the foreign decision.[69]

4. *Finality Condition*

The fourth condition (Art. 298(3)) requires that the judgment may not be appealed according to the law of the court which rendered it (*force de la chose jugée*).

It has been decided that final judgments regarding the state of persons (*état des personnes*) can be recognized in Egypt since they are rendered by court having jurisdiction and they are not contrary to public policy even though those judgments do not have the *formule exécutoire*.[70]

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[66] Cass. 28 November 1990, case 1136/54.

[67] In the same meaning, see O. ABDEL-AL, *International civil procedure and enforcement of foreign decisions*, Alexandria 2007, p. 416

[68] Cass. 6 May 1969, case 231/35.

[69] Cass. 28 November 1990, case 1126/54.

[70] Cass. 26 June 1963, case 45/29

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5 "Irreconcilability" Condition

The fifth condition (Art. 298, para 4) is that the judgment should not contradict any judgment or order previously rendered by Egyptian courts.

6. Public Policy

The sixth condition (Art. 298(4)) is that the judgment must not be contrary to public policy or to morality in Egypt.

From the outset, since Egyptian law seems to ignore the concept of *effet atténué de l'ordre public*,[71] one can consider that decisions making references to public policy in the domain of conflicts of laws[72] are relevant in the context of the enforcement of foreign judgments. Decisions in the context of arbitration[73] should also be considered relevant since there does not appear to be a difference between the public policy of Art. 298 CCPC and the public policy of arbitration. Decisions in this domain are much more common than decisions in the context of enforcement of foreign decisions.

That being said, one should recognise that it is always difficult to describe, or even predict, the content of public policy because the law is usually silent about what public policy consists of and because judges, in light of their subjectivity, may differ on how to fill this elastic notion.

Despite this intrinsic uncertainty, it is clear that in Egypt, public policy plays a greater role in the domain of family law than in the other branches of private law. As to monetary judgments, public policy is much more discrete. The main focus in this regard, therefore, will be on family law judgments.

The first striking characteristic of public policy with regard to family law judgments is that its effect is different depending on whether or not the parties concerned by the foreign judgment are Muslim.

When litigants are not Muslim – even if they are Egyptian – public policy will rarely intervene as an obstacle to the enforcement of the foreign judgment because public policy will be mainly the public policy of the whole Egyptian society: what can be called the "general public policy."[74] Egyptian law accepts *talaq* (repudiation) and accepts also the prohibition of divorce, which is still the positive law for Egyptians of Catholic faith. Public policy, where there is no

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[71] There is no known evidence of any decision making the distinction between "*effet plein*" and "*effet atténué*" of the Public policy. For certain authors, there cannot be "*effet atténué*" where the foreign judgment concerns a family law issue and one of the litigants is Muslim. See O. ABDEL-AL (note 67) at 439.

[72] On Public policy in Egyptian conflicts of laws, see M. BERGER (note 15) and M. ABDELWAHAB (note 15).

[73] On public policy in Egyptian Arbitration law, see D. HUSSEIN/ I. SELIM/ S. EL SAWAH (note 1); A. EL KOSHERI, Public Policy under Egyptian Law, in P. SANDERS (eds), *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series*, 1987, p. 321-328 and I. SELIM, *L'ordre public international* in favorem arbitrandum, *étude de droit comparé*, Sarrebruck 2012.

[74] This expression comes from M. BERGER (note 15).

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Muslim concerned, seems rather loosely influenced by Islamic Law[75] and is likely to intervene only where the whole Egyptian society tends to share the same view as, for example, the refusal of same-sex marriages or slavery.

When litigants are Muslim – even if they are not Egyptian – public policy will be strongly connected to Islamic law even though there is no explicit reference to Islamic law in Article 298 CCPC. Public policy in this situation is no longer the public policy of the whole Egyptian society but an "Islamic Public policy", based on Islamic law. That being said, it is not easy to define the notion of Islamic law that should not be contradicted by the foreign judgment. This definition can vary extensively among judges.[76]

One option is to consider that Islamic law should be understood to encompass *any imperative Islamic law rule.* Such a definition would greatly enlarge the scope of public policy and would entail a review of the merits of the foreign judgment. Since the distinction between local public policy and international public policy is not well established in Egyptian law, it is possible that some judges may adopt this view (especially because some view the application of Islamic law as a "right" of every Muslim).

Islamic law – as a source of public policy – could be understood as referring to the rules on which there is a *consensus* among Islamic legal jurists[77] or as referring to the most *distinctive* rules of Islamic law (which distinguishes Islamic law from other legal systems).

Under a narrower definition, Islamic law – as a source of public policy – can refer to its *most fundamental or essential rules.* This definition would be quite similar to the distinction between *local public policy* and *international public policy,* which is relied on in France and by the Egyptian doctrine. Nevertheless, that being said, it is not an easy task to define what a fundamental rule of Islamic law is.[78]

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[75] It is acknowledged that this view is not absolutely upheld in practice. Courts can refer to Islamic Law rules even when Muslims are not concerned. See for example the decision of 12 January 1956, case 4/25 where it was decided that a Lebanese judgment denying filiation does not contradict Islamic law, which prohibits the establishment of the filiation of a child born outside the wedlock. In the case, the parties were Christian orthodox and it is not clear under which title it was referred to in Islamic law.

[76] More generally, the definition of Islamic law has, in the recent history of Egypt, been the subject of intense legal and political debates. It must be noted that Islamic law is the product of jurists of the different Islamic legal schools interpreting the Quran and the *Sunna.* Thus, Islamic law is not a homogeneous set of rules but consists of a variety of legal opinions on every issue. It seems that in Egypt, Islamic Law is to be understood as Islamic Law as embodied by Egyptian law (more or less as interpreted by Hanafi school of law). See Cass. 14 May 2005, case 200/66 where the Court of Cassation founds its decision on the opinion of the Hanafi school of law.

[77] It is, more or less, the position of the Egyptian Supreme Constitutional Court with regard to the definition of Islamic law in the context of the control of the conformity of laws to the Islamic law principles (Article 2 of the Constitution stipulates the Islamic law principles are the main source of legislation). That being said, defining "consensus" is not an easy task.

[78] In other words, it may be said that there are two methods to define public policy. One method is to determine public policy by looking only to its own legal system. Public

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Two recent decisions have been identified which address the question of public policy in the context of enforcement of foreign decisions. In one case, it has been decided that a judgment rendered upon a *serment décisoire* in a monetary dispute is not contrary to public policy or to morality in Egypt.[79]

In the other case, where the enforcement of a French judgment granting the custody of a Muslim child to his French Christian mother was sought, the Court of Cassation approved the Court of Appeals' judgment granting enforcement.

The Court of Appeal, following the Court of first instance, held that the French judgment did not contradict public policy since it did not contradict Islamic law which permits the grant of custody of a Muslim child under 7 years to his Christian or Jewish mother when there is no fear that the child would be educated in a religion other than Islam. The Court of Cassation adds that it is settled law in the Hanafi school of law[80] that a mother has priority to be the custodian of her child even if she is not Muslim because she will be the most tender with him and tenderness does not differ according to religion. However, the child should be taken from her when the child understands religion (when he becomes 7 years old) or when there is a fear that he will be educated in a religion other than Islam.

7. Identity between the Applied Law and the Law Designated by the Egyptian Conflict of Laws Rule?

According to Article 298 CCPC, there is no requirement that the foreign court applies the law designated by the Egyptian conflict of laws rule in order to grant enforcement to a foreign judgment. Accordingly, authors teach that this is not a condition that a foreign judgment must fulfil.[81]

However, certain authors – influenced by foreign laws, which are familiar with this condition – are in favour of this solution[82] and one rather recent Court of Cassation decision[83] upheld this point of view. In a case where the recognition of a Californian divorce judgment[84] was sought, the Court of Cassation quoted Article

policy will consist of imperative rules (maximalist approach) or fundamental rules (minimalist approach). In the second method, public policy will be defined by contrast to (in reaction to) other legal systems (public policy will consist of distinctive rules even if they are not considered to be fundamental). It may be considered that in Egyptian doctrine and case law, both methods are used.

[79] Cass. 12 March 2012, case 2950/68.

[80] Hanafi school of law, as said earlier, is the main source of Islamic family law in Egypt.

[81] See a detailed discussion in H. SADEK, *Private International Law*, Alexandria 2004, p. 288-294.

[82] E. ABDALLAH, *Private International Law*, part 2, Cairo 1986, p. 920. This author mentions the French law. It is worth noting that the French Court of Cassation decided in 2007 that there is no need to make such control.

[83] Cass. 25 May 1993, case 62/61.

[84] Both parties held both the Egyptian and American citizenship and were domiciled in the US. The wife sustained that the Californian court was composed of Muslim judges so there is no contradiction to public policy.

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13 CC, stating that the law of the country to which the husband belongs at the time of the introduction of the divorce suit should govern the divorce; it also relied on Article 14 CC, which states that when one of the spouses is Egyptian, Egyptian law should be applicable. The Court then declared that Article 14 CC is an imperative provision and part of public policy. Thus, Egyptian law should be applied in the present case even though this case was brought before a foreign court and the fact that both spouses acquired American citizenship does not change the matter. Accordingly, this foreign judgment should be denied enforcement.[85]

This decision makes it difficult to determine the current state of law (*droit positif*). In any event, since the control of the applicable law by the foreign court is not required by the CCPC and since only this decision requires such control,[86] the rule laid down in this decision should be construed narrowly and should not be extended beyond the case of Egyptians' divorce decided by courts of non-Islamic countries.

8. Other Conditions?

Although absence of fraud is not a condition required by 298 CCPC, authors consider that a judgment obtained by fraud to rules of international jurisdiction can be denied enforcement.[87] A decision, rendered under the former CCPC, mentioned the absence of fraud as a condition of the foreign judgment enforcement.[88]

C. Procedural Aspects of the Enforcement Suit

Article 297 CCPC indicates that the enforcement suit should be brought before the court of first instance in the jurisdiction in which the judgment is to be enforced.

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[85] It is worth noting that this decision is not unique. A Cairo Court of Appeal decision (6 April 1989, cases 815/104 and 818/104) annulled a Texan decision because the American decision was rendered by a non-Muslim judge and it did not apply Egyptian personal status law for Muslims according to Articles 13 and 14 CC. This decision was quashed by the Court of Cassation (31 December 1991, case 140/59) because an Egyptian court has no authority to annul a foreign judgment. However, the issue of the control of the law applied by the foreign judge was not explicitly addressed.

[86] The author is not aware of any other decision of the same vein.

[87] H. SADEK (note 81) at 287.

[88] Cass. 12 January 1956, case 4/25.

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VI. Distinction between Recognition and Enforcement

Notwithstanding that the applicable texts refer only to "enforcement" and make no reference to "recognition", it would be inaccurate to say that Egyptian law ignores the distinction between the two concepts.[89]

First, Egyptian doctrine – following French doctrine – acknowledges that a foreign decision can produce legal effects even where it has not been granted enforcement.[90] Second, the Egyptian Court of Cassation has confirmed that view. Nonetheless, it seems that a judgment's ability to produce legal effects depends on its subject matter.

In line with French case law, Egyptian authors and case law seem to agree that in the matter of the state of persons, it is accepted that a judgment can produce legal effects without the need to follow the enforcement procedure.

The most recent cases we identified are decisions from 1956 and 1963. In the first decision,[91] the Court of Cassation approved a decision, which held that a Lebanese judgment denying paternity has *res judicata* in Egypt even though it was not granted enforcement for the reason that it is a final judgment concerning the state of persons.

In the second decision,[92] the Court of Cassation decided that a final foreign judgment[93] concerning the state of persons rendered by a court having jurisdiction could be taken into account even if it was not granted enforcement.

In addition to these two decisions, it should be noted that the Supreme Constitutional Court recently decided[94] that there could not be a positive jurisdictional conflict (*conflit juridictionnel positif*)[95] between a pending suit in Egypt and a foreign judgment on the same matter. This finding was based on the argument that since enforcement had not been granted by an Egyptian court, a foreign judgment could not be enforceable in Egypt even though it has *res judicata*.

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[89] On this distinction, see D.P. STEWART (Recognition and Enforcement of Foreign Judgements in the United States, *YPIL* 2010, p. 192) who writes: "while recognition of a foreign judgment is a prerequisite to enforcement of that judgment, recognition and enforcement remain two separate concepts. Recognition denotes a court's willingness to accept the judgment as a valid and binding legal determination between the parties; enforcement denotes a court's application of its powers to require the judgment debtor to carry out the terms of a judgment that has been recognized."

[90] Egyptian authors differ about the types of judgment which can be recognized without being granted enforcement. See for example E. ABDALLAH (note 82), at 945; O. ABDEL-AL (note 67), at 459.

[91] Cass. 12 January 1956, case 4/25.

[92] Cass. 26 June 1963, case 45/29.

[93] It was a divorce judgment rendered by a Swiss court (Lugano).

[94] Supreme Constitutional Court, 6 June 2010, case 46/31.

[95] According to Article 192 of the Constitution, the SCC has jurisdiction in disputes pertaining to the enforcement of two final judgments rendered by two different jurisdictional orders.

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As for the monetary judgments, a 2012 decision of the Court of Cassation[96] accepted that such judgments produce effects even though they were not granted *exequatur*. In this case, the Court of Appeal refused to take into account a UAE judgment for the reason that this judgment was not granted *exequatur*. The Court of Appeal quashed this decision and declared that although a foreign judgment cannot be enforced in Egypt unless it has been granted *exequatur*, a distinction should be drawn between the enforcement of the foreign judgment and the recognition of its authority. For the latter hypothesis, an *exequatur* is not needed and it is sufficient that the judgment fulfils the standard conditions.

VII. Enforcement of Authentic Instruments

Article 300 CCPC regulates the issue of the enforcement of authentic instruments by establishing the enforcement conditions and the procedure to be followed.
As per civil status records, Article 9 of the law on Civil Status 143/1994 stipulates, "Every registration of a civil-status event which occurred, to an Egyptian citizen, in a foreign state, is considered to be valid if it was accomplished according to this country's laws provided that it does not contravene Egyptian laws"[97].

A. Conditions of Enforcement

Article 300 CCPC sets three types of conditions:

Firstly, it stipulates that a foreign authentic instrument could be enforced in Egypt after fulfilling the same conditions required by the law of the country where it was drafted for the enforcement of the Egyptian authentic instruments (rule of reciprocity).

Secondly, it must be verified that the conditions of the instrument's authenticity and enforceability stipulated by the country where it was concluded are met.

Thirdly, the authentic instrument must not contradict public policy or morals in Egypt.

In a case where the recognition of an authenticated will by the Greek Consul in Cairo was sought, the Court of Cassation[98] decided that foreign Consuls based in Egypt are competent to authenticate legal acts concluded by their nationals since Egyptian Consuls have the same competence in their countries (rule of reciprocity). It held also in the same case that an authenticated instrument does not enjoy enforceability (*force exécutoire*) in Egypt unless it is granted enforcement according to the CCPC. But since only the validity of the authenticated will

[96] 12 March 2012, case 2950/68.

[97] Our own translation.

[98] 4 December 1974, case 27/37. This case was rendered under the former CPC.

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was questioned in that case, it was held that the will could have the authority of a proof even if it was not granted enforcement.[99]

B. Procedure

According to Article 300 CCPC, the request for enforcement should be presented to the judge of enforcement (*juge de l'exécution*) in the jurisdiction in which the authentic instrument is to be enforced.

VIII. Concluding Remarks

Uncertainty goes hand in hand with adjudication since the interpretation of legal texts is not a cognitive act but an act of will. The judge – any judge – has some discretion when applying the law to the facts.

That being said, it seems that the risk of uncertainty in the context of enforcement of foreign judgments in Egypt is higher than the average level of uncertainty to be expected in a European country. This is particularly true when it comes to the enforcement of judgments concerning family law issues rendered by courts of Non-Muslim countries. The fact that case law of lower courts is never published and that the case law of the Court of Cassation is not regularly published are just two of the factors contributing to the increase in uncertainty. These factors also make it more difficult for the law to be "settled". The interpretation of Islamic law, as part of public policy, can also vary from one judge to another.

In addition to that, it must be noted that since a legal amendment of 2004, the Court of Cassation cannot be seized of family law matters (including cases related to the enforcement of foreign decisions).

Finally, as for monetary judgments, uncertainty is less important (because public policy considerations are more discrete) and case law seems to be settled on some formerly controversial issues (especially the condition related to the Egyptian courts' lack of jurisdiction).

[99] In the same meaning, E. ABDALLAH (note 82), at 953.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN JAPAN

Yasuhiro OKUDA*

I. Introduction
II. Rules on Recognition
  A. Foreign Judgments
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  C. Service of Process
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I. Introduction

Recognition and enforcement of foreign judgments in civil and commercial matters are regulated in Japan by the Code of Civil Procedure (CCP) and the Code of Civil Execution (CCE).[1] There is neither bilateral nor multilateral treaty between Japan and any other country, except the international conventions on oil pollution.[2] Japan is not a contracting state of the Hague Conventions on private international law on

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[1] *Minji Soshô Hô* [Code of Civil Procedure], Law No 109/1996 as last amended by Law No 30/2012; *Minji Shikkô Hô* [Code of Civil Execution], Law No 4/1979 as last amended by Law No 96/2013. The English translation of the Japan's CCP and CCE is available at <http://www.japaneselawtranslation.go.jp/?re=02>. As for the translation of the relevant provisions by the author, see Appendix.

[2] Art. 10 of the 1992 International Convention on Civil Liability for Oil Pollution Damage; Art. 8 of the 2003 Protocol to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. Both provisions are incorporated into Art. 12 and 27 of *Senpaku Yudaku Songai-baishô Hoshô Hô* [Act on Compensation for Oil Pollution Damage by Ships], Law No 95/1975 as last amended by Law No 37/2004.

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this subject, although it ratified some conventions concerning applicable law and judicial assistance.[3]

Japan's CCP and CCE are similar to the German Code of Civil Procedure (GCCP) in respect of recognition and enforcement of foreign judgments. Art. 118 CCP (like Art. 328 GCCP) determines the conditions for recognition, such as jurisdiction of foreign court, proper service of process, compatibility to public policy, and reciprocity. There is no need of registration or any other procedure for the effects other than the compulsory execution that can be done if a judgment for execution is given and binding under Art. 22 No 6 CCE (like Art. 722 GCCP). Art. 24 CCE (like Art. 723 GCCP) prescribes the procedure seeking a judgment for execution. However, the interpretation of the provisions may be different between Japan and Germany under the developments of case law and doctrine.[4] This paper will analyse mainly the case law[5] established by Japanese courts in civil and commercial matters, although the family matters are in principle excluded.

II. Rules on Recognition

A. Foreign Judgments

The leading case is the judgment of the Supreme Court of 28 April 1998 (hereinafter cited as "SC 1998").[6] It defines a foreign judgment for the purpose of Art. 24 CCE (and Art. 118 CCP) as any final and binding decision of a foreign court on private law relations, regardless of its name, procedure or form. Art. 118 CCP concerns only a "final and binding judgment" (*Kakutei Hanketsu*) of a foreign court. A Japanese judgment is final and binding by expiration of the period for

[3] Japan ratified the Convention of 1 March 1954 on civil procedure (in 1970); the Convention of 24 October 1956 on the law applicable to maintenance obligations towards children (in 1977); the Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions (in 1964); the Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents (in 1970); the Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters (in 1970); the Convention of 2 October 1973 on the law applicable to maintenance obligations (in 1986); the Convention of 25 October 1980 on the civil aspects of international child abduction (in 2014).

[4] As for the German case law and doctrine, see generally D. MARTINY, Recognition and Enforcement of Foreign Judgments in Germany and Europe, in J. BASEDOW/ H. BAUM/ Y. NISHITANI (ed.), *Japanese and European Private International Law in Comparative Perspective*, Tübingen 2008, p. 389-400.

[5] The English translation of the Supreme Court decisions is available at <http://www.courts.go.jp/english/judgments/index.html>. See also the translation cited in the notes for each case.

[6] *Minshû*, vol. 52, No 3, p. 853. As for the English translation, see *the Japanese Annual of International Law,* No 42 (1999), p. 155-161; Case No 68 with comment by T. KONO, in M. BÄLZ/ M. DERNAUER/ Ch. HEATH/ A. PETERSEN-PADBERG (ed.), *Business Law in Japan - Cases and Comments,* Alphen aan den Rijn 2012, p. 745-755.

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appeal or review (Art. 116 CCP).[7] Similarly a foreign judgment must be no longer subject to ordinal procedure for appeal or review. A decision on "private law relations" means the one in civil and commercial matters. An American judgment for punitive damages is regarded to concern not criminal matter but civil and commercial matters, as mentioned *infra* in D. Although not yet discussed in Japanese case law, tax law cases including a case presented by a private person to whom tax claims were assigned will be treated as administrative matter and not be recognized under Art. 118 CCP.[8] The SC 1998 concerns a decree of interest payment rendered by the Hong Kong High Court separately after the judgment in merit. The Supreme Court decided that the decree may be recognized and enforced, because it is only a technical matter, whether to include the interest payment in the judgment in merit (like Japan and other civil law countries) or to give enforceability by law without including it in the judgment in merit.[9]

B. Jurisdiction

The foreign court must have jurisdiction according to Japanese laws or conventions concluded by Japan (Art. 118 No 1 CCP). The jurisdiction of foreign courts for recognition of their judgments in Japan is generally called "indirect jurisdiction". However, there is neither written law nor convention concerning such an indirect jurisdiction, although the (direct) jurisdiction of Japanese courts is prescribed by CCP, Articles 3-2 to 3-12 since April 1, 2012.[10] The SC 1998, which was rendered before the new legislation, declared that the foreign court must have jurisdiction according to the principle of Japan's international procedural law that should be determined by rule of reason (*Jyôri*) considering the fairness of the parties as well as the proper and prompt proceedings. The wording is similar to the other Supreme Court decision of 16 October 1981 concerning the direct jurisdiction of Japanese courts.[11] Nevertheless the SC 1998 added that the jurisdiction of the foreign court should be decided considering whether the recognition of the foreign judgment in Japan is proper under the circumstances of each case.

The ruling of the SC 1998 is not so clear but suggests that the jurisdiction of foreign courts and Japanese courts should be determined not always on same

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[7] A final and binding judgment may be attacked only by retrial for exceptional cases that are restrictively provided (Art. 338 CCP).

[8] See M. DOGAUCHI, Comment to the SC 1998, in *Kokusai-shihô Hanrei Hyakusen* (100 Cases on Private International Law), Rev. Ed., Tokyo 2007, p. 193.

[9] See also the judgment of the Supreme Court of 11 July 1997, *Minshû,* vol. 51, No 6, p. 2530; *the Japanese Annual of International Law,* No 41 (1998), p. 107-109 for the case between the same parties as mentioned *infra* in D.

[10] As for the new legislation, see generally Y. OKUDA, New Provisions on International Jurisdiction of Japanese Courts (Annotated Translation of the amended Civil Procedure Act), in this *Yearbook* 2011, p. 367-380.

[11] *Minshû*, vol. 35, No 7, p. 1224. As for the English translation, see *the Japanese Annual of International Law,* No 26 (1983), p. 122-124; Case No 66 with comment by A. PETERSEN-PADBERG, in *Business Law in Japan* (note 6), p. 727-737.

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criteria but may be different if necessary. Under present law the jurisdiction of the foreign court should be in principle determined by changing some words of CCP, Articles 3-2 to 3-12 on the jurisdiction of Japanese courts. For example, the foreign court may have jurisdiction because of the domicile of the defendant, the principal place of business of the defendant company, the performance of the obligation, the assets of the defendant, or the occurrence of tort in the country where the court is situated.[12] However, assuming that the plaintiff has lost his case due to lack of jurisdiction, the indirect jurisdiction of the foreign court for the merit will be arguably denied also according to the Japanese rules, but a decree of court costs should be recognized and enforced in Japan, because the foreign court is deemed to have jurisdiction for court costs in such a case.[13] On the contrary, the jurisdiction on appearance (Art. 3-6 CCP) may be denied for recognition of a foreign judgment in some cases. For example, the defendant may give up the idea of contesting the jurisdiction in the proceedings before the foreign court, even though the jurisdiction rule is exorbitant such as the jurisdiction based on the nationality of the plaintiff (Art. 14 of the French Civil Code) or the transient rule (case law of the United Kingdom).[14] If the defendant has no chance for succeeding in dispute on the jurisdiction, he or she will argue the merit of the case without contesting the jurisdiction. In such a case the recognition of the foreign court should be denied if no base for jurisdiction other than appearance is found according to the Japanese jurisdiction rules.[15]

C. Service of Process

The summons or the order of the foreign court for starting the suit must be effectively served on the defendant, except by the service by publication or any other similar service. A foreign judgment will not be recognized, unless the defeated defendant was duly served in above-mentioned manner, or where that is not the case, the defendant appeared before the court (Art. 118 No 2 CCP).

The service by publication is recognized as one type of service of process for proceedings of Japanese courts in certain cases such as where the domicile or residence of the defendant is not known, or where the service abroad by judicial assistance was rejected or by other reason impossible (Art. 110 para. 1 CCP). The service is effective by expiring the certain period after posting a notice to the effect that the court clerk will hand over the document at any time (Art. 111 and 112

[12] The SC 1998 affirmed the jurisdiction of the Hong Kong High Court because of the domicile of the defendants for the one case and the related claims or the counter-claim for the other cases.

[13] See M. DOGAUCHI (note 8), at 193.

[14] The transient rule means that the jurisdiction is justified by serving the document instituting the proceedings on the defendant during his or her temporary presence in the United Kingdom. See Annex I of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), *OJ* L 12 of 16 January 2001, p. 18.

[15] See Y. OKUDA, Comment to the decision of the District Court Osaka of 25.3.1991, in *Hanrei Jihô*, No 1421, p. 196.

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CCP). As a matter of fact the summons will not be served on the defendant in most or arguably all cases. Accordingly a foreign judgment started by the service by publication is not recognized in Japan, the same as a Japanese judgment will likely be effective only in Japan.

In Japanese practice the service of process is usually effectuated by post, if the defendant is found in Japan (Art. 107 CCP). On the contrary, if the defendant is abroad, he or she should be served in principle by judicial assistance either under Article 108 CCP, bilateral agreements with foreign countries, or the Hague Convention on civil procedure of 1954 or on the service abroad of 1965.[16] This is because the service of process is an act of sovereignty that can be done inside of its own territory. However, in practice of common law countries the summons is served often by mail or by handing over by the plaintiff's representative, even though the defendant is outside of the jurisdiction of the forum. The SC 1998 decided that the service of process for the purpose of Art. 118 No 2 CCP need not be always identical to the service determined by the CCP but conform to the rules of agreements concluded by Japan and the forum state. In that case the notice of motion of the Hong Kong High Court was handed over by a Japanese lawyer, who was authorized by the plaintiff, to the defendants domiciled in Japan. The SC 1998 found the service illegal, because such a personal service abroad is justified neither by the Hague Convention on the service abroad nor the Consul Treaty concluded by Japan and UK, under whose sovereignty Hong Kong was at that time, although the condition of Art. 118 No 2 CCP was considered to be fulfilled by appearance of the defendants before the Hong Kong High Court. Despite of the reasonable conclusion the reasoning of the SC 1998 is questionable, as neither the Hague Convention nor the Consul Treaty regulates the effects of a judgment started by the service abroad that is contrary to the rules prescribed by them.[17] The exclusion of the personal service and the service by mail abroad should be justified for recognition of a foreign judgment by incompatibility to the basic principle of Japanese civil procedural law, under which the service of process is considered as an act of sovereignty and therefore should be done abroad only by judicial assistance.[18]

The service of process should be distinguished from the mere notice. The plaintiff may let the defendant know the start of the suit by a notice. If the defendant appeared before the court, although he or she was not duly served, the defect of the service will be cured. The SC 1998 decided that Art. 118 No 2 covers also the

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[16] The service by consul is also permitted under a certain conditions by the Consul Treaties with UK and USA, the both Hague conventions, and acceptance in each case by the state where the service should be done.

[17] That is the same for the Hague Convention on civil procedure. Similarly it is not relevant that Japan did not declare the objection to "the freedom to send judicial documents, by postal channels, directly to persons abroad" (Art. 10 (a) of the Convention on the service abroad).

[18] In family matter the exclusion of the service by mail is often justified by lack of the Japanese translation of the documents. See the High Court Tokyo of 18 September 1997, *Kôminshû,* vol. 50, No 3, p. 319 (the judgment of Ohio for maintenance to a minor child); the District Court Tokyo, Branch Hachi-ôji of 8 December 1997, *Hanrei Taimuzu,* No 976, p. 235 (the judgment of New York for delivery of a minor child). However, the lack of the Japanese translation is a marginal problem.

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case where the defendant appeared for contesting the jurisdiction of the foreign court, although the jurisdiction by appearance is recognized only in a case where the defendant argued the merit without contesting jurisdiction.

D. Public Policy

A foreign judgment will not be recognized if its contents or the proceedings are contrary to the Japanese public policy (Art. 118 No 3 CCP). This means both the substantive and the procedural public policy. A foreign court applies often a law other than the applicable law designated by Japanese conflict rules,[19] because the applicable law should be determined by other conflict rules of the forum. However, the difference of conflict rules is not relevant to the public policy for recognition. Even though a same law is designated by conflict rules of the forum and Japan, the foreign court applies the law that may be contrary to the basic principles of Japanese law and not applied by a Japanese court due to incompatibility to the Japanese public policy.

As for the public policy for recognition, the leading case is the judgment of the Supreme Court of 11 July 1997 (hereinafter cited as "SC 1997").[20] The case concerns the punitive damages under the law of California. The SC 1997 decided that the punitive damages aim at the sanction to the defendant and the prevention of future wrongs, the same as criminal law, although the purpose of the damages under Japanese civil law is the compensation and recovery of damage to the plaintiff, that is, the punitive damages for the above mentioned purpose is incompatible to the basic principles of the Japanese civil law system. The judgment of the High Court Tokyo of 28 June 1993 for the same case considered the criminal nature of the punitive damages and doubted that the part of the American judgment ordering the punitive damages falls into the category of a judgment in civil and commercial matters to be recognized in Japan.[21] However, the Supreme Court considered it as a judgment in civil and commercial matter. This will be because the punitive damages should not be paid to the government but to the plaintiff. The critical point is whether the damages are compensatory. The SC 1998 decided that the order to pay court costs including the lawyer's fee is compatible to the Japanese public policy in so far as the amount is determined within the costs in fact incurred, although the Hong Kong High Court had considered the act in bad faith of the defendant, so that the order is of punitive nature.

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[19] *Hô no Tekiyô ni kansuru Tsûsoku Hô,* [Act on the General Rules on the Application of Laws], Law No 78/2006. See generally Y. OKUDA, Reform of Japan's Private International Law: Act on the General Rules on the Application of Laws, in this *Yearbook* 2006, p. 145-167.

[20] *Minshû*, vol. 51, No 6, p. 2573. As for English translation, see *the Japanese Annual of International Law,* No 41, p. 104-106; Case No 67 with comment by T. KONO, in *Business Law in Japan* (note 6), at 739-743.

[21] *Minshû,* vol. 51, No 6, p. 2563. As for English translation, see *the Japanese Annual of International Law,* No 37 (1994), p. 155-158. The High Court Tokyo continued that the punitive damages, even if in civil and commercial matters, are incompatible to the public policy.

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Further, the SC 1998 found the judgment on merit of the Hong Kong High Court compatible to the procedural public policy, although it was argued in the proceedings that the judgment was obtained by fraud of the plaintiff. The Supreme Court considered the argument as substantially to the effect that the finding of facts by the Hong Kong High Court was improper, and decided that the finding of facts by a foreign court should not be reviewed, as the so called "révision au fond" is excluded under Art. 24 para. 2 CCE (see *infra* III).

E. Reciprocity

The lack of reciprocity is one reason for non-recognition of a foreign judgment (Art. 118 No 4 CCP). However, recognition rules are so differently determined in each country of the world, that it cannot be easily decided, whether and under which conditions a Japanese judgment is effective in the country of the foreign court. As for the reciprocity, the leading case is the judgment of the Supreme Court of 7 June 1983 (hereinafter cited as "SC 1983).[22] It decided that the reciprocity is affirmed if a Japanese judgment of the same type as the foreign judgment in question is effective in that country under not significantly different conditions; this is because recognition rules of the foreign country will not be exactly the same as the Japanese rules without any agreement between both countries. Thus the Supreme Court affirmed the reciprocity between Japan and D.C. Columbia in respect on a pecuniary judgment. On the same reason the SC 1998 affirmed the reciprocity between Japan and Hong Kong, because English common law rules for recognition of a foreign pecuniary judgment are not significantly different from the Japanese rules.

On the contrary, the judgment of the High Court Osaka of 9 April 2003 denied the reciprocity between Japan and the People's Republic of China.[23] Although it declared the same rule as the SC 1983 that the reciprocity is affirmed if a Japanese judgment is effective in that country under not significantly different conditions, it considered the reply of the Supreme People's Court of China of 26 June 1994 to the inquiry of the Intermediate People's Court Dalian and the latter's decision of 5 November 1994 that there is neither agreement nor reciprocity between Japan and China for mutual recognition of judgments; it concluded that there is no precedent of China that recognized a Japanese judgment or affirmed the reciprocity.

The judgment of the High Court Osaka is questionable. The Code of Civil Procedure of China provides that a people's court should recognize the effects of a foreign judgment if it considers the judgment to be compatible to the basic principles of Chinese law as well as sovereignty, governmental security, and social and public interests after reviewing the judgment according to international agreements

[22] *Minshû,* vol. 37, No 5, p. 611. As for English translation, see *the Japanese Annual of International Law,* No 27 (1984), p. 119-127.

[23] *Hanrei Jihô,* No 1841, p. 111. As for English translation, see *the Japanese Annual of International Law,* No 48 (2005), p. 171-176.

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concluded by China or the principle of reciprocity.[24] From this it will follow that the reciprocity and the conformity to the Chinese public policy in broader sense are required for recognition of a foreign judgment in China,[25] so that the recognition rules of China may be milder than the Japanese rules. Anyway it is not clear why the Chinese courts denied the reciprocity between Japan and China. Decisive for reciprocity is not a precedent but recognition rules of the foreign country. Unless the rules are clearly stricter than the Japanese rules, the reciprocity should be affirmed.[26]

III. Enforcement Proceedings

A foreign judgment, even though final and binding in that country, may be compulsory enforced only if a Japanese judgment for execution of the foreign judgment is final and binding (Art. 22 No 6 CCE). A suit for this purpose must be brought before the district court having jurisdiction over the general venue[27] of the debtor, and where such a general venue is not found in Japan, before the district court having jurisdiction over the place where the object of dispute or the assets of the debtor to be seized are located (Art. 24 para. 1 CCE). Although not clearly provided in CCE, the international jurisdiction of Japanese courts will be found in so far as the object of dispute or the assets of the debtor to be seized are located in Japan. The court must refrain from reviewing the justice of the foreign judgment (*révision au fond*, Art. 24 para. 2 CCE). This is because a *révision au fond* is substantially the same as a new trial in Japan and equivalent to non-recognition of the foreign judgment. The suit will be rejected either if it is not proven that the

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[24] Art. 268 in version of 1991. Art. 266 in version of 2007 and Art. 282 in version of 2012 determine similar recognition rules.

[25] The High Court Osaka doubted the recognition of a Japanese judgment in China because of the Chinese public policy, considering the difference of economy system between both countries. However, the public policy is always different in each country as a matter of course. If the reciprocity should be denied because of difference of public policy concept, no foreign judgments would be recognized at all in the countries requiring the reciprocity.

[26] On this point the judgment of the District Court Nagoya of 6 February 1987, *Hanrei Jihô,* No 1236, p. 113; *the Japanese Annual of International Law,* No 33 (1990), p. 189-196 should be noted. It affirmed the reciprocity between Japan and Germany, although the predominant opinion in Germany at that time denied it erroneously. The present German opinion affirmed it. See generally D. MARTINY (note 4), at 397.

[27] The general venue is determined for a natural person by his or her domicile, or where he or she is not domiciled in Japan or his or her domicile is unknown, by his or her residence, or where he or she is not resident in Japan or his or her residence is unknown, by his or her last domicile in Japan (Art. 4 para. 2 CCP); for a company by its principal place of business, or where it has no place of business, by the domicile of its representative (Art. 4 para. 4 CCP); however for a foreign company by its principal place of Japanese business, or where it has no place of Japanese business, by the domicile of its representative for Japanese business (Art. 4 para. 5 CCP).

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foreign judgment is final and binding in that country, or if one of the conditions enumerated in No 1 to 4 of Art. 118 CCP is not fulfilled (Art. 24 para. 3 CCE). In the execution judgment the court must declare that the compulsory execution of the foreign judgment is permissible (Art. 24 para. 4 CCE).

IV. Conclusion

The enforcement of a foreign judgment is necessary for a plaintiff who is not satisfied with the enforcement in that country where the assets of the defendant are not at all or not enough located. The plaintiff will enforce the foreign judgment in Japan under clear and not strict conditions, although there is no agreement with any other country. This is because Japanese law considers the need to prevent inconsistent judgments between the same parties, to reduce the judicial costs, and to realize the right of the parties.[28] However, Japanese courts have difficulty to recognize American judgments that started by improper service of process or ordered the punitive damages contrary to the basic principles of the Japanese civil law system. It will be fated that a certain type of service of process or of damages is effective only in the territory of the forum. In other words a judgment has not always the exterritorial effects. On the other hand, it will be desirable for Japan to conclude agreements for mutual recognition of judgment with foreign countries. This will prevent the situation of non-recognition each other between Japan and a foreign country such as China. The condition of reciprocity does not work well in such a situation for promoting a good relationship with foreign countries.

V. Appendix

Minji Soshô Hô [Code of Civil Procedure]

Article 118
Effect of Final and Binding Judgment of Foreign Court

A final and binding judgment of a foreign court shall be effective in so far as all of the following conditions are fulfilled:

(i) That the jurisdiction of the foreign court is recognized by laws or treaties;

(ii) That the defeated defendant was served with a summons or an order necessary for start of the suit (except a service by publication or any other similar service), or where that is not the case, he or she appeared before the court;

[28] See the judgment of SC 1983 on reciprocity (note 22).

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(iii) That the contents of the judgment and the proceedings are not contrary to the Japanese public policy; and

(iv) That the reciprocity is found.

Minji Shikkô Hô [Code of Civil Execution]

Article 22
Title of Obligation

Compulsory execution shall be effectuated by any of the following (hereinafter referred to as 'title of obligation'):

(No 1 to 5, 6-2 and 7 omitted)

(vi) A judgment of a foreign court for which an execution judgment is final and binding

Article 24
Execution Judgment for Judgment of Foreign Court

(1) A suit seeking an execution judgment for a judgment of a foreign court shall belong to the competence of the district court having jurisdiction over the general venue of the debtor, and where such a general venue is not found, of the district court having jurisdiction over the place where the object of the dispute or the assets of the debtor are located.

(2) An execution judgment shall be given without reviewing the justice of the judgment.

(3) The suit set forth in Paragraph (1) shall be dismissed either in case where it is not proven that the judgment of the foreign court is final and binding, or in case where one of the conditions enumerated in Numbers of Article 118 of the Code of Civil Procedure is not fulfilled.

(4) In an execution judgment shall be declared that compulsory execution of the judgment of the foreign court is permissible.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE REPUBLIC OF KOREA

Kwang Hyun SUK*

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I. Introduction

This article discusses the recognition and enforcement of the judgments of foreign courts in Korea. Provisions for the recognition of foreign judgments in Korea are contained in the Code of Civil Procedure ("CCP"), while provisions for the enforcement of foreign judgments are contained in the Code of Civil Execution ("CCE"). Since Korea is not a party to any treaty or international agreement concerning the recognition and enforcement of foreign judgments in general, the question of recognition and enforcement of foreign judgments is governed solely by the relevant provisions in the CCP and the CCE, which were largely modelled on the German Code of Civil Procedure. However, since Korea is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"),the CCP and the CCE do not apply to the recognition and enforcement of foreign arbitral awards, which is governed by the New York Convention and/or the Arbitration Act.

II. Conditions for Recognition and Enforcement of Foreign Judgments

In order for a foreign judgment to be enforced in Korea, it is necessary to obtain an enforcement judgment (*exequatur*) pursuant to §§26-27 of the CCE. A prerequisite for obtaining such an enforcement judgment is that the conditions for recognition specified in §217 of the CCP are satisfied. These conditions are as follows: (i) the judgment should be final, conclusive and no longer subject to ordinary review; (ii) the foreign court should have had international jurisdiction; (iii) the defendant who has lost the case should have been served with the complaint and the summons or any orders in a lawful manner in advance so as to allow sufficient time for preparation of his defence; (iv) the recognition of the judgment should not be contrary to public policy of Korea; and (v) there should be a guarantee of reciprocity. These conditions are discussed below in more detail.

A. Judgments Entitled to Recognition

Foreign judgments which may be recognized in Korea are those rendered by foreign courts or other foreign juridical organs to determine legal rights or relations of a private law nature, including not only "judgments" as such but also decrees or decisions rendered by foreign courts. It is immaterial whether the foreign judgment deals with property rights, contractual claims or personal relations. §217, para. 1, subpara. 1 of the CCP amended in May of 2014 expressly provides such effect by stating that a judgment which is final, conclusive and no longer subject to ordinary review, or any other decision having the same effect, of a foreign court may be recognized upon the fulfillment of the requirements for recognition.

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To be entitled to recognition in Korea, a foreign judgment must be final, conclusive and no longer subject to an ordinary review. Examples of non-final judgments are an order for provisional attachment and an order for provisional injunction. Even if a foreign judgment subject to provisional enforcement is enforceable in the foreign country, it cannot be a subject of recognition in Korea while it is not final.

The Supreme Court held that a confession judgment under the Code of Civil Procedure of the State of California does not constitute a foreign judgment entitled to recognition in Korea because the confession judgment cannot be viewed as a judgment of the court and the opportunity of examinations between the parties was not guaranteed in the proceedings.[1]

However, the Supreme Court recently held that the discharge effect resulting from a court's approval of a rehabilitation plan in a U.S. bankruptcy proceeding could be recognized in Korea if the conditions for recognition of foreign judgments are satisfied.[2] Some commentators criticize the decision on the basis that (i) recognition of a foreign bankruptcy proceeding does not occur automatically, but requires a decision of a Korean court under the relevant provisions of the Korean Insolvency Act, which has been modelled on the UNCITRAL Model Law on Cross-Border Insolvency of 1997,and that (ii) in the above-mentioned case, the U.S court's decision to commence the bankruptcy proceeding that obviously precedes the approval of the rehabilitation plan had not yet been recognized in Korea.

B. Jurisdiction Requirement

1. Application of Jurisdiction Requirement

The jurisdiction requirement is specified in §217, para. 1, subpara. 1 in such terms that "the foreign court should have had international jurisdiction under the principles of international jurisdiction laid down in Korean law or international treaties."This means that Korean courts will recognize foreign judgments only when the international jurisdiction of the judgment rendering foreign court over the case ("indirect international jurisdiction") is found to exist on the basis of the criteria that the Korean court would apply in determining the jurisdiction when a similar cross-border action is brought before it ("direct international jurisdiction").

Although the CCP contains provisions on distribution of judicial power among the various courts within Korea (§§2-25, §§29-31;"CCP Venue Provisions"), the CCP does not contain any specific provision on direct international jurisdiction of Korean courts. Principles on international jurisdiction had been developed by court decisions in the past. However, the Private International Law of Korea ("KPILA"), which was amended in 2001, introduced three articles on international jurisdiction.§2 in the General Provisions lays down general rules on international jurisdiction and states that detailed and refined rules on international

[1] Docket No. 2009 Da 68910, April 29, 2010.

[2] Docket No. 2009 Ma 1600, March 25, 2010.

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jurisdiction should be developed by consulting the CCP Venue Provisions in civil or commercial matters. The idea underlying §2 requires judges to establish detailed and refined rules on international jurisdiction after considering the special characteristics of international jurisdiction instead of mechanically assuming that "rules on international jurisdiction are equal to the CCP Venue Provisions."In addition, §§27-28 introduced special rules to protect consumers and employees, respectively.

Influenced by the introduction of §2, the judgment of January 27, 2005 of the Supreme Court,[3]being the leading case on international jurisdiction, held as follows:

> "In determining the international jurisdiction the courts should follow the basic ideas of fairness to the parties, justice, promptness and economy of trial; more concretely, the courts should consider not only the interests of individuals such as fairness, conveniences and predictability of the litigating parties but also the interests of the courts and the state such as justice, promptness, efficiency and effectiveness of court decisions. In determining which of the various interests need to be protected, the courts shall follow in concrete cases the reasonable principles in conformity with the objective test, *i.e.*, a substantial connection between the parties and the forum, and a substantial connection between the dispute and the forum."

Following this decision, Korean courts tend to employ a case-by-case analysis based upon such general guidelines. However, the determination as to whether Korean courts have international jurisdiction in concrete cases is not clear enough because Korean courts sometimes exercise too much discretion. Therefore, legal commentators strongly suggest that detailed and refined rules on international jurisdiction should be inserted in the KPILA.

2. *Specific Criteria for Determining Jurisdiction*

The specific criteria that the Korean courts may apply in determining the question of jurisdiction when they are presented with cross-border actions are generally as follows:[4]

a) Defendant's Domicile

The CCP provides that an action is subject to the jurisdiction of the court located at the place where the defendant has his domicile (in the case of natural person) or principal place of business (in the case of juridical person)(§§2-3, 5). It is generally

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[3] Docket No. 2002 Da 59788.

[4] For more details, see Kwang Hyun SUK, *Gukjeminsasosongbeop (International Civil Procedure Law)*, Seoul, 2012, p. 67*et seq.*

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recognized that this rule (*actor sequitur forum rei)* applies to international jurisdiction.

b) Place of Branch

An action against a person maintaining an office or a place of business can be brought in the court located in that area only if the action concerns the business affairs of such office or such place of business (CCP, §12). It is generally recognized that this rule also applies to international jurisdiction.

The CCP also provides that the general forum for a foreign juridical person shall be the place in Korea where it has an office or a place of business (§5(2)). According to §5(2), it is not material to the exercise of jurisdiction by the court whether such office or place has any relation to a particular action involving the foreign corporation. The relationship between §5(2) and §12 is unclear. Despite an influential view to the contrary, Korean courts tend to apply §5 in determining international jurisdiction.[5] Under this view (which can be viewed as supporting the American concept of doing business), if a foreign corporation establishes a branch office or a place of business in Korea, it will be subject to Korean international jurisdiction generally without regard to whether the particular cause of action is connected with the operation of the Korean branch.

However, it is not clear whether the Supreme Court still maintains the position expressed in 2000, because in a recent case the Supreme Court apparently did not follow the approach of the 2000 Judgment in a comparable dispute.[6]

c) Place of Performance

The CCP provides that an action concerning property rights may be brought before the court located in the place of abode or the place of performance (§8). In a case involving payment of contractual obligations, the Supreme Court held in 1972 that §8 could be a basis of international jurisdiction.[7] Although §8 on its face is not limited to the performance of a contractual obligation, there is an influential view maintaining that the provision should not apply to the non-contractual obligations. It is not clear whether the Supreme Court still maintains the former position expressed in 1972, because in a recent case the Supreme Court apparently did not follow the approach of the 1972 Judgment in a dispute based upon contractual obligations.[8]

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[5] Docket No. 98 Da 35037, June 9, 2000.

[6] Docket No. 2010 18355 Da, July 15, 2010.

[7] Docket No. 71 Da 248, April 20, 1972.

[8] Docket No. 2006 Da 71908, 71915, May 29, 2006.

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d) Place of Tort

An action for tort may be brought before the court of the place where the tortious act occurred (CCP, §18). It is generally recognized that §18 should apply in determining the question of international jurisdiction. Where the tortious act occurred in one place and the consequence of the injury occurred in another, each of them could constitute a ground of international jurisdiction over the same tort case.[9] However, there is an influential view to the effect that such places should be determined rationally from the viewpoint of international jurisdiction and that, particularly in cases of product liability, it should be taken into account in determining the place of act or the place of injury whether the concerned place was one of the areas that the defendant was reasonably able to foresee. In fact this view has been expressly endorsed by the Supreme Court in a product liability case,[10] where the Court was influenced by the ideas of "reasonable foreseeability" and "purposeful availment" that appear in decisions of the Supreme Court of the U.S.[11]

e) Place of Property

An action concerning property rights against a person who does not have a domicile in Korea may be brought before the court located in the area where the subject matter of the claim, the subject matter for security or any attachable property of the defendant, is located (CCP, §11). This provision confers jurisdiction merely on the grounds of the location of any specified subject matter or property, and the Supreme Court admitted in 1988 that §11 may be applied to international jurisdiction.[12] However, there is an influential view which seeks to restrict application of the provision to the effect that it should apply only when the defendant has had property in Korea for a certain period of time and whose value is sufficient to cover the plaintiff's claim. In this context, there is also discussion as to whether an arrest of a ship could create jurisdiction over the case against the owner of the arrested ship.

f) Jurisdiction Agreement

In practice, the parties' agreement on international jurisdiction plays a very important role. The validity of the parties' agreement on international jurisdiction in a cross-border action is generally accepted in Korea. However, the Supreme Court has held that the following conditions should be satisfied in order for a jurisdiction clause conferring upon a foreign court exclusive jurisdiction to be valid;

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[9] Docket No. 82 Daka 1533, March 22, 1983.

[10] Docket No. 93 Da 39607, November 21, 1995.

[11] *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980) and *Asahi Metal Indus. v. Superior Court,* 480 U.S. 102 (1987).

[12] Docket No. 87 Daka 1728, October 25, 1988.

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(i) the case does not fall under the exclusive jurisdiction of Korea; (ii) the agreed-upon foreign court has valid jurisdiction under its law; (iii) the case should have a reasonable relationship with the chosen foreign court; and (iv) the jurisdiction agreement is not egregiously unreasonable or unfair.[13] Condition (iii) has been criticized by legal commentators.

g) Appearance

Even if a person is not otherwise subject to the international jurisdiction of Korean courts, if he appears before the Korean court and responds to the merits without reserving his objection against the jurisdiction of the Korean court, the Korean court will assume international jurisdiction over him since he can be deemed to have consented to the international jurisdiction of Korean courts (§30).

h) Protection of Socio-Economically Weaker Parties

The KPILA sets forth special rules on international jurisdiction in respect of passive consumer contracts and individual employment contracts (§§27-28), which are modelled on the Brussels Convention (§§13-15), the Brussels I Regulation (§§15-17) and on the 1999Hague Draft Convention (§§7-8). Whereas the consumer's habitual residence is relevant in consumer contracts, the place where the employee habitually performs his work is relevant in individual employment contracts.

i) Related Jurisdiction

The CCP contains a provision allowing an action against several persons or an action involving several claims to be brought before the court having jurisdiction over one of the defendants or one of the claims (§25). Some legal commentators take the view that the provision could be applicable to cross-border actions as well as domestic actions.

j) Exclusive International Jurisdiction

The CCP does not contain provisions on exclusive international jurisdiction of Korean courts. However, a majority of commentators take the position that Korean courts have exclusive international jurisdiction in the following cases: (i) in proceedings concerning rights *in rem* in immovable property if the property is situated in Korea; (ii) in proceedings concerning the validity of the constitution, nullity or dissolution of companies or the validity of the decisions of their organs, if the company has been established under Korean law; (iii) in proceedings concerning the validity of entries in

[13] Docket No. 96 Da 20093, September 9, 1997.

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public registers, if the register is kept in Korea; and (iv) in proceedings concerning the registration or validity of patents, trademarks, or other similar rights required to be registered, if the registration has been applied for or has taken place in Korea. This is very similar to the list of the exclusive jurisdiction under the Brussels I Regulations (§22). With regard to (iv) above, there was a dispute whether proceedings where the Korean plaintiff requires the Japanese defendant to transfer and register the transfer of the patents registered in Japan pursuant to the contract between the parties is subject to the exclusive jurisdiction of Japan or not. While the Supreme Court admitted that the proceedings where the subject matter is the validity or existence of patents generally fall under the exclusive jurisdiction of the country of registration, the Supreme Court held that the proceedings in question did not fall under the exclusive jurisdiction of Japan, because the principal subject matters of the dispute were the interpretation of the contract, and the rights and obligations of the parties under the contract.[14] The judgment was welcomed by legal commentators.

k) Family Matters

As to the case of family matters, the Supreme Court held in its leading case of 1975 that (i) in principle, considering the fairness of court proceedings and the idea of justice, the domicile of the defendant should be located in Korea in order for Korean courts to have jurisdiction because the *forum rei* principle is also valid for family matters including divorce cases, and that (ii) by way of exception, however, the Korean courts may have jurisdiction even if the domicile of the defendant is located outside of Korea, in a case where refusal to entertain the action could amount to a denial of justice.[15] As examples of such situations, the Supreme Court expressly mentioned cases where the defendant is missing or a comparable situation exists, or where the defendant actively responds to the action.

However, it is not clear whether the Supreme Court still maintains this position after the amendment of the KPILA in 2001, because a subsequent judgment of the Supreme Court[16] did not mention the foregoing jurisdictional rules. Lower courts appear to make efforts to establish the jurisdictional rules on a case-by-case analysis based upon §2 of KPILA instead of following the old jurisdictional rules established by the Supreme Court.

l) Forum non conveniens

There is a divide in the opinion of legal commentators as to whether or not the doctrine of *forum non conveniens*, under which the Korean court may refuse to exercise international jurisdiction even if Korean courts have international

[14] Docket No. 2009 Da 19093, April 28, 2011.

[15] Docket No. 74Meu 22, July 22, 1975.

[16] Docket No. 2005 Meu 884, May 26, 2006.

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jurisdiction according to the standard established by the KPILA, is allowed under the KPILA.

C. Service of Process

As one of the conditions for recognition of foreign judgments, the CCP stipulates that "the defendant who has lost the case should have been served with the complaint (or equivalent document) and the summons or any orders in a lawful manner (other than public notice or similar methods) in advance so as to allow sufficient time for preparation of his defence, or the defendant should have responded to the suit without having been served" (§217, para. 1, subpara. 2). Even where a Korean defendant was not served with due process, the CCP condition would be satisfied if he voluntarily responded to the action. However, the views are divided, and there is no court decision, as to whether appearance in court by a Korean defendant to protest the exercise of jurisdiction in a foreign court should be regarded as a voluntary response to the action.

1. Lawfulness and Timeliness of Service of Process

In order to satisfy the above-mentioned condition, the service of process should be lawful. Whether the service of process is lawful should be decided on the basis of the concerned foreign law since service of process is basically a procedural matter; provided, however, that service of process should not infringe on the sovereignty of Korea. The CCP expressly requires that process should be served so as to allow the defendant sufficient time to prepare for his defence.

2. Manner of Service of Process

It has been indicated above that process should be served in accordance with the laws of the rendering jurisdiction. Accordingly, service upon an agent appointed by the defendant will be viewed by Korean courts as satisfying the condition as long as such service is recognized as lawful under the laws of the rendering jurisdiction. The Supreme Court expressly supported this view in a judgment of July 22, 2010.[17] In that case, the Supreme Court has refused to recognize a default judgment rendered by a court of the State of Washington on the ground that the relevant service of summons was not made strictly in conformity with the requirements of the State of Washington. In the case in question, the plaintiff inadvertently served the form of summons which is designed to be used for residents of the State of Washington, although the defendant was not a resident. The plaintiff should have served the form of summons designed to be used for non-residents. The difference between the two forms is that the form for residents states that the defendant is

[17] Docket No. 2008 Da 31089.

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given 20 days of period before the default judgment is rendered, whereas the form for non-residents states that the defendant is given 60 days of period. The Supreme Court pointed out this irregularity and held that the service of process was not lawful under the laws of the State of Washington. I do not share the view of the Supreme Court, because the primary purpose of the service of process requirement is to ensure that the defendant who has lost the case should have had an adequate opportunity to defend against the action, and such opportunity had not been lost in that case, because the defendant was actually given a period of 60 days before the default judgment was rendered and the defendant intentionally decided not to respond to the action believing that the court of the State of Washington lacked international jurisdiction.

The methods similar to public notice include service by means of the mere display of process on the notice board of the concerned court or by publication in a newspaper, *remise au parquet* under French law or mere dispatch of service by a court official according to which the notice is deemed as being delivered to its addressee even if it is not actually delivered. Korea is not a signatory to the Hague Convention on Civil Procedures of 1954. However, the Hague Service Convention of 1965 took effect in Korea in 2000. Pursuant to the Service Convention, Korea has designated the Ministry of Court Administration of the Supreme Court as the central authority under the Service Convention. Since then service of process from a Contracting State of the Service Convention can be effected pursuant to the Convention. At the time of the accession, Korea objected to the use of the methods of service referred to in Art 8 and sub-paragraphs (a), (b) and (c) of Art 10 of the Service Convention.

Korea has also concluded bilateral treaties with China, Australia, Mongolia and Uzbekistan, respectively, on judicial assistance in civil and commercial matters.

3. *Cure of Defective Service of Process*

The question of whether a defective service of process may be considered to have been cured can arise when the defendant readily accepts a defective service and has no difficulty in preparing for the action. In such a case, it would seem appropriate to recognize the service of process as valid since the primary purpose of CCP condition is to ensure that the defendant should have had an adequate opportunity to defend against the action. However, Korean courts would not accept a defective service as cured where the defective service itself resulted in or implied an infringement of Korean sovereignty (such as service of process by a foreign court upon a Korean national in Korea through the consul of that country in Korea).

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D. Public Policy Test

1. General Meaning of the Test

The specific language used in §217, para. 1, subpara. 3 of the CCP with respect to the public policy test was that "the recognition of the foreign judgment should not be contrary to the good morals or other social order of Korea."The public policy here was interpreted to include not only the substantive aspects of public policy, but also the procedural aspects. §217, para. 1, subpara. 3 amended in May of 2014 expressly provides such effect. Both aspects of public policy will be discussed in turn.

2. Substantive Aspects of Public Policy

In connection with the recognition and enforcement of a foreign arbitral award, the Supreme Court stated in 1990 that in determining whether or not to recognize a foreign arbitral award, the Korean court should take into account the need for the stability of international transactions, as well as the domestic situation.[18] This statement is also relevant to the recognition of foreign judgments. Accordingly, it is generally accepted that Korean courts would interpret the public policy test to refer to "international public policy", rather than "domestic public policy". In determining the question of public policy, a Korean court may examine the reasons of the foreign decision, although Korean courts should adhere to the principle that they should not re-examine the merits of a case (CCE, §27(1)). In other words, the *révision au fond* is prohibited; provided, however, that Korean courts may review the merits of the foreign judgments insofar as such review is necessary to determine whether the conditions for recognition are satisfied or not.[19]

There is the question of public policy about a foreign judgment (particularly of a U.S. court) awarding punitive damages, treble damages or excessive damages.

Korean law does not recognize punitive damages or multiple damage which is not related to the actual damage suffered by the victim. Moreover, the compensatory damages permissible under Korean law are calculated in proportion to the degree of the actual damage suffered by the victim. In addition, in cases where a tort is governed by foreign law under the KPILA, damages arising from the tort shall not be awarded if the nature of the damages is clearly not appropriate to merit compensation to the injured party or if the extent of the damages substantially exceeds appropriate compensation to the injured party(§32(4)).

Accordingly, the majority view takes the position that recognition of foreign judgments awarding punitive damages would be denied on the ground of public policy. The same principle would apply to foreign judgments awarding treble damages insofar as the amount exceeds the actual damage suffered by the victim.

[18] Docket No. 89 Daka 20252, April 10, 1990.

[19] Supreme Court Judgment, Docket No. 94 Daka 1003, February 9, 1988 on recognition of a foreign arbitral award.

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However, since the concept of treble damages was introduced in 2011 into the Act on Fairness of Subcontracting Transactions (§35(2)), it is not clear how that change will affect the attitude of Korean courts in the future.

As regards the excessive damages, the recognition of a foreign judgment awarding damages for an amount excessively greater than the one that may be awarded by a Korean court in a similar case would be regarded to be contrary to the public policy of Korea. In a case in 1995 involving the recognition and enforcement of judgment of the court of the State of Minnesota against the Korean defendant ordering payment of US$500,000 as damages (including compensation for mental anguish, physical injury, consequent medical expenses, loss of earning, etc.), *plus* reasonable compensation for damages arising out of the assault and rape of the plaintiff, the Eastern Branch of the Seoul District Court found that the amount of award was much higher than would be acceptable under Korean law for such damages and thus, reduced the amount of compensation that would be enforceable to 50% of the original amount, based upon the rationale that recognition and enforcement of the portion in excess of US$250,000 would be against the public policy of Korea. The judgment was upheld by the Supreme Court in 1997.Since then several lower courts have followed this approach.

In this regard, it is noteworthy that §217*bis*, para. 1 inserted in May of 2014 now expressly provides that the Korean court may not recognize a foreign judgment in part or in whole, if the foreign judgment concerning damages leads to a result that is manifestly incompatible with the basic principles of the laws of Korea, or the international treaties to which Korea is a party. In addition, §217*bis*, para. 2 also expressly provides that in cases where the Korean court applies §217*bis*, para. 1, regard is to be had to whether the scope of damages rendered by the foreign court encompasses legal costs such as lawyers' fees. Although it is not entirely clear from the text, I believe that the purpose of §217*bis* is to set forth the clearer criteria than those under the public policy test, rather than introducing new stricter requirements for recognition of foreign judgments. It remains to be seen how Korean courts will interpret §217*bis* in the future.

3. Procedural Aspects of Public Policy

If a foreign court did not give the defendant opportunities to defend himself or if the defendant was not properly represented by an attorney during his trial, the recognition of a foreign judgment would be regarded to be contrary to the public policy of Korea. However, the mere lack of reasoning of the foreign judgment would not be against public policy. The question of whether recognition of an American judgment rendered on the basis of evidence obtained by pre-trial discovery would be contrary to public policy has not been debated in Korea. If, however, pre-trial discovery was conducted contrary to the International Civil Judicial Assistance Act of Korea and thereby infringed on the Korean sovereignty, it could be argued that a foreign judgment rendered on the basis of evidence obtained thereby should be regarded to be contrary to public policy.

The Supreme Court has held that recognition of a foreign judgment is contrary to public policy if the foreign judgment is inconsistent with a prior Korean

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judgment.[20]The Supreme Court has also held that recognition of a foreign judgment could be contrary to public policy, if it was obtained by fraud and the defendant who lost the case in the foreign court could not argue that there was a fraud on the part of the plaintiff, and the existence of the fraud can be established with a high degree of certainty.[21]

E. Reciprocity Requirement

One of the conditions for recognition of foreign judgments is the existence of reciprocity between Korea and the relevant foreign country (§217, para. 1, subpara. 4). Reciprocity need not be guaranteed by a treaty, but it is sufficient to have reciprocity assured by law or regulation, customary law, court decision or prevailing practice. The expectation of receiving reciprocal treatment is sufficient, even if there are no actual cases extending reciprocity to Korean judgments. However, the mere existence of a foreign law or regulation providing for reciprocal treatment is not sufficient if such reciprocity is not guaranteed in practice.

The reciprocity requirement has been criticized by some legal commentators on the grounds that it has a retaliatory element and is not conducive to the protection of justified claims. As a matter of interpretation of the current law, however, the reciprocity requirement should be respected. This is also the case with family matters including divorce and adoption.

It is sufficient if the concerned foreign courts recognize Korean judgments under conditions which are not substantially different from CCP conditions in any material respect. Although the Supreme Court held in a 1971 case involving the recognition and enforcement of a divorce decree of a Nevada state court that there is reciprocity only if the concerned foreign courts recognize Korean judgments under the same or more generous conditions than those applicable in Korea, the Supreme Court changed its position in 2004[22] and now maintains the more liberal approach described above. §217, para. 1, subpara. 4 amended in May of 2014 expressly provides such effect.

The extent of reciprocity need not be determined according to the same and uniform criteria for different kinds of judgments, such as monetary judgments and non-monetary judgments. Accordingly, it is inappropriate to apply a decision on the question of reciprocity made in a case involving family matters in determining the question of reciprocity arising in a case involving property rights. The above-mentioned Supreme Court Judgment of 2004 made this point clear by stating that in comparing the conditions for recognition of foreign judgments of the two countries, the focus should be on the same kind of judgments. Unfortunately, however, the Supreme Court does not appear to follow that principle consistently.[23]

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[20] Docket No. 93 Meu 1051, 1068, May 10, 1994.

[21] Docket No. 2002 Da 74213, October 28, 2004.

[22] Docket No. 2002 Da 74213, October 28, 2004.

[23] Docket No. 2012 Meu 66, February 15, 2012.

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Korean courts have held that there was reciprocity between Korea and the State of New York,[24] Germany,[25] Japan,[26] China,[27] England,[28] Ontario,[29] Argentina,[30] Hong Kong,[31] respectively. It is well established that there is reciprocity between Korea and the states of the U.S. which have adopted the Uniform Foreign (or Foreign Country) Money Judgment Recognition Act, at least insofar as monetary judgments are concerned.

On the other hand, the Supreme Court denied the existence of reciprocity between Korea and Australia.[32] However, since in 1991 Australia added the courts of Korea in the list of the countries for which Australia is willing to afford reciprocity appearing in the Regulations under the Foreign Judgments Act 1991, Korean courts are expected to acknowledge in the future the existence of reciprocity between Korea and Australia.

Given the lower court decision which acknowledged the existence of reciprocity between Korea and England, Korean courts could be expected to acknowledge the existence of reciprocity between Korea and England and other Commonwealth countries (other than Australia) which follow the English approach. However, given the absence of precedent of the Supreme Court directly on point, we cannot guarantee that Korean courts would actually do so, in view of the earlier Supreme Court precedent which had denied the existence of reciprocity between Korea and Australia.

F. Examination of Conditions for Recognition

Since all CCP conditions for the recognition of foreign judgments are related to the national interests of the country as well as the personal interests of concerned parties, it is generally recognized that Korean courts should examine compliance with such conditions *ex officio*. As to the condition of service of process, the Supreme Court expressed its support of such view.[33] §217, para. 2 amended in May of 2014 expressly provides that Korean courts should examine compliance with the conditions *ex officio*.

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[24] Docket No. 88 Meu 184,191, March 14, 1989.

[25] Seoul High Court Judgment, Docket No. 84Na 3733, August 20, 1985.

[26] Seoul District Court Judgment, Docket No. 68 Ka 620, October 17, 1968.

[27] Seoul District Court Judgment, Docket No. 99 Kahap26523, November 5, 1999.

[28] Changwon District Court Tongyoung Branch, Docket No. 2009Kahap 477, June 24, 2010.

[29] Docket No. 2009 Da 22952, June 25, 2009.

[30] Seoul Central District Judgment, Docket No. 2008 Kadan363951, April 23, 2009.

[31] Seoul Central District Judgment, Docket No. 2008 Kahap 64831, March 27, 2009.

[32] Docket No. 85 Daka 1767, April 28, 1987.

[33] Docket No. 2008 Da 31089, July 22, 2010.

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III. Effects of Recognition of Foreign Judgments

A. Automatic Recognition and General Effects of Foreign Judgments

Foreign judgments that comply with the CCP conditions for recognition are "automatically" recognized. Therefore, a foreign judgment should take effect as from the time when it took effect in the jurisdiction in which it was rendered, rather than just from the time when its recognition is confirmed in Korea where its enforcement is sought.

A foreign judgment which complies with the CCP conditions for recognition has the same effects in Korea as the ones given to it in the rendering jurisdiction, except that its enforcement is subject to an enforcement judgment to be obtained in Korea. There are, however, minority views maintaining that a foreign judgment should have the same effects as those given to a corresponding Korean judgment or that the effects given in both jurisdictions (that is, in Korea and in the concerned foreign jurisdiction) should be compared in favour of the more restrictive effects.

B. *Res judicata* Effect

Under the CCP, a final and conclusive Korean judgment has the effect of determining the rights of the parties only with respect to the matters covered in the tenor as distinguished from the reasoning (§216(1)).

If one takes the minority view that a foreign judgment should have the same effects as those given to a corresponding Korean judgment, the effects of a final and conclusive foreign judgment will extend to the matters covered in the tenor even though the relevant law of the foreign country is different. However, under the majority view that a foreign judgment satisfying the CCP conditions for recognition has the same effects in Korea as those given to it in the foreign country, the principle prevailing in the relevant foreign country will apply. In addition, under the CCP, the effects of a final and conclusive judgment extend to the parties to the action, their successors coming into existence after the conclusion of oral hearings and a third party who holds the subject matter of the litigation (§218).

The doctrine of *res judicata* is generally understood in Korea to prevent not a new suit *per se* but a new judgment which conflicts with an earlier judgment; provided, however, that a party who has won the case is not allowed to file a new suit on the same cause of action since in such case it is not worth granting him the same judgment again. The prevailing view in Korea seems to be that the doctrine of *res judicata* in this sense should also apply to foreign judgments even though the doctrine has a different effect in the foreign country. There is a Supreme Court judgment which can be construed as supporting the same view.[34]

[34] Docket No. 88 Meu184, 191, March 14, 1989.

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C. Partial Recognition of Foreign Judgments

When a foreign judgment deals with more than one claim, recognition may cover only part of the judgment. In addition, the amount for a judgment for one claim may be recognized only partially in terms of amount. An example is to recognize a judgment for excessive damages only to the extent consistent with the public policy of Korea by reducing the amount of the judgment.

IV. Enforcement of Foreign Judgments

A. Prerequisites for Enforcement Judgment (*exequatur*)

Korean law distinguishes between recognition and enforcement with regard to foreign judgments. While a foreign judgment is "automatically recognized" if the conditions for recognition are satisfied (CCP, §217, para. 1), it can be enforced only when an enforcement judgment (*exequatur*) is obtained from a Korean court (CCE, §§26-27). This is because the enforcement of a foreign judgment has a greater impact than recognition on the legal *status quo* in Korea.

In order to obtain an enforcement judgment, it is necessary to establish that the CCP conditions for recognition are satisfied. Review of the merits of the case is expressly prohibited under the CCE (§27(1)).

B. Procedure for Enforcement Judgment

An action for enforcement judgment should be brought to the court having general jurisdiction over the judgment debtor (§26(2)). In the absence of any court having such general jurisdiction, an action for enforcement judgment may be brought to a court having jurisdiction over the assets of the judgment debtor. The plaintiff in an action for enforcement judgment should be the person designated as the entitled claimant in the foreign judgment or his successor, and the defendant should be the named judgment debtor or his successor.

Proceedings for an ordinary action apply to proceedings in an action for enforcement judgment. The amount of award stated in a foreign judgment need not be converted into Korean currency (Won), since such conversion is made at the rate of exchange prevailing at the time of actual execution (Civil Code, §378). If the plaintiff's action is sustainable, the court will render an enforcement judgment expressly referring to the concerned foreign judgment and permitting its enforcement.

There is dispute as to whether the defendant in an action for enforcement judgment can raise as a defence the fact that the claim affirmed in the foreign judgment has been discharged by performance, set-off or the like after the foreign judgment was rendered. The negative view refers to the CCE (§44) for a separate action for objection to a claim affirmed in a final and conclusive judgment and argues that in light of this provision, the judgment debtor in such an action should not be

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allowed to object to the same action on the grounds of post-judgment discharge. The affirmative view, however, may be considered to be more conducive to the efficient and economical resolution of judicial disputes. In a case where the defendant raised a defence on the grounds of post-arbitral award discharge, the Supreme Court has expressly supported the affirmative view.[35] Korean courts are expected to apply the same principle to an action for enforcement judgment based upon a foreign judgment.

V. Concluding Remarks

The CCP and the CCE set forth the conditions for the recognition of foreign judgments and the general procedures to be followed for the enforcement of foreign judgments, respectively. There are still unsettled issues regarding the interpretation and application of such conditions and procedures. The number of court decisions which can serve as authoritative precedents is continuously increasing. The number of actual cases in Korea seeking the recognition and enforcement of foreign judgments is expected to increase in the future. With such developments, Korean laws concerning these matters will evolve so as to meet the needs of an international community seeking the efficient, economical and consistent adjudication of cross-border actions, and Korea can also contribute to the development of a harmonious system toward the recognition and enforcement of foreign judgments. Given the current diversity of the conditions, the effects and the procedures of the recognition and enforcement of foreign judgments in various countries, conclusion of an international convention on the subject is very desirable. It is a pity that the Judgment Project of the Hague Conference has resulted in only the very modest Convention on Choice of Court Agreements of 2005, rather than the comprehensive convention originally envisaged. I vehemently hope that the Judgment Project of the Hague Conference can be resumed and that the international community can produce a reasonable and comprehensive global convention in the near future.

[35] Docket No. 2001 Da 20134, April 11, 2003.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN RUSSIA

RECENT TRENDS

Anna GRISHCHENKOVA[*]

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I. Introduction

The importance of a clear and effective system of recognition and enforcement of foreign judgments cannot be overestimated.

Theoretical and practical issues of recognition and enforcement have been extensively described in legal literature.[1] Therefore, this article contains an analysis of recent court cases on the topic.

When analysing recent trends, it is necessary to note that the Russian court system is currently facing periods of restructuring and nobody can now predict what will be the result of this restructuring in the area of recognition of foreign judgments. Until recently, the courts of Russia, besides the Constitutional court of the Russian Federation, have included the *arbitrazh* (commercial) courts with the Supreme *Arbitrazh* Court of the Russian Federation (SAC) as their head and the

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[1] The author, as a practising litigation lawyer, strongly believes that readers are more interested in recent trends in terms of Russian judicial practice, especially refusals to recognise and enforce foreign judgments.

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courts of common jurisdiction with the Supreme Court of the Russian Federation as their head.

The *arbitrazh* (commercial) courts[2] deal with most cases of recognition of foreign judgments because they have jurisdiction over commercial and economic disputes between legal entities. Courts of common jurisdiction deal mostly with family law and successions disputes, as well as disputes between individuals; therefore, they rarely consider applications for the recognition of foreign judgments.

The SAC and the Supreme Court are generally courts of last instance and consider cases on a discretionary basis. They also produce some guidelines for the courts of lower instances on particular issues and areas of law.

In Russia, it is common that lower instance courts refuse to recognise foreign judgments and awards. They usually do this claiming that foreign judgments contradict so called "public policy" of the Russian Federation, and the SAC overrules these decisions, ordering enforcement. In 2013, the SAC produced very progressive guidelines regarding the rule of "public policy", thereby decreasing the number of cases where this rule was applicable.

However, under the amended Russian legislation, the SAC has been merged with the Supreme Court of the Russian Federation, such that both *arbitrazh* courts and courts of common jurisdiction have the Supreme Court of the Russian Federation as their head.

Consequently, there is a doubt as to whether the Supreme Court of the Russian Federation, due to the amount of cases it has to deal with, will be able to provide the same degree of attention, as the SAC, to cases on recognition and enforcement of foreign judgments.

Another important change is the ongoing procedure of improvement of Russian legislation regarding arbitration procedures in Russia. So far, probable changes in legislation cover only Russian arbitration courts and exclude international arbitration; they also do not affect proceedings before foreign state courts. Nevertheless, the most recent trend is to refuse to enforce awards of "doubtful" arbitration institutions and these changes might reflect the shifting attitude of Russian courts in face of increased disputes under the exclusive jurisdiction of Russian state courts.

In light of this situation, it is interesting to summarise the trends to date in the area of recognition and enforcement of foreign judgments, and to use these trends, as far as possible, in practice.

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[2] Russian *arbitrazh* courts are not arbitration courts; their name does not mean that these courts deal only with arbitration matters. The Arbitration Procedural Code governs the procedure of litigation in these courts and enforcement and recognition both of foreign judgments and arbitral awards.

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II. Brief Note on the Legal Grounds for Recognition and Enforcement of Foreign Judgments and Foreign Arbitral Awards

The procedure for the recognition and enforcement of foreign arbitral awards in Russia is quite similar to the procedure for the recognition of foreign judgments. The same rules are generally applied and the same Russian courts are competent. Moreover, some court precedents on recognition and enforcement of foreign arbitral awards provide useful rules regarding the enforcement of any type of foreign decision, whether judicial or arbitral. This is why the procedure for the recognition of arbitral awards is covered briefly below.

A. Basic Grounds for Recognition and Enforcement of Foreign Judgments

Generally, foreign judgments can be recognised and enforced in Russia if bilateral or multilateral international agreement exists. Countries which have such agreements with Russia include, among others, CIS countries, Greece, China, Iraq, and Macedonia. Where a judgment emanates from a country which does not have a relevant treaty with Russia, the rule of reciprocity will be applied.

The first Russian case in which reciprocity was applied was a case on the recognition of a decision of the High Court of Justice in Northern Ireland (the "High Court") in favour of Moscow Common Bank Limited (London). The adverse party was the Russian entity Interindustrial Scientific-Technical Complex "Microsurgery of eye named of S. Fedorov".

The Russian court found that recognition of the High Court's decision could not be refused based on the absence of a bilateral agreement. The courts added that the possibility of recognition could be justified by rules of an Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Russian Federation on economic co-operation dated 9 November 1992, as well as the Agreement on partnership and cooperation between the Russian Federation and the European Union. According to these treaties, private parties of each country have access to the procedure of litigation in any court within the territory of the other country, as well as access, free from discrimination, to the competent courts for the defence of their individual rights. At the same time, the Russian court noted that it was necessary to check whether courts of the other country had reciprocally enforced judgments of Russian courts.[3]

Similar principles were used by Russian courts in many subsequent cases.[4]

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[3] E.A. KUDELICH, Presentation on recognition and enforcement of foreign judgments in practice of Russian courts made during conference of Societe Juridique Franko-Russe at 17 February 2012. Presentation was available at <http://www.dialoguefrancorusse.com/ru/archives/2012/248-conclusions-et-propositions-prises-a-lissue-de-la-conference-du-17-fevrier-2012-ue-russie>.

[4] Rulings of the Federal *Arbitrazh* court of Moscow Region case number КГ-А40/8581-05-П dated as of 12 October 2005, case number КГ-А40/698-06-П dated as of 22

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At present, there are no clear, settled criteria regarding checks on the reciprocity rule by Russian courts. Determination is generally done on a case-by-case basis. In some cases, no evidence of reciprocal enforcement is presented to the court.[5] Sometimes Russian courts will accept legal memoranda of recognised law professors and letters from courts of other countries that confirm the possibility of enforcement of Russian decisions in the foreign country.[6]In other cases, the courts refuse to enforce foreign judgments and explicitly mention that the claimant has not presented evidence that decisions of Russian courts were enforced in the other country (*e.g.* Israel[7] and the United States[8]).

The latter practice can lead to an endless circle – if a decision of a foreign court is not enforced in Russia due to the lack of enforced decisions of Russian courts in the foreign country, then the foreign country may refuse to enforce a Russian decision the next time because of Russia's previous refusal. In order to avoid this, we believe it is crucial to enforce foreign decisions based on the reciprocity rule even where there are no enforced decisions of Russian courts in the foreign country.

B. Basic Grounds for Recognition and Enforcement of Foreign Arbitral Awards

Russia is a party to the Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Apart from arbitral awards that are recognised and enforced under the New York Convention, arbitral awards and foreign judgments may be recognised and enforced in accordance with Russian procedural legislation.

C. Recognition of Foreign Judgments and Foreign Awards under Russian Procedural Legislation: Grounds for Refusal

National legislation contains rules for the recognition and enforcement of both foreign judgments and foreign arbitral awards.

These rules regulate applications for recognition, including jurisdiction, terms of applying, duration of court procedure, *etc.*

February 2006, ruling of the Supreme *Arbitrazh* Court case number N BAC-13688/09 dated as of 7 December 2009.

[5] Ruling of the Federal *Arbitrazh* court of Povolzhskiy Region case number A55-5718/2011 dated as of 23 January 2012.

[6] In case number A40-53839/05-8-388, courts of the Moscow region accepted a legal memorandum and a letter from the High Court of Justice of England and Wales as proof, and stated that Russian decisions can be enforced in accordance with English law.

[7] Ruling of the SAC dated as of 19 May 2008 N 5105/08 case number A40-73830/06-25-349.

[8] Ruling of the Federal *Arbitrazh* court of Moscow Region dated as of 09 September 2008 КГ-А40/7229-08 case number A40-7480/08-68-127.

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Recognition and enforcement are made by means of a court order of the competent Russian state court. The enforcement of foreign judgments is possible for three years after the judgment is rendered.

General rules to determine which state court has jurisdiction for applications of this nature are as follows:

(1) If parties to the dispute are legal entities, commercial (*arbitrazh*) courts have jurisdiction and the rules of the Arbitration Procedural Code[9] (chapter 31) will be applied.

(2) If one of the parties is a natural person (without any special status as an entrepreneur) courts of common jurisdiction are appropriate and the rules of the Civil Procedural Code (chapter 45) will be applied.

(3) Both in *arbitrazh* courts and in courts of common jurisdiction, the procedure of recognition usually starts in the court of first instance.[10] The venue usually depends on where the defendant resides or has property. Procedural rules contain exhaustive reasons for which recognition of the judgment or award can be refused.

In accordance with Article 244 of the Arbitration Procedural Code of the Russian Federation, "[t]he commercial court refuses to recognise and enforce a foreign court judgment fully or in part, if:

> 1) the judgment has not entered into force, according to the law of the state where it was adopted;
>
> 2) the party against whom the decision was adopted was not properly notified of the time and place of the case, or could not give its explanations to the court for other reasons;
>
> 3) according to an international treaty of the Russian Federation or a federal law, the consideration of the case falls under the exclusive competence of a court in the Russian Federation;
>
> 4) in the Russian Federation there exists an effective court decision, rendered in a dispute between the same persons on the same subject matter and on the same grounds;
>
> 5) there is a dispute between the same persons on the same subject matter and on the same grounds under consideration by a court in the Russian Federation, which commenced prior to the institution of proceedings in a foreign court, or if a court in the Russian Federation was the first to accept an application concerning the dispute between the same persons on the same subject matter and on the same grounds for its consideration;

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[9] See *supra*, note 1.

[10] Generally, cases in Russia are tried by the court of first instance, then by the appellate court and then by the court of cassation. There were also higher courts – the Supreme *Arbitrazh* Court and the Supreme Court – which are now merged into one court (the Supreme Court).

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6) the term for the enforcement of the foreign court judgment has expired, and this term was not restored by the commercial court;

7) the enforcement of the foreign court judgment would contradict the public policy of the Russian Federation."[11]

Article 412 of Civil Procedural Code contains a similar list of grounds for refusal of recognition and enforcement of foreign judgments. Analysis of Russian court practice shows that improper notification and violation of Russian public policy are the most frequent reasons for refusal of enforcement of foreign acts.

III. Analysis of Reasons for Refusal to Recognise and Enforce Foreign Judgments in Russia

A. Refusal to Recognise Preliminary Decisions

In general, only final awards can be enforced. The main consequence of this principle is the refusal of Russian courts to enforce preliminary injunctions (interim measures) such as the seizure of property of the debtor or the prohibition to act in some way.[12]

The position of Russian courts usually makes state court procedure in other jurisdictions less efficient, as it is difficult to win against a Russian debtor without interim measures. Until enforcement, the debtor can sell all of its assets, making actual enforcement impossible. The SACis, thus, attempting to explicitly allow parties to proceedings abroad to seek injunctions in Russian commercial courts.[13]

A pre-condition for applying for interim measures to preserve the rights of a party to proceedings pending before a foreign court is effective jurisdiction of the Russian court. Effective jurisdiction is present if an applicant requests interim measures before the court in the venue where the debtor is registered or has property or money subject to interim measures, or where rights of the applicant have been violated. When considering the possibility of granting interim measures, a Russian court must check that the foreign court has jurisdiction to try the case and that the dispute in the foreign court does not fall into a category of disputes under the exceptional jurisdiction of Russian courts.

[11] This translation is available at < http://www.arbitr.ru/law/perevod_apk/>.

[12] Paragraph 26 of Information letter of the Supreme *Arbitrazh* Court of Russian Federation N 78 dated as of 7 July 2004.

[13] Paragraphs 29, 30 of Information Letter of the Supreme *Arbitrazh* Court of Russian Federation N158 dated as of 9 July 2013.

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B. Exclusive Jurisdiction of Russian Courts and Lack of Arbitrability

Generally, Russian courts have exclusive jurisdiction in the following cases:

- disputes regarding rights to real property situated in Russia;
- disputes regarding the existence, validity of status and procedure of dissolution of legal entities registered in Russia (and the validity of decisions of authorities of such legal entities);
- disputes regarding correctness of records in official registries which are kept by Russian authorities in Russia;[14]
- disputes regarding infringement of patents, trademarks, and other intellectual property rights, which lead to the invalidation of registration in Russia;
- disputes arising from carriage contracts where carriers are situated in Russia;
- divorce cases where both spouses have their residency in Russia; and
- cases challenging the acts of Russian authorities ("public disputes").

In some situations, the exclusive jurisdiction of Russian courts is rather clear; in other cases, it is not.

The most controversial is with respect to the limits of the Russian courts' exclusive jurisdiction over disputes which lead to registration in Russian registries. For example, in a recent case, Russian courts refused to recognise a decision of a Cypriot court invalidating a decision of a Cypriot legal entity. The reasoning was as follows: since invalidation of the decision of a Cypriot entity affects a Russian LLC and the structure of participation in the Russian LLC, and since the structure of participation in the Russian LLC is recorded in a special Russian registry (the Unified Registry of Legal Entities), Russian courts have exclusive jurisdiction over such a dispute and a decision of a Cypriot court cannot be enforced.[15]

Such a broad approach to the jurisdiction of Russian courts can be found in arbitration decisions as well. The reasoning of Russian courts in these cases is similar to that demonstrated in enforcement cases for foreign judgments.

Although there are disputes which are invariably non-arbitrable, such as bankruptcy cases, there are many disputes which are not explicitly non-arbitrable, but can be deemed as such by Russian courts. The difficulty is that courts in different regions and at different levels have opposite views which make the position of the parties to arbitration even more unpredictable.

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[14] For example, the Unified Registry of Real Property, where all rights and transactions regarding real property are recorded, the Unified Registry of Legal Entities, where all legal entities and information about them (date of registration, name of officers, participants, information about type of services, licenses, bank accounts) are recorded.

[15] Ruling of the SAC dated as of 23 October 2012 N 7805/12 case number A56-49603/2011.

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Generally, to distinguish arbitrable and non-arbitrable disputes, it is necessary to understand whether the subject matter of such disputes is in the area of public relations or in the area of commercial relations. In the latter case, the dispute is non-arbitrable, whereas in the former, it can be resolved through arbitration.

However, recently there has been a tendency to broaden the scope of non-arbitrable disputes. Usually courts provide the following reasoning: "[i]f the relationship is connected with making a record to a state registry of the Russian Federation, which is carried out by competent state authorities, then all economic disputes following from such a relationship are tried exclusively by state courts of the Russian Federation".[16]

Many practitioners in Russia do not agree with this reasoning because it makes almost all disputes relating to corporate matters (as far as rights to shares and stock are recorded in special registries), real property, and loan recovery (as far as it is linked to a mortgage since real property rights are also recorded in state registries) non-arbitrable.

Interestingly, the Constitutional Court of the Russian Federation supported concerns described above and stated that not all disputes regarding real property can be tried only by state courts.[17] The reasoning of the Constitutional Court was very promising. It stated that the consideration of commercial disputes as public disputes does not take into account their constitutional nature. The public nature of disputes which leads to their non-arbitrability is not related to the kind of property (real (immovable) or movable) but to the specificity of the relationship between the parties to the dispute. The requirement of registration of real property is connected neither with the parties, nor with the nature of their relationship. Therefore, state registration cannot be deemed as a substantial element of the relationship in dispute, the nature of which is still private. The "public effect" will arise only after verification by a state of results of the transaction or other legal acts.

Thus, the necessity of state registration cannot be deemed a criterion for prohibiting the resolution of a dispute regarding real property by arbitration.

The same kind of reasoning might have been applied to disputes regarding shares. Unfortunately, state commercial courts did not support this position of the Constitutional Court and continue to hold that such disputes are non-arbitrable and assigned to the exclusive jurisdiction of Russian state courts. For example, in a famous case, *NLMK v. Maksimov*, NLMK filed suit in a state court alleging the invalidity of a share-purchase agreement and requesting recovery of the purchase price. The court did not consider the case, as the parties had agreed that their disputes would be resolved by the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. The Court of cassation, overruling the decision of the court of the first instance and ordering a new trial, provided guidance to the lower court, which had to check whether the dispute was in relation to corporate matters and thus within the exclusive jurisdiction of the

[16] A.V. ASOSKOV, Possibility of solving corporate disputes in international commercial arbitration, in A.A. Kostin (eds) *Compillation of articles dedicated to 80 anniversary of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry*, Москва, Статут, 2012, p. 7.

[17] Ruling of the Constitutional Court of Russian Federation number 10-П dated as of 26 May 2011.

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Russian state courts.[18] During the new trial, the state court found that it had exclusive jurisdiction. As a result, even a dispute regarding the price of shares may be deemed non-arbitrable (or as falling outside the jurisdiction of the foreign state court) and foreign decisions in this area may be unenforceable.

Another recent trend to broaden the scope of non-arbitrable disputes is to use the "public element" criterion. For example, in a very recent case, the SAC ruled that a dispute between private parties regarding the recovery of a penalty under a contract was not arbitrable and that the arbitral award could not be enforced. The reason for the refusal was that the contract between the parties had been concluded under the procedure of the State Procurements' Act, the main goal of which was in the public interest. Therefore, "such a high concentration of public interest made it impossible to resolve such a dispute in arbitration, instead of in a state court."[19]

Such court practice should be taken into account at the forum selection stage of proceedings. If a speedy decision is needed, it is better to file a suit in Russian state courts because decisions emanating from a foreign court are unlikely to be enforced in Russia and parties may have to face a new trial there. The same is true even if the parties have entered into an arbitration agreement.

C. Improper Notification

Notification of Russian participants to proceedings abroad should be made in accordance with the Hague Convention[20] to which the Russian Federation is a State Party. Issues of improper notification are brought to Russian courts very frequently and Russian courts generally do not accept letters from the foreign court or arbitrator as proof of proper notification. Moreover, Russian courts require postal evidence.[21]

As a general rule, sufficient notification is achieved where the participant is notified of the start of proceedings in which he or she is named as a party. By contrast, wrongful information about the particular date and place of the hearing does not in itself constitute improper notification leading to a refusal of enforcement or default judgment.[22]

The courts can analyse not only the existence of notification, but also its sufficiency to allow the party to participate in proceedings. For example, a notifi-

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[18] Ruling of the Federal *Arbitrazh* Court of Moscow Region case number A40-26424/11-83-201 dated as of 6 December 2011.

[19] The text of the main ruling of the SAC dated as of 28 January 2014 is not published yet. The preliminary ruling is available at < http://kad.arbitr.ru/Card/e940b0c1-bbe0-403e-afd1-6864647297c8>.

[20] Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter "The Hague Convention").

[21] Ruling of the Federal *Arbitrazh* Court of the Eastern Siberian region dated as of 15 March 2010 under case number A69-1222/2009.

[22] Ruling of the SAC number N 17463/10 dated as of 26 April 2011 under case N A47-2947/2010.

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cation in a foreign language without translation, made on the same day as a hearing, has been considered insufficient and improper notification.[23]

An interesting case on point was recently decided by the SAC,[24] which analysed whether effective notification of the party, made in violation of official procedural rules, was sufficient for enforcement of the award.

An English company had filed suit before the High Court of Justice of England and Wales against a Russian party. The plaintiff asked the court for notification of the defendant and such notification was made in accordance with the procedural rules of the High Court.

After receiving a default judgment in his favour, the plaintiff applied to the *Arbitrazh* Court of Moscow (Russia) for recognition of the judgment. The defendant objected to recognition, alleging improper notification. Although the Russian courts determined that notification of the defendant was made in accordance with the procedure of the High Court and that two originals of the court documents had been delivered to the defendant's professional and personal address, the Russian courts refused to enforce the judgment. The SAC supported the ruling of the lower instance courts and stated that notification was insufficient and should have been done in accordance with the Hague Convention. The SAC found that only official notification could be deemed sufficient notification for the purposes of enforcement.

D. Violation of Public Policy

Until recently, alleged violations of Russian public policy by foreign arbitral awards or foreign judgments were the most frequently mentioned objection by debtors against enforcement. Debtors used any slight difference between Russian legislation and foreign legislation to show that the public policy of the Russian Federation had been violated. Unfortunately, Russian courts usually found in favour of debtors and refused to enforce awards. For example, for a long time, Russian courts refused to enforce awards on liquidated damages or excessive (from a Russian court's point-of-view) penalties and costs. However, in 2013 the SAC issued very detailed and important guidelines describing what constitutes a violation of public order and what does not.[25] As a consequence, the list of possible violations was substantially shortened, and the discretion of the courts in this area substantially decreased.

The SAC explicitly mentioned that courts must not decide cases a second time, and that the following situations, therefore, did not constitute violations of public order:

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[23] Ruling of the SAC number BAC-11330/12 dated as of 28 August 2012 under case N A67-487/2012.

[24] The text of the main ruling of the SAC dated as of 28 January 2014 is not published yet. The preliminary ruling is available at < http://kad.arbitr.ru/Card/1a688295-488b-4724-bdca-13db22ca26bc>.

[25] Information letter of the SAC number 156 dated as of 26 February 2013.

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– the recovery of damages amounting to twice the real damages in accordance with the foreign law applicable to the dispute;

– the recovery of damages based on a liquidated damages agreement between the parties, which was not admitted under Russian law; and,

– the absence of corporate approval for an agreement in accordance with the personal law of the foreign entity.

These guidelines cite other situations in which public order is not deemed to be violated, and only two situations where public policy is deemed violated: (1) where the agreement in dispute was concluded as a result of bribery; and (2) where arbitrator(s) were not impartial (for instance, as a result of their contact with one of the parties to the arbitration).

The adoption by the SAC of these guidelines demonstrates that the SAC has tried to reduce the use of "public policy" as a basis for the refusal of enforcement of foreign judgments and awards where this result is unjust. Whether or not Russian state courts will follow these guidelines remains to be seen, particularly in light of the restructuring procedure of the SAC and the overall situation with *arbitrazh* courts.

Some recent cases demonstrate that the "public policy" ground for refusal continues to be applied.[26] For example, courts of the Moscow region recently refused to enforce an arbitral award, stating that agreements under dispute in arbitration were considered invalid by Russian state courts. The foreign creditor objected to that and stated that only one of the agreements was invalid while the other was valid. However, the Russian courts did not find in favour of the creditor and declared that the partial enforcement of the arbitral award based on the valid agreement was impossible as far as this would lead to another decision of the case. Thus, recognition of the whole award was refused.[27]

E. Violation of Rights of Third Parties

The violation of rights of third parties by foreign judgments is not mentioned in procedural rules as a basis for refusal of enforcement of such judgments. However, in practice, such violation can be the basis for challenging such judgments[28] and can lead to the impossibility of enforcement of the judgment, as courts sometimes treat the violation of third party rights as violations of public policy. For example, in a recent case, the Russian courts refused to enforce a decision of a Cypriot court, which violated third party rights, and in particular, those of a Russian entity that

[26] Ruling of the SAC dated as of 9 December 2013 N ВАС-14658/13 under case N A40-16825/13-68-184.

[27] Ruling of the SAC dated as of 11 November 2013 N ВАС-15205/13 under case N A40-16787/13-68-180.

[28] This possibility was mentioned, for example, in the ruling of the Federal *Arbitrazh* Court of the Moscow region number КГ-А40/2810-03 dated as of 3 June 2003.

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had not accepted the jurisdiction of the Cypriot court and was not a participant of the litigation in Cyprus.[29]

To justify their position, the Russian courts cited Article 6 of the European Convention on Human Rights, 1950 and stated that everybody is entitled to a fair hearing and to be heard by a proper court. Therefore, the decision of the Cypriot court on the rights and obligations of third parties, made without the participation of such parties, was found to violate Russian public policy, including the right to a fair trial.

IV. Conclusions

According to official statistics of the SAC, Russian courts have considered few applications for enforcement of foreign judgments and foreign awards: 145 in 2010, 174 in 2011, and 179 in 2012.[30] Official statistics do not contain information about how many foreign acts were recognised and enforced, but based on the analysis carried out in this article, as well as the personal experience of the author, it is clear that the enforcement of foreign judgments and awards is still problematic and can vary a lot according to the opinion of a particular judge.

Taking into account recent guidelines of the SAC, we believe that the situation will improve and are hopeful that court precedents mentioned in this article will help readers to better understand current trends and avoid some of the complications that arise in practice.

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[29] Ruling of the SAC dated as of 23 October 2012 number N 7805/12 under case number A56-49603/2011.

[30] These statistics are available at<http://www.arbitr.ru/_upimg/E71E1F5763D26D47E142A3F677BED00C_3.pdf>.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN SINGAPORE

Tiong Min YEO*

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Abbreviations:

MLJ: Malayan Law Journal;

SGHC: Singapore High Court (neutral citation);

SGCA: Singapore Court of Appeal (neutral citation);

SJICL: Singapore Journal of International and Comparative Law;

SLJ: Straits Law Journal;

SLR: Singapore Law Reports

SLR(R): Singapore Law Reports (Reprint);

SSLR: Straits Settlements Law Reports;

SYBIL: Singapore Year Book of International Law;

Yearbook of Private International Law, Volume 15 (2013/2014), pp. 451-465
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I. Introduction

Singapore inherited the common law legal tradition. Its private international law is still very much based on the common law, and there has so far not been very significant legislative intervention. The rules for the recognition and enforcement of foreign judgments are largely based on the common law,[1] though there is legislation facilitating the enforcement of judgments from specified countries. There are not many cases on the effect of foreign judgments in Singapore, and the local court often considers authorities from other Commonwealth countries, especially the (albeit now diminishing) common law authorities from England.

Foreign judgments have no legal force in Singapore except to the extent that they are given such effect by the private international law of Singapore. Foreign judgments may be *in personam* or *in rem* or in respect of a status, or a combination of them. An *in personam* judgment pronounces on the rights and obligations between the parties to the litigation, and most civil and commercial judgments fall within this category. A judgment *in rem* purports to affect title to property and has legal effects beyond the parties to the dispute. A judgment on status pronounces on the status of a person, usually in the context of family law.[2] Whether a foreign judgment has one effect or another is determined by nature of the judicial proceeding involved, the reasoning of the foreign court, and its intention as to the effect of the order.[3]

This paper will focus on *in personam* foreign judgments. Essentially, a foreign *in personam* judgment may be recognised in Singapore if it is a final and conclusive judgment on the merits given by a foreign court of competent jurisdiction in civil proceedings, the foreign court has international jurisdiction according to the rules of private international law of Singapore, and there are no valid defences against recognition. Further, such a judgment may be enforced if it is for a fixed or ascertainable sum of money.[4]

[1] It has recently been affirmed that the applicable regime for foreign judgments are the principles of private international law and not the act of state doctrine: *The Republic of the Philippines v Maler Foundation* [2013] SGCA 66 at [53]-[55].

[2] Capacity to contract is typically classified as an issue of status in civil law systems, but common law systems tend to regard it as a contractual issue, at least outside the context of marriage and marriage settlement contracts.

[3] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2007] 4 SLR(R) 565 (CA) at [30]-[31].

[4] Conflict of Laws, *Halsbury's Laws of Singapore,* Vol. 6(2), Singapore 2009, at [75.146]. Whether or not the foreign court has ordered a sum of money to be paid is determined according to the foreign law under which the judgment was given: *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 (CA) at [19]. Such an order can be enforced even if the foreign court has made other non-monetary orders in the same judgment: *Giant Light Metal Technology (Kunshun) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16 at [73]-[76].

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II. Uses of a Foreign Judgment

A foreign judgment satisfying the conditions for recognition will be conclusive on the merits decided.[5] To that extent, it has the same effect as a local judgment. It is often used by litigants to raise cause of action or issue estoppel.

If such a foreign judgment orders the payment of a fixed or ascertainable sum of money (which could include costs and interest), it may be enforceable under the common law. Under Singapore private international law, the foreign judgment creates a payment obligation which needs to be enforced like a debt.[6] Thus, fresh proceedings must be started against the judgment debtor, and the court must obtain *in personam* jurisdiction over the debtor. What is eventually executed is in reality a local judgment.

A foreign judgment which is not for a sum of money cannot be enforced in Singapore directly,[7] but it can be recognised to raise issue estoppel in respect of the merits decided. The judgment creditor needs to sue afresh to get his local remedy, but can use the foreign judgment to assist in establishing the elements of his cause of action.

Legislative provision has been made to facilitate the *enforcement* of foreign judgments from countries in respect of which there is political assurance of substantial reciprocal treatment. The rules of recognition[8] must still be satisfied and enforcement is still confined to foreign money judgments. If the judgment comes from a superior court[9] of a state covered by the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA),[10] or the Reciprocal Enforcement of Foreign Judgments Act (REFJA),[11] the judgment can be enforced by registration. A registered judgment can be executed in Singapore as if it were a local judgment.

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[5] *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 (CA) at [12].

[6] *Giant Light Metal Technology (Kunshun) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16 at [60].

[7] *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 (CA). Some common law jurisdictions would enforce non-money judgments (*e.g.*, Canada: *Pro Swing Inc v Elta Golf* [2006] 2 SCR 61 and Jersey: *The Brunei Investment Agency v Fidelis Nominees Ltd* [2008] JLR 337). However, any common law development in this direction would leave a gap in the statutory enforcement regime.

[8] These are substantially similar – but not identical – to the common law principles of recognition.

[9] In common law terminology, a superior court is a court of general competence which usually has unlimited civil (and criminal) jurisdiction. The common law rules are not so confined, so that a judgment from an inferior court (a court of limited jurisdiction) which satisfies the conditions may also be recognised or enforced.

[10] Cap 264, 1985 Rev Ed, covering: United Kingdom, New Zealand, Sri Lanka, Malaysia, Windward Island, Pakistan, Brunei Darussalam, Papua New Guinea, India (except the states of Jammu and Kashmir), Commonwealth of Australia (High Court, Federal Court and Family Court), New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory, Norfolk Island and Northern Territory.

[11] Cap 265, 1985 Rev Ed. Only Hong Kong SAR is covered.

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This is the only means of enforcement for a foreign judgment under the REFJA regime.[12] The RECJA discourages the judgment creditor from taking the common law enforcement route by denying recovery of costs.[13]

Under domestic law, a final and binding judgment has the effect of *merging* the claimant's cause of action into the judgment, so that the claimant is left with recourse only to the judgment and cannot sue on the same cause of action again. However, under the common law a foreign judgment does not have the same effect. A claimant may ignore the foreign judgment if it has not been satisfied and sue afresh on the same cause of action in Singapore[14] but it may be that such a claim can be struck out as an abuse of process if the claimant cannot justify his course of action.[15]

Apart from recognition and enforcement, a foreign judgment may have legal effect in another way. A judgment from the court of a foreign legal system which governs the rights and liabilities of the parties may have evidential effect as to the content of the foreign law as applied to the facts and the parties.[16] Such a foreign judgment may very well have been obtained by the parties at the direction of the Singapore court.[17]

III. Principles of Recognition

A foreign judgment may be recognised in Singapore if it is a final and conclusive judgment on the merits given in civil proceedings from a foreign court of law of competent jurisdiction which has international jurisdiction over the party sought to be bound, and there are no applicable defences.

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[12] REFJA (note 11), s. 7.

[13] RECJA (note 10), s. 3(5).

[14] *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 (CA) at [14], *Malaysian Credit Finance Bhd v Chen Huat Lai* [1991] 2 SLR(R) 300; *JM Lyon & Co v Meyer & Goldenberg* [1893] 1 SSLR 19.

[15] This is the position in English common law (*The Indian Grace* [1993] 1 Lloyd's Rep 387 (HL) at 391 and *The Indian Grace (No 2)* [1996] 2 Lloyd's Rep 12 (CA) at 23-24), but remains untested though persuasive in Singapore.

[16] *Kredietbank NV v Sinotani Pacific Pte Ltd (Agricultural Bank of China, Third Party)* [1999] 1 SLR(R) 274; affirmed in [1999] 2 SLR(R) 970 (CA).

[17] *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166; T.M. Yeo, Common Law Innovations in Proving Foreign Law, *YPIL* 2010, p. 493-502.

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A. Characteristics of the Foreign Judgment

1. Court of Law

Whether a foreign institution is a "court of law" is not a matter of precise definition. The Singapore court will have reference to how it is designated or described within the foreign legal system, how it has been characterised in other areas of the law, and whether certain key features are present which usually characterise a court of law, *e.g.*, judicial procedures, administration of oaths, and public hearings.[18] In a different context, it has been said that as a matter of international comity it is entirely up to foreign countries how they choose to constitute their tribunals to adjudicate disputes and what really matters is not the tribunal's label but its competence.[19] Thus, it will probably be sufficient that the foreign tribunal employs a recognisably judicial process, parties have been fully heard through legal representatives, facts investigated and found, and the relevant law applied to determine the rights and obligations of the parties.[20] However, a foreign tribunal may not be regarded as a court of law if it is affected by political direction or bias.[21]

2. Competent Jurisdiction

Although there is some support in English case law that the competence of the foreign court under its domestic law is not material to the question of its recognition under the law of the forum,[22] it is suggested that the better view is that a judgment which is a nullity because of excess of jurisdiction under the foreign court's own law will not be recognised by the law of the forum.[23] On the other hand, a procedural irregularity in the course of the foreign tribunal taking jurisdiction will not affect the recognition of the foreign judgment unless the defect has the effect of nullifying the judgment under the foreign law, or if the defect otherwise amounts to a breach of the forum's notion of natural justice.[24]

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[18] *Muttiah v Chang Kiam Ho* [1933] SSLR 392 at 393.

[19] *The Rainbow Joy* [2008] 3 SLR(R) 719 at [18] (in the context of *forum non conveniens*).

[20] *Midland International Trade Services Ltd v Al-Sudairy* (QBD, 11 April 1990), The Financial Times, 2 May 1990.

[21] *Re The Rawang Tin Mining Co Ltd, ex p The Chartered Bank of India Australia and China* (1890) 3 SLJ 27 (CA Straits Settlements) at 33.

[22] *Pemberton v Hughes* [1899] 1 Ch 781 (CA) at 791.

[23] Conflict of Laws, *Halsbury's Laws of Singapore,* Vol. 6(2), Singapore 2009, at [75.196]. See also REFJA (note 11), s. 4(3)(b) and RECJA (note 10), s. 3(2)(a).

[24] *Pemberton v Hughes* [1899] 1 Ch 781 (CA) at 796-797.

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3. *Civil Proceedings*

Usually, the foreign judgment sought to be recognised or enforced would have originated in civil proceedings. However, an order to pay compensation made in criminal proceedings may be enforceable at common law if it is effectively a claim for civil damages and provided it does not amount to a penalty. The question is whether there is substantially "civil proceedings" conjoined with the criminal proceedings, and usually the claimant is expected to be party to the proceedings for this to be the case.[25]

4. *Final and Conclusive on the Merits*

The foreign judgment must be final and conclusive between the parties under the law of the state in which the judgment was given; it must make a final determination of the rights between the parties.[26] A foreign judgment does not satisfy this condition if it can be re-opened or have its terms altered by the same tribunal, or if there is another body (not being an appellate or supervisory body) which can override its decision.[27]

A default judgment gives rise to some difficulty because it is arguably not given on the merits, even if it can be regarded as final and conclusive if the time for setting it aside under the foreign procedural law has lapsed. The modern tendency of the common law is to treat such judgments as being on the merits[28] for the purpose of the recognition of foreign judgments (probably on the basis that the judgment debtor should not complain as he had forfeited a reasonable opportunity to argue).[29]

A judgment on a point of procedure is not a judgment on the merits. This is a manifestation of the general principle in private international law that procedure is a matter for the law of the forum to decide. What amounts to procedure is

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[25] *Raulin v Fischer* [1911] 2 KB 93 at 98-99. RECJA (note 10), s. 2(1) requires "civil proceedings". REFJA (note 11), s. 2(1) and s. 5(1)(a)(vi) suggest that it may be enough that the claimant has acquired rights under the foreign law.

[26] *Murakami Takako (executrix of the estate of Takashi Murakami, deceased) v Wiryadi Louise Maria* [2007] 4 SLR 565 (CA) at [51].

[27] *Muttiah v Chang Kiam Ho* [1933] SSLR 392 at 395-396.

[28] *Ho Hong Bank Ltd v Ho Kai Neo* [1932] MLJ 76 at p. 80; *Russell v Smyth* (1842) 9 M & W 810 at 817-819, 152 ER 343 at 346-347; *Schnabel v Lui* [2002] NSWSC 15 at [152]-[153].

[29] Courts tended to take a stricter approach under statutory requirement of "merits" in s. 13 of the Indian Code of Civil Procedure (*Keymer v Reddi* (1916) LR 44 IA 6 (PC, India)) and equivalent legislation elsewhere: *Nagina Singh s/o Tara Singh v Tarlochan Singh s/o Boor Singh* (1937) 17 KLR 82 (Kenya), cited in S. THANAWALLA, Foreign *Inter Partes* Judgments: their Recognition and Enforcement in the Private International Law of East Africa, *I.C.L.Q.* 1970, p. 430 at 433-434; *AN Abdul Rahiman v JM Mahomed Ali Rowther* [1928] 6 (Ran) 552 (Myanmar), cited in A. CHRISTIE, The Rule of Law and Commercial Litigation in Myanmar, *Pacific Rim Law & Policy Journal* 2000, p. 47 at 64, fn. 108.

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determined by the law of the forum. The common law has been taking a gradually narrowing view of "procedure", to give greater scope to principles of choice of law.[30] While Singapore common law is in a state of flux on this point,[31] it has been made clear by legislation that a foreign judgment on a point of time limitation (regarded by traditional common law as an issue of procedure governed by the law of the forum[32]) is to be regarded as a judgment on the merits.[33]

A difficult question that has not been squarely addressed by the Singapore courts[34] is whether a foreign judgment enforcing another foreign judgment will be regarded as a judgment on the merits of the case. There are common law authorities permitting[35] and disapproving[36] the enforcement of such a judgment. It is suggested that the better view is that it is not a judgment on the merits,[37] to prevent parties from bypassing the gatekeeping control of the law of the forum by "laundering" the foreign judgment in a jurisdiction with more friendly rules.[38]

B. International Jurisdiction

Whether the foreign court had international jurisdiction is tested by the private international law of Singapore. In general, international jurisdiction is established by showing that the party sought to be bound by the foreign judgment was present or resident in the foreign jurisdiction at the time of commencement of the foreign

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[30] *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR(R) 367 (CA) at [19]-[21]; *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* [2013] 2 HKC 459 (Court of Final Appeal, Hong Kong SAR) at [95]; *Pfeiffer Pty Ltd v Rogerson* (2000) CLR 503 (High Court, Australia) at 543; *Tolofson v Jensen* [1994] 3 SCR 1022 (Supreme Court, Canada).

[31] *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR(R) 367 (CA).

[32] *Harris v Quine* (1869) LR 4 QB 653.

[33] Foreign Limitation Periods Act, Cap 111A, 2013 Rev Ed, s. 5.

[34] It was assumed in *Desert Palace Inc (doing business as Caesars Palace) v Poh Soon Kiat* [2009] 1 SLR(R) 71 that a Singapore court could enforce a foreign judgment on a foreign judgment on a foreign judgment (*i.e.*, two intermediate foreign judgments), but the decision was reversed on appeal without discussion of this point: [2010] 1 SLR 1129 (CA).

[35] *Morgan Stanley & Co International Ltd v Pilot Lead Investments Ltd*, Court of First Instance, Hong Kong, 22 May 2006; see also P. HAY, Recognition of a Recognition Judgment Within the European Union: "Double Exequatur" and the Public Policy Barrier, in P. HAY/ L. VÉKÁS/ Y. ELKANA/ N. DIMITRIJEVIC (eds), *Resolving International Conflicts: Liber Amicorum Tibor Várady*, Budapest 2009, p. 143 *et seq*.

[36] *Taylor v McGiffen*, SC NSW, 15 July 1985; *Frederick A Jones Inc v Toronto General Insurance Co* [1933] 2 DLR 660 (CA Ontario); *Owen v Rocketinfo Inc* (2008) BCCA 501; *Reading and Bates Constr Co v Baker Energy Resources Corp* 976 SW 2d 702 (Tex App 1998). See also P. SMART, Conflict of Laws: Enforcing a Judgment on a Judgment?, *Australian Law Journal* 2007, p. 349; Y.L. TAN/ T.M. YEO, The Conflict of Laws, in T.M. YEO/ H. TJIO/ H.W. TANG (eds), *Developments in Singapore Law between 2006 and 2010*, Singapore 2011, at [64].

[37] Conflict of Laws, *Halsbury's Laws of Singapore,* Vol. 6(2), Singapore 2009, at [75.164].

[38] *Clarke v Fennoscandia Ltd* [2004] SC 197, at [31].

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proceedings, or that the party had voluntarily submitted or had agreed to submit to the jurisdiction of the foreign court.

1. Presence or Residence

Although there is old authority denying that presence is a sufficient ground of international jurisdiction,[39] modern local authority assumes that it is a sufficient ground,[40] together with residence.[41] Presence as a ground is based on the principle of territoriality. Modern English common law assumes that presence – but not necessarily residence – is a basis of international jurisdiction.[42] In comparison, residence – but not presence – is a ground of international jurisdiction under the RECJA and REFJA in Singapore.

The practical justification for requiring residence as a ground of international jurisdiction is the connection between the judgment debtor and the foreign jurisdiction. However, this justification runs into the slippery slope argument of what degree of connection would be legally sufficient. The issue whether the Singapore court should follow the Canadian approach of recognising foreign judgments where there is a real and substantial connection between the parties and the litigation with the foreign jurisdiction which court issued the judgment[43] has not been tested under Singapore law.[44] The main argument against the Canadian approach is that it makes it practically difficult to advise clients on the proper course of action when faced with legal proceedings in foreign jurisdictions.

2. Voluntary Submission

Whether a party has voluntarily submitted to the jurisdiction of the foreign court depends in each case on the party's actions and/or omissions in relation to the proceedings in the foreign court. The question in every case is whether the party had taken a step in the proceedings which necessarily involved waiving his objection to the jurisdiction of the court in respect of the dispute.[45] Whether there has been voluntary submission is a question answered by the law of the forum, though it is

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[39] *RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) 2 SSLR 12. For modern criticism of presence as international jurisdiction, see the opinion of LeBel J in *Beals v Saldanha* [2003] 3 SCR 416 (Supreme Court, Canada).

[40] *United Malayan Banking Corporation Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 at [9].

[41] *United Malayan Banking Corporation Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 at [9]; see also *RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) 2 SSLR 12.

[42] *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236, at [8].

[43] *Beals v Saldanha* [2003] 3 SCR 416 (Supreme Court, Canada).

[44] See *Giant Light Metal Technology (Kunshun) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16.

[45] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088, at [54].

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important to consider the foreign procedural context in which the party had acted. Conversely, an act that would have amounted to submission in the context of the assumption of local jurisdiction may not by itself amount to voluntary submission to the foreign jurisdiction for the purpose of recognition of a foreign judgment.

One issue that has yet to receive the considered attention of the Singapore courts is whether arguing that the foreign court should not hear the dispute on the basis that it is not the natural forum will amount to voluntary submission. The often criticised English decision in *Henry v Geoprosco International Ltd*,[46] which answered this question in the affirmative, had been statutorily overruled in the United Kingdom[47] but remains persuasive common law authority in Singapore. The reasoning was that an argument that a court was not the natural forum necessarily acknowledged the existence of the court's jurisdiction. It is ironic that a party who argues for the case to be heard elsewhere is taken to have voluntarily accepted the jurisdiction of the court. The Singapore High Court in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*[48] considered but left this question open, but held that it was not voluntary submission to argue that a foreign court had no jurisdiction at all. It remains to be seen how the Court's advocated "common sense approach"[49] will fare against the technical reasoning in *Henry v Geoprosco International Ltd*.

It also remains to be seen whether Singapore courts will follow the somewhat expansive common law approach adopted in the UK Supreme Court decision in *Rubin v Eurofinance SA* that participation in a foreign liquidation of a company by proof of debts and receipt of dividends amounted to submission to subsequent avoidance proceedings commenced by the liquidator.[50] Singapore courts have at least accepted that in principle it is possible for a party who had submitted in respect of one proceedings to be taken to have submitted to another related proceeding, either on the argument that they amount to a single unit of litigation, or on the broader principle that there may be an inchoate submission to other claims which are reasonably closely related to it.[51]

3. Agreement to Submit

The clearest manifestation of an agreement to submit is the express choice of court clause in a contract. Whether it is exclusive or non-exclusive, it clearly contains an agreement by the parties to accept the jurisdiction of the chosen court. The common law takes a contractual characterisation approach to the choice of court agreement. Its validity will be tested by the proper law of the agreement, and this will usually be the proper law of the main contract unless there are indications that

[46] [1976] QB 726 (CA).

[47] Civil Jurisdiction and Judgments Act 1982, s. 33.

[48] [2002] 1 SLR(R) 1088.

[49] [2002] 1 SLR(R) 1088, at [54].

[50] [2012] UKSC 46, [2013] 1 AC 236, at [164]-[167].

[51] *Giant Light Metal Technology (Kunshun) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16; A. BRIGGS, Private International Law, *BYIL* 1998, p. 332 at 352.

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the parties intended a separate law to govern the choice of court agreement. There are no special requirements as to formalities in the common law. An agreement to submit may be oral, or even arise by estoppel due to the conduct of the parties.

More controversial is the supposed principle that an *implied* agreement to submit to a foreign court is a legal impossibility.[52] However, there are common law cases supporting the proposition that from an agreement to arbitrate in a foreign country may be implied consent to the jurisdiction of the foreign court in respect of matters within its supervisory and enforcement jurisdiction,[53] though not generally.[54] It may well be that the true principle is that any such agreement must be inferred from clear and cogent evidence.[55]

C. Defences

Although the recognition of foreign judgments in Singapore is based on the obligation theory, international comity nevertheless is an important consideration, and consequently, the courts take a narrow approach to applicable defences.

1. Foreign Penal, Revenue or other Public Law

It is clear that the principle that the forum will not directly or indirectly enforce a foreign penal, revenue or other public law applies to the enforcement of foreign judgments.[56] The limits of the principle have not been fully tested in Singapore.[57] The Court of Appeal has recognised the distinction between recognition and enforcement of such laws, and that only the latter is prohibited under this rule.[58] There is no objection against the recognition of such a foreign law insofar as its scope of operation is limited to the territory of the foreign state because the recognition in itself does not require the court to assist the foreign state in asserting its sovereign powers within the territory of the forum court.[59] A foreign judgment may

[52] *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR(R) 275 at [16], following *Vogel v R&A Kohnstamm Ltd* [1971] 2 All ER 1428 at 1439.

[53] *International Alltex Corp v Lawler Creations Ltd* [1965] Ir Rep 264; *Tracomin SA v Sudan Oil Seeds Co Ltd (No 2)* [1983] 1 WLR 1026 (CA).

[54] *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd* [1985-1986] SLR(R) 695.

[55] Since the common law characterises choice of court agreements as contractual, it should follow that the implied terms doctrine of the proper law of the contract would apply to determine the existence of an implied submission. Singapore common law (which would apply in default of proof of foreign law) has strict rules on the implication of terms.

[56] *The Republic of the Philippines v Maler Foundation* [2013] SGCA 66.

[57] *Her Majesty's Revenue & Customs v Hashu Dhalomal Shahdadpuri* [2011] 3 SLR 1186 at [40].

[58] *The Republic of the Philippines v Maler Foundation* [2013] SGCA 66 at [106]-[107].

[59] *The Republic of the Philippines v Maler Foundation* [2013] SGCA 66 at [107].

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be severable if there are distinctive parts of it which cannot be enforced in Singapore.[60]

2. *Public Policy*

Under the common law and the REFJA, a foreign judgment will not be recognised or enforced if doing so will contravene some fundamental public policy of Singapore. A slightly different formulation of the defence is found in the RECJA: a foreign judgment will not be enforced if the underlying *cause of action* cannot be entertained in Singapore for reasons of public policy or some similar reason.[61] In *Liao Eng Kiat v Burswood Nominees Ltd*[62] it was held that although a foreign gaming contract could not be enforced in Singapore directly, a foreign judgment enforcing such a contract could be registered under the RECJA. Serious doubt has now been cast on this decision.[63] The Court of Appeal has yet to decide whether such a foreign judgment could be enforced in Singapore under the modern common law[64] or the REFJA but its discussion of the issue in *Poh Soon Kiat v Desert Palace Inc (trading as Caesar's Palace)*[65] suggests that it is inclined to find that there is such a fundamental public policy in Singapore.

It is well-recognised that a different threshold of public policy applies to the conflict of laws than to domestic law, because not all domestic public policies are intended to operate in the international sphere. Most heads of public policy are judge-made, though statutes can also be a source of public policy. In any event of conflict between common law and statutory public policy, the latter must clearly prevail.[66]

It would not be against public policy to recognise a foreign judgment merely because the foreign court applied different choice of law rules, or applied a cause of action unknown in the forum. In extreme cases, however, it may be that a foreign judgment which disregards generally accepted doctrines of private international law may be deemed to be so "perverse" it would not be recognised.[67]

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[60] *Yong Tet Miaw v MBF Finance Bhd* [1992] 2 SLR(R) 549 (CA).

[61] The distinction was analysed in detail in T.M. YEO, Statute and Public Policy in Private International Law, *SYBIL* 2005, p. 133-146, and endorsed in *Poh Soon Kiat v Desert Palace Inc (trading as Caesar's Palace)* [2010] 1 SLR 1129 (CA) at [73].

[62] [2004] 4 SLR(R) 690 (CA).

[63] *Poh Soon Kiat v Desert Palace Inc (trading as Caesar's Palace)* [2010] 1 SLR 1129 (CA), at [114].

[64] *Ralli v Anguilla* (1917) 15 SSLR 33 (SS CA) which allowed the enforcement of such a judgment was called into question in *Poh Soon Kiat v Desert Palace Inc (trading as Caesar's Palace)* [2010] 1 SLR 1129 (CA), at [125] on the basis of a different understanding of the local legislation prohibiting the enforcement of gambling contracts.

[65] [2010] 1 SLR 1129 (CA).

[66] *Poh Soon Kiat v Desert Palace Inc (trading as Caesar's Palace)* [2010] 1 SLR 1129 (CA), at [113].

[67] *Air Foyle v Centre Capital Ltd* [2003] 1 Lloyd's Rep 753 at 761, 766. This remains untested in Singapore law.

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3. *Breach of Natural Justice*

A foreign judgment will not be recognised if it had been obtained in breach of natural justice. Whether there has been such a breach is determined by the law of the forum. Breach of natural justice typically occur when there had been insufficient opportunity to be heard, and more rarely, if the judges have personal interests in the outcome of the dispute. Mere procedural irregularities do not necessarily amount to a breach of natural justice, unless there has also been contravention of the forum's views of substantive justice. In determining whether there has been a breach of natural justice, it is relevant to consider the availability of corrective procedure and the reasonability of recourse to such procedures.

4. *Estoppel*

A foreign judgment cannot be recognised if to do so would be inconsistent with a judgment of the forum that is binding on the parties. If the same issue has been the subject of two judgments from different states and both are otherwise entitled to recognition under the private international law of Singapore, then in general, it is likely that the judgment given first in time will prevail and create an estoppel against the recognition of the later judgment,[68] unless there is a cross-estoppel preventing reliance on the earlier judgment.[69]

5. *Fraud*

Under the traditional common law, a foreign judgment may be impeached for fraud even in the absence of newly discovered evidence, and even if the fraud was or might have been alleged in the foreign proceedings. This appears to go against the general principle of the conclusiveness of foreign judgments because a successful impeachment means that the merits of the case will be re-examined.

In *Hong Pian Tee v Les Placements Germain Gauthier Inc*,[70] the traditional rule was modified for cases of intrinsic fraud. Intrinsic fraud refers to cases involving the procuring of perjured or forged evidence. In such cases, a foreign judgment is treated on the same level as a domestic judgment, *i.e.*, it can only be challenged for fraud if there is compelling fresh evidence not reasonably discoverable at the time of the trial[71] that was likely to make a difference in the result.

The traditional rule continues to apply in cases of extrinsic fraud, *i.e.*, where the judgment went against the defendant by fraud of the judgment creditor, *e.g.*, where the defendant had never been served, or the suit had been undefended with-

[68] *Showlag v Mansour* [1995] 1 AC 431 (PC Jersey).

[69] *Showlag v Mansour* [1995] 1 AC 431 (PC Jersey) at 440-441.

[70] [2002] 1 SLR(R) 515 (CA); criticised in D. Tan, Enforcement of Foreign Judgments – Should Fraud Unravel All?, *SJICL* 2002, p. 1043-1057.

[71] *Compare Ching Chew Weng Paul, deceased v Ching Pui Sim* [2011] 3 SLR 869 at [41].

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out the defendant's default, or where the defendant had been fraudulently persuaded or deceived to allow the judgment to go by default, or some other fraud to the defendant's prejudice committed or allowed in the proceedings of the foreign court.

It is not clear what effect *Hong Pian Tee v Les Placements Germain Gauthier Inc* has on the registration regimes. In *Owens Bank Ltd v Bracco*, the House of Lords, interpreting the equivalent of the RECJA, refused counsel's invitation to depart from the traditional common law version of the fraud defence on the basis that the statutory provision captured the common law understanding at the time of its enactment.[72]

Fraud is a serious allegation and generally requires cogent evidence of dishonest conduct of the party alleged to have fraudulently procured the foreign judgment.[73] The issue of fraud may itself be the subject of issue estoppel from another foreign judgment, if the question of fraud in the earlier foreign judgment had been submitted to another foreign court for consideration.[74] Where estoppel does not strictly apply, a fraud challenge may nevertheless be struck out as an abuse of process if the issue has been ventilated in the foreign jurisdiction, even if the ventilation occurred in appellate hearings in the same foreign proceedings.[75]

6. Limitation

Although there had been some uncertainty as to the applicable limitation period in the enforcement of a foreign judgment at common law, it is now settled that the applicable period is 6 years from the date of the judgment, on the basis that the claimant is suing on an implied obligation to obey the foreign judgment.[76]

An application to register a foreign judgment under the RECJA must be made within 12 months after the date of judgment, though late registration may be allowed with the leave of court upon satisfactory explanation of the delay.[77] An application to register a judgment under the REFJA must be made within 6 years after the date of the judgment.[78]

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[72] [1992] 2 AC 443 at 461.

[73] *Commercial Innovation Bank Alfa Bank v Kozeny* [2002] UKPC 66 (PC Bahamas).

[74] *House of Spring Gardens v Waite* [1991] 1 QB 241 (CA).

[75] *Owens Bank Ltd v Etoile Commercialte SA* [1995] 1 WLR 44 (PC St Vincent & The Grenadines); T.M. YEO, Foreign Judgments: Fraud and Abuse of Process, *SJICL* 1997, p. 382-391.

[76] *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 (CA) at [49]-[54]. The applicable provision is the Limitation Act, Cap 163, 1996 Rev Ed), s. 6(1)(a) (action founded on a contract).

[77] RECJA (note 10), s. 3(1).

[78] Or the last judgment in the event of appeals: REFJA (note 11), s. 4(1).

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Under the RECJA[79] and REFJA,[80] it is not possible to register a foreign judgment that is not capable of enforcement in the originating jurisdiction because of the expiry of a limitation period in that jurisdiction. Where a foreign judgment is being enforced at common law, the position is not clear but probably similar because even if the common law (as traditionally understood) were to disregard the unenforceability in the foreign jurisdiction as a matter of procedure to be ignored by the law of the forum, the Foreign Limitation Periods Act[81] arguably applies to require the matter to be governed by the foreign law.[82]

7. *Breach of Agreement*

Under the REFJA, it is a defence against registration that the foreign judgment had been obtained through proceedings that had been brought in breach of a choice of court clause.[83] However, the position under the common law and RECJA is unclear, though there may be an argument that there is equitable jurisdiction to restrain a party from relying on a foreign judgment obtained in breach of contract.[84] If the Singapore court had previously granted an anti-suit injunction to restrain a breach of the choice of court agreement, then the enforcement of the resulting foreign judgment will clearly be against public policy.[85]

IV. Conclusions

The principles of private international law governing the recognition and enforcement of *in personam* foreign judgments in Singapore are based on the traditional common law, with a few local glosses. On the whole, Singapore common law gives very strong effect to foreign judgments, without demanding reciprocity. The statutory registration regimes, premised on inter-governmental reciprocal

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[79] *Westacre Investments Inc v The State Owned Co Yugoimport SDPR (also known as Jugoimport-SDPR)* [2009] 2 SLR(R) 166 (CA).

[80] REFJA (note 11), s. 4(3)(b).

[81] Cap 111A, 2013 Rev Ed.

[82] Whether this raises a choice of law question or not, the foreign limitation law will be applicable if the situation can be seen as one where "in any action or proceedings in a court in Singapore the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be applied in the determination of any matter" (Foreign Limitation Periods Act, Cap 111A, 2013 Rev Ed, s. 3(1)).

[83] REFJA (note 11), s. 5(3)(b).

[84] Conflict of Laws, *Halsbury's Laws of Singapore,* Vol. 6(2), Singapore 2009, at [75.236]; *Ellerman Lines Ltd v Read* [1928] 2 KB 144 (CA).

[85] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088, at [65].

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arrangements, are directed at facilitating enforcement without substantial changes to the underlying principles of recognition.

At the time of writing, the Government of Singapore was actively considering[86] signing the Hague Convention on Choice of Courts Agreement 2005[87] (which aims to replicate the success of the international commercial arbitration regime for international commercial litigation). If this materialises and the Convention comes into force, it will entail some changes to the recognition and enforcement of foreign judgments regime in Singapore. The underlying principle of party autonomy in the Convention is consistent with the common law in Singapore. To the extent that an agreement to submit is a ground of international jurisdiction in the common law, it is consistent with the general scheme for the enforcement of Convention judgments.

There will be some differences where the Convention applies. The Convention allows for the enforcement of non-monetary judgments in contrast to the common law, but this is not a significant practical difference.[88] A more significant difference lies in the determination of the validity of a choice of court clause under the Convention by the law to be applied by the chosen court,[89] and the conclusiveness of the decision of the chosen court of a signatory state on the validity of the choice of court agreement.[90] In comparison, under the common law the enforcing forum decides the question of international jurisdiction (including the existence and validity of an agreement to submit) according to its own private international law.[91]

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[86] Speech by Minister for Law, K. SHANMUGAM, during the Committee of Supply Debate 2014, 5 Mar 2014, available at <http://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/speech-by-minister-during-cos-2014.html >.

[87] *I.L.M.*, 2005, Vol. 44, p. 1294.

[88] See main text to note 7.

[89] See Section III.B.3.

[90] Article 9(a).

[91] For analysis of the Convention from the perspective of Singapore law, see SINGAPORE ACADEMY OF LAW, *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005*, Singapore 2013, available at <http://www.sal.org.sg/digitallibrary/Lists/Law Reform Reports/Attachments/37/01 LRC Hague Convention 2005.pdf>.

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THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN SOUTH AFRICA

Paul BÄDER* / Thalia KRUGER**

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I. Introduction

South Africa is often referred to as one of those interesting legal systems that are composed of a blend between common law and civil law. Procedural law was greatly influenced by English law, while substantive law by Roman-Dutch law. Since the recognition and enforcement of foreign judgments is a procedural matter, South African courts have often turned to English law, including case law, to find

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solutions.[1] However, traces of the mixed system are also to be found in the topic of the recognition and enforcement of foreign judgments.

Under South African common law the point of departure is that a foreign judgment provides a cause of action in South Africa. This does not mean that the South African court will reconsider the entire case. It will only test certain factors. There is legislation in South Africa on the recognition and enforcement of foreign judgments, but only for limited situations.

The reader will immediately realise that the law on recognition and enforcement in South Africa is not as modern and well-elaborated as in many other countries and regional organisations.[2] The fact that South Africa functioned as an isolated State for many years, particularly from its neighbours, explains this state of the law.

The South Africa Law Reform Commission in 2004 issued a Discussion Paper on the topic of international co-operation in civil matters, in which recognition and enforcement took an important place.[3] The recommendations made in that Paper have not yet led to legislative amendments.

The purpose of this article is to give a brief overview of the current state of South African law, *i.e.* legislation and the common law, on recognition and enforcement.

II. Statute Law

A. Reciprocal Enforcement of Civil Judgments Act 9 of 1966

The Reciprocal Enforcement of Civil Judgments Act of 1966 was modelled on the British Foreign Judgments (Reciprocal Enforcement) Act of 1933.[4] The Act was based on the principle of reciprocity and would apply to judgments of proclaimed

[1] Discussion Paper 106 (Project 121), Consolidated Legislation Pertaining to International Co-operation in Civil Matters, available at <http://salawreform.justice.gov.za/dpapers/dp106.pdf>, p. 33.

[2] Such as the European Union, with Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12 of 16 January 2001, 1 and its recast, Regulation No 1215/2012, *OJ* L 351 of 20 December 2012, p. 1; the Inter-American Convention on Extraterritorial Validity of Freign Judgments and Arbitral Awards, concluded in Montevideo in 1979.

[3] Discussion Paper 106 (Project 121) (note 1), notes at 2: "Unfortunately the law on international judicial co-operation in South Africa has not kept abreast of commercial and political developments within the country, let alone within the international community."

[4] A.V. Dicey/ J.H.C. Morris, *Dicey's Conflict of Laws,* 7th edn, London 1958, p. 979, at 987-990; see also E. Spiro, The Enforcement of Foreign Civil Judgments Act 1988, *The Comparative and International Law Journal of Southern Africa* 1989, p. 104 *et seq.*

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countries.[5] A foreign judgment could be registered and would then be enforceable in the same way as a domestic judgment.

This Act never entered into force. The first problem was the Act's requirement of reciprocity. This requirement was contrary to the existing practice and case law in South Africa.[6] Moreover, South Africa had difficulties in establishing this reciprocity, because the country was unable to conclude mutually acceptable agreements with foreign governments.[7] The provisions of the Act also led to uncertainty, as it provided that the recognition of a foreign civil judgment was possible only in accordance with the rules stipulated in the Act.[8] On the one hand this would seem to replace the common law. On the other hand, some legal scholars understood this provision as meaning that the common law rules on recognition would still remain applicable, as the Act only applied to proclaimed countries.[9]

The Act was repealed in 1988 and replaced by a new Act.[10]

B. Enforcement of Foreign Civil Judgments Act, Act 32 of 1988

The 1988 Act was necessitated by the legal status of Transkei, Bophuthatswana, Venda, Ciskei (TBVC states). These territories were at the time regarded by South Africa as independent countries, even though they were not recognised as such by the international community. They have been reincorporated into South Africa in 1994, at the time of the entry into force of the first post-apartheid constitution.

The Act was considered necessary to improve the reciprocal enforcement of civil judgments between South Africa and the TBVC states. This goal was reached by introducing a system of registration for judgments from these States. The Act provides only for the registration of judgments from States that had been designated by the Minister of Justice.[11] While the Act no longer sets a reciprocity requirement,[12] the safety valve is now with the Minister of Justice with designation powers. Apart from the TBVC States, which no longer exist, only Namibia has been designated. Although nothing prevents the Minister from designating other States, this was never done. Because of its limited scope of application and the lack of case law, the discussion below about this act will be brief.

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[5] E. KAHN, Conflict of Laws, *Annual Survey of South African Law* 1966, p. 431.

[6] *Ibid.*

[7] Issue Paper 21 Project 121 2003, p. 23.

[8] Sec 8.

[9] E. KAHN (note 5), at 435.

[10] See Art 11 of the Enforcement of Foreign Civil Judgments Act, Act 32 of 1988, which repeals the 1966 Act.

[11] Art 2 of the 1988 Act.

[12] See also C. SCHULZE, *On jurisdiction and the recognition and enforcement of foreign money judgments*, Pretoria 2005, p. 26.

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Registered judgments have the same legal effect as domestic rulings.[13] The clerk of the registering court must give notice of the registration to the judgment debtor.[14] He or she then has 21 days to request the registration to be set aside.[15]

The Act provides a limited number of grounds upon which the registration can be set aside. These are:

– the judgment was registered in contravention of the Act;
– the court of the designated country concerned lacked jurisdiction;
– the judgment debtor did not receive notice of the proceedings in conformity with the law of the designated country or reasonable notice;
– the judgment was obtained by fraud;
– the enforcement would be contrary to public policy in South Africa;
– the certified copy of the judgment was lodged by someone other than the judgment creditor;
– the matter in dispute had, prior to the date of the judgment, been the subject of a final judgment in civil proceedings by a court of competent jurisdiction;
– the judgment has been set aside by a court of competent jurisdiction;
– the judgment has become prescribed under the laws either of South Africa or of the designated country concerned;
– the judgment has been satisfied;
– the judgment may not be recognised or enforced in terms of any South African law.[16]

These requirements are more flexible than those set by the common law, which will be discussed below. The Act, although its initial goal can be criticised, potentially provides a useful tool for recognition and enforcement in South Africa. This potential has however thus far not been used, except with respect to Namibia.

C. Statutes in Specific Domains

The legislator has introduced specific legislation for the recognition of divorces granted in foreign countries. Such judgments will be recognised if either party

(a) was domiciled in the country or territory concerned, whether according to South African law or according to the law of that country or territory;

(b) was ordinarily resident in that country or territory; or

[13] E. Spiro, (note 4).

[14] Art 3(2)-(3) of the 1988 Act.

[15] Art 5(2) of the 1988 Act. See also E. Spiro (note 4), at 106.

[16] Art 5(1) of the 1988 Act.

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(c) was a national of that country or territory.[17]

This recognition is not based on reciprocity.[18] The provision does not mention that the foreign divorce order must be final, but as Forsyth submits, this should be implicit:[19] the silence on the exception of public policy surely does not mean that the exception cannot be used.[20]

There are two Acts for the recognition and enforcement of maintenance orders. The first dates from 1963 and applies to designated countries.[21] Several countries have been designated under this Act.[22] A maintenance order from one of these countries can be registered through diplomatic channels and then becomes equivalent to a South African order. The second Act dates from 1989,[23] but the countries designated were only the TBVC States, which are now part of South Africa.[24] While the Act remains on the Statute Books, it therefore has no practical meaning today. It is, however, possible for the Minister of Justice to designate other African countries under this Act. The Act provides for local registration of the judgment; registration does not have to be made via diplomatic channels.

III. Common Law Requirements for Recognition and Enforcement

For the most part, the recognition and enforcement of foreign judgments is governed by common law. This is to a great extent English law, as explained above.

A foreign judgment provides a cause of action in a South African court.[25] Thus, the judgment creditor's original cause of action (for instance in contract) is replaced by a new cause of action for the enforcement of the foreign judgment.

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[17] Divorce Act 70 of 1979, Sec 13.

[18] C.F. Forsyth, *Private International Law,* 5th edn, Cape Town 2012, p. 421-422 and 429-433; R.F. Oppong, *Private International Law in Commonwealth Africa,* Cambridge 2013, p. 448.

[19] C.F. Forsyth (note 18), at 449.

[20] *Ibid.*

[21] Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.

[22] Australia, Botswana, Canada (), Cocoa (Keeling) Islands, Cyprus, Fiji, Germany, Guernsey, Hong Kong, Isle of Jersey, Isle of Man, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Nigeria, Norfolk Islands, Sarawak, Singapore, St Helena, Swaziland, the United Kingdom (England, Northern Ireland, Scotland, Wales), the United States of America (California and Florida), Zambia and Zimbabwe. (See the website of the Department of Justice and Constitutional Development: www.justice.gov.za.)

[23] Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989.

[24] C.F. Forsyth (note 18), at 451.

[25] *Jones v Krok* 1995 (1) SA 677 (A) at 685.

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This raises the question of what happens to the original cause of action. Under English common law, the original cause of action survived.[26] This had the result that the judgment creditor could choose whether he or she wanted to institute enforcement proceedings or whether he or she rather wanted to start fresh proceedings in England. In England, this has been changed by statute, to the effect that the judgment creditor can only start fresh proceedings if the foreign judgment is unenforceable.[27] Under South African law it is unclear whether the judgment creditor has this choice, or whether he or she must take the recognition and enforcement route if this route is available.[28]

The enforcement proceedings must be brought at the court with jurisdiction, which depends among others on the amount of the debt.

The South African enforcing court may not enter into the merits of the foreign judgment, but is restricted in its assessment to a number of factors elaborated by the courts.[29] This approach places South Africa somewhere in the middle of the spectrum between restrictive approaches to recognition and enforcement (such as the Scandinavian countries) and liberal ones (such as the US). We will discuss the factors to be considered in this section.

A. International Jurisdiction of the Issuing Court

The first requirement for recognition and enforcement is that the court that had issued the judgment should have been internationally competent. This requirement does not mean that the foreign court should only have assumed jurisdiction if a South African court would have done the same.[30] Neither does it mean that it suffices if the foreign court had jurisdiction based on its own rules.[31] Rather, it means that the assuming of jurisdiction must be regarded as appropriate.[32] The required connection has been defined as the foreign court's ability to give effective judgment.[33]

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[26] Discussion Paper 106 (Project 121) (note 1), at 33.

[27] Civil Jurisdiction and Judgments Act 1982, s 34. See also J. FAWCETT/ J.M. CARRUTHERS, *Cheshire, North & Fawcett Private International Law*, 14th edn, Oxford, 2008, p. 544-550 explaining the relation between recognition and estoppel.

[28] Discussion Paper 106 (Project 121) (note 1), at 33.

[29] The leading case is *Jones v Krok* 1995 (1) SA 677 (A), esp 685.

[30] *Richman v Ben-Tovim* 2007 (2) SA 283 (A); *Supercat Incoroporated v Two Oceans Marine CC* 2001 (4) SA 27 (C) at 30. See also the Namibian case of *Argos Fishing Co Ltd v Friopesca SA* 1991 (3) SA 255 (Nm).

[31] *Purser v Sales* 2001 (3) SA 445 (SCA) at 450; *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 (1) SA 13 (T).

[32] See the South African Law Reform Commission's Discussion Paper No 106 (note 1), at 30.

[33] H. SILBERBERG, *The recognition and enforcement of foreign judgments in South Africa*, Pretoria 1977, p. 9, citing W. POLLAK, *The South African law of jurisdiction*, Johannesburg 1937, p. 207-209.

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The ability of the court to give effective judgment is an important principle in South Africa for purposes of jurisdiction.[34] However, using effectiveness as a condition at the time of recognition and enforcement of a foreign judgment, is somewhat ironic. As Silberberg pointed out:

> "the very fact of a court being asked to consider enforcement of a foreign judgment is in itself the clearest possible proof that such judgment is not effective within the jurisdiction of the court which pronounced it."[35]

Despite this apparent irony, the doctrine of effectiveness is still the basic principle of South African jurisdiction and is therefore also found as the underlying idea in the grounds which are accepted to establish international competence. According to this doctrine, jurisdiction depends upon the court's power to give effect to its judgment.[36] The court's powers are of course limited by the principles of sovereignty and the equality of states.[37]

The party requesting recognition or enforcement bears the burden of proving that the foreign court had international competence.[38]

The condition of international competence for purposes of recognition and enforcement can be considered fulfilled in the following cases:

– The defendant is *resident* in the foreign court's jurisdiction.[39] The assumption of international competence would be problematic if a court was deciding a case against a defendant that is neither present, nor living or staying within the jurisdiction of that court, nor possessing assets in it. It is established under South African law of internal jurisdiction that a legal person is considered to be resident where its registered office is and where its principal place of business is.[40] For purposes of international jurisdiction, it is not entirely clear whether the same approach will be followed in

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[34] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) esp. 307; D. PISTORIUS, *Pollak on jurisdiction,* 2nd edn, Cape Town 1993, p. 15; C. SCHULZE (note 12), at 12.

[35] H. SILBERBERG (note 33), at 10.

[36] *Alfred Morten v A.M. Van Zuilecom* (1907) 28 NLR 90 509; *Steytler N.O. Appellant v Fitzgerald Respondent* 1911 AD 295, 346.

[37] I. BROWNLIE, *Principles of public international law*, 7th edn, Oxford 2008, p. 289.

[38] *Purser v Sales* 2001 (3) SA 445 (SCA); *Reiss Engineering Co Ltd v Isamcor (Pty)* Ltd 1983 (1) SA 1033 (W).

[39] *Zwysig v Zwysig* 1997 (2) SA 467 (W): in this case the South African recognising court accepted that the defendant had been resident in Florida, where the judgment was given. The court seemed to have accepted in this case that a person could have more than one residence. The court further accepted the Florida court's jurisdiction on the basis of submission (see below). Residence as basis of international jurisdiction had also been accepted, although *obiter* in *Purser v Sales* 2001 (3) SA 445 (SCA) at 450-451 and in *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 (1) SA 13 (T). See also C. SCHULZE (note 12), at 18, 22-23; C.F. FORSYTH (note 18), at 324.

[40] *Bisonboard Ltd v K Braun Woodworkig Machinery (Pty) Ltd* 1991 (1) SA 482 (A).

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situations where the defendant company has its registered office and principal place of business in different states. The question will become more difficult when one of those is in South Africa and the other in a foreign court that assumed jurisdiction.

– The defendant was not resident but merely *temporarily present* in the area of the foreign court's jurisdiction. The Supreme Court of Appeal ruled in this sense in 2006.[41] However, the facts of the case were such that there were other links to the court which assumed jurisdiction. The judgment has been criticised by authors stating that it is not in line with the international trend of viewing jurisdiction on the basis of mere presence as exorbitant.[42]

– *Submission* to the Court's jurisdiction.[43] Submission can be explicit, in the form of a choice of court clause in the contract. This was accepted in the *Society of Lloyd's* case.[44] The judgment debtors contested the validity of the clauses, but the South African recognising court held that the clauses were valid under the *lex causae* and that the English court therefore had international jurisdiction. In the Namibian case of *Argos Fishing Co Ltd v Friopesca SA*,[45] the Court accepted that the English court had international jurisdiction even though the Namibian court would not have jurisdiction in the same circumstances. Under Namibian and South African law, a choice of forum clause will not suffice to vest the court with jurisdiction if the case further has no connection with the court. Submission can also be tacit, *i.e.* agreed but not explicitly taken up in the contract; or implicit, such as appearance without contesting jurisdiction.[46] Implicit submission is not easily accepted and it must be shown that the parties have clearly accepted the court's jurisdiction.[47] Appearance to contest jurisdiction or to obtain the

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[41] In *Richman v Ben-Tovim* 2007 (2) SA 283 (A) the Supreme Court of Appeal accepted this basis of international jurisdiction (of the English court in this case), even though it is not a basis of jurisdiction in internal South African law.

[42] C.F. Forsyth (note 18), at 429-431; R.F. Oppong, Mere Presence and International Competence in Private International Law, *Journal of Private International Law* 2007, p. 321-332.

[43] *Purser v Sales* 2001 (3) SA 445 (SCA); *Zwysig v Zwysig* 1997 (2) SA 467 (W); *Reiss Engineering Co Ltd v Isamcor (Pty)* Ltd 1983 (1) SA 1033 (W); *Argos Fishing Co Ltd v Friopesca SA* 1991 (3) SA 255 (Nm); C.F. Forsyth (note 16), at 422-429; C. Schulze (note 10), at 19-21; R.F. Oppong, (note 16), at 323.

[44] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA). This basis of jurisdiction of the English court was also accepted the Namibian case of *Argos Fishing Co Ltd v Friopesca SA* 1991 (3) SA 255 (Nm). In this case the Court accepted that the English court had international jurisdiction even though the Namibian (or in fact a South African) court would not have jurisdiction in the same circumstances. Under Namibian and South African law, a choice of forum clause will not suffice to vest the court with jurisdiction if the case further has no connection with the court.

[45] 1991 (3) SA 255 (Nm).

[46] *Purser v Sales* 2001 (3) SA 445 (SCA).

[47] *Maschinen Frommer GmbH & Co KG v Trisave engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 80-82.

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release of attached property does not qualify as submission.[48] A contractual choice for the law of a country does not amount to submission,[49] and neither does the mere choice of a *domicilium citandi et executandi*.[50] However, the Johannesburg High Court found that a defendant had submitted to the jurisdiction of the Florida court since he was the plaintiff in another matter between the same parties in the same court. The fact that he had subsequently withdrawn that action in order to avoid jurisdiction of the court in the present matter, did not nullify the submission.[51] It must be noted that the Johannesburg court also found that the defendant was resident within the foreign court's area of jurisdiction, although such residence was not uncontested.[52]

– For *immovable property* the *place where the property is situated.*[53]

There is uncertainty as to whether the requirement of international competence is fulfilled in the following situations:

– The defendant was *domiciled*[54] but not resident in the area of the foreign court's jurisdiction.[55]

– The *cause of action* arose in the area of the foreign court (*e.g.* that is the place where the delict was committed. While there is case law that accepted this basis for international jurisdiction for purposes of enforcement,[56] it has been criticised.[57] A case from another division of the High Court of South Africa (in Cape Town) held that "[e]ven if the cause of action arose within

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[48] C.F. FORSYTH (note 18), at 425.

[49] *Reiss Engineering Co Ltd v Isamcor (Pty)* Ltd 1983 (1) SA 1033 (W). In this case the English court assumed jurisdiction over a contract in which the parties had chosen the law of the UK. The South African court, however, refused recognition and enforcement of the English judgment.

[50] C.F. FORSYTH (note 18), at 428-429; C. SCHULZE (note 12), at 25-26; R.F. OPPONG, (note 18), at 324.

[51] *Zwysig v Zwysig* 1997 (2) SA 467 (W).

[52] See note 39.

[53] C.F. FORSYTH (note 18), at 455.

[54] The concept of "domicile" in South Africa law has its origins in English law. However, the Domicile Act 3 of 1992 has abolished the possibility of the revival of the domicile of origin. In South African law, one keeps one's domicile (whether of origin or acquired by choice) until a new domicile is chosen. This has the result that domicile under South African law is closer to the facts than under English law; see Discussion Paper 106 (Project 121) (note 1), at 43.

[55] C.F. FORSYTH (note 18), at 431-433.

[56] *Duarte v Lissack* 1973 (3) SA 615 (D). The full bench of the Natal High Court overturned this judgment on appeal: *Duarte v Lissack* 1974 (4) SA 560 (N), but the latter judgment considered only the requirement of natural justice (see below). Since the full bench found that the foreign judgment offended natural justice, it did not consider the question of international jurisdiction.

[57] C.F. FORSYTH (note 18), at 434.

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the area of the foreign Court's jurisdiction, no goods of the defendant were attached. That would have been an additional requirement for the exercise of internal jurisdiction in our law."[58] Yet another did not accept the cause of action as sufficient to establish international competence when the defendant was without known residence in the country of the foreign court.[59] The Supreme Court of Appeal case *Richman v Ben-Tovim*, however, created new uncertainty.[60]

The foreign court is considered to lack international competence in the following situations:

– The defendant was a *national* of the State of the foreign court, but not resident in the court's area of jurisdiction. Nationality in itself without being backed up by residence does not suffice to grant international competence.[61]

– *Property* within the area of jurisdiction of the court and belonging to the defendant has been *attached*.[62] This is rather surprising, as the attachment of property can be used under South African law to found or to confirm jurisdiction.

B. Judgment Final and Conclusive

The foreign judgment must be final and conclusive in the court that pronounced it. The fact that the judgment is still appealable or appealed, does not preclude enforcement, but grants the enforcing court a discretion.[63] In exercising this discretion the court may take into consideration all relevant circumstances, such as whether an appeal is in fact pending, the possible detriment to the judgment debtor if the judgment is enforced in South Africa and subsequently overturned in the country of origin, whether the defendant is pursuing the right of appeal genuinely and with due diligence, the amount concerned, and public policy considerations. The court will however refuse to assess the merits of the appeal and its prospects of

[58] *Supercat Incoroporated v Two Oceans Marine CC* 2001 (4) SA 27 (C) at 31.

[59] *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 (1) SA 13 (T).

[60] *Richman v Ben-Tovim* 2007 (2) SA 283 (A). In this case the Court accepted that the English court had international competence on the basis of the presence of the defendant in England (see above). Although it was argued that the English court's international competence could also be based on the cause of action in England (which arose through the provision of services), the Court did not address this question.

[61] C.F. FORSYTH (note 18), at 433.

[62] See C.F. FORSYTH (note 18), at 434, referring to old case law.

[63] See the judgment in *Jones v Krok* 1995 (1) SA 677 at 689-696 where the judge made a comparative analysis and came to the conclusion that a foreign judgment (of the Californian court in this case) was final and conclusive even though an appeal was pending against it. The judge used his discretionary power to stay enforcement, based on the large sums involved and the possible public policy concern.

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success in the foreign court. If the court of origin has granted a stay of execution pending the appeal, the judgment will not be enforced in South Africa.[64]

The position with respect to the enforcement of default judgments is somewhat unclear.[65] The principle remains that the judgment must be final. If the law of the court of origin provides the defendant recourse to the same court within a certain time limit after which the judgment becomes final,[66] enforcement is only possible after that time limit. However, where the law of the court of origin does not prescribe any time limit, and the defaulting defendant retains the right to have the proceedings done afresh, there is uncertainty with respect to the requirement of finality. One view is that such judgments must be assessed in the same way as appealable and appealed judgments, *i.e.* that the enforcing court must exercise its discretion in light of all the circumstances. The other view is that default judgments are enforceable, since no judgment is ever absolutely final: like default judgments, other judgments can also be set aside, for instance if it later emerges that they were obtained by fraud.[67]

Foreign judgment for the payment of maintenance posed a particular problem as such judgments can be amended and are therefore not final.[68] Specific legislation was introduced to solve this problem.[69]

C. Foreign Judgment neither Lapsed nor Satisfied

If the judgment has been satisfied, a court can refuse recognition and enforcement.

The requirement that a judgment should not have lapsed was named "not superannuated" in the Appeal Court case of *Jones v Krok*.[70] That case did not determine which law governs the question. Under South African law, judgments lapse after three years if they have not been acted upon and can then only be revived by application to court.[71]

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[64] C.F. FORSYTH (note 18), at 457-458. Note that the South African legislator dealt with the topic in the same way in the Reciprocal Enforcement of Civil Judgments Act 9 of 1966 (s 7 I), which never entered into force, and in the Enforcement of Foreign Civil Judgments Act 32 of 1988 (s 7 I), which only applies to judgments issued in Namibia.

[65] C.F. FORSYTH (note 18), at 459.

[66] As is the case for instance under German law. §§ 338-340 ZPO provide that a defendant against whom a default judgment has been given may file an objection against this judgment within a two-week period without the need to excuse his default or give any reasons at all. The proceedings will be re-opened at the same court. In South Africa a defendant can apply for rescission of a judgment granted by default under certain circumstances (Rule 31 of the Uniform Rules of Court).

[67] C.F. FORSYTH (note 18), at 459.

[68] Discussion Paper 106 (Project 121) (note 1), at 47.

[69] As discussed above.

[70] 1995 (1) SA (A) 677 at 685. This particular requirement was not at issue in this case, but the court set out all the requirements.

[71] Discussion Paper 106 (Project 121) (note 1), at 51.

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Until the *Society of Lloyd's* case,[72] there was uncertainty in South African law about the situation when the foreign law allows a longer prescription period for (judgment) debts.[73] In this case Society of Lloyd's attempted to enforce judgments against Price and Lee in South Africa. Under the South African Prescription Act,[74] claims prescribed after three years. More than three years had passed between the judgments and the institution of the enforcement proceedings. However, under English law, the claims only prescribed after six years. Under South African law this prescription rule is considered substantive. That means that the *lex causae* had to be applied, which was English law. However, under English law prescription is considered procedural, which would lead to the application of South African law. Identifying the problem of "gap", the High Court found that the *lex fori* applied and that the judgments could not be enforced due to prescription.[75] The Supreme Court of Appeal, however, dealt differently with the question of characterisation. It followed the "via media approach". This meant that the characterisation of the prescription as substantive or procedural law had to be considered according to the *lex fori* and according to the *lex causae*. As a last step the court had to find the via media by looking at considerations of policy, international harmony of decisions, justice and convenience.[76] Van Heerden JA was in favour of a flexible approach. This, however, does not create clarity with respect to the enforcement in South Africa of foreign judgments.

This approach at first sight seems unduly burdensome. It results, to a certain extent, from the fact that the foreign judgment is seen under South African law as a cause of action. If foreign judgments have to be registered, a separate and clear rule (of the recognising legal system) can be inserted. The Enforcement of Foreign Civil Judgments Act discussed above, however, did not choose such a clear route, but refers to the law of either South Africa or the designated country.

D. Recognition and Enforcement not Contrary to Public Policy

A South African court will not recognise or enforce a foreign judgment that is contrary to public policy. As is generally accepted also in other legal systems, recognition and enforcement can be refused on the basis of public policy only in exceptional cases. The mere fact that the judgment contravenes a rule of South African law or that the judgment was given on a basis that does not exist in South

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[72] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2005 (3) SA 549 (T); on appeal *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA). See also FORSYTH's discussion of the first instance case: C.F. FORSYTH, "Mind the Gap": A Practical Example of the Characterization of Prescription/Limitation Rules, *Journal of Private International Law* 2006, p. 169-180.

[73] Discussion Paper 106 (Project 121) (note 1), at 51.

[74] Act 68 of 1969.

[75] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2005 (3) SA 549 (T).

[76] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) at 406.

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African law will not suffice.[77] The Court in *Jones v Krok* refused enforcement of the part of the California judgment that amounted to punitive damages on the basis that awarding the claimant twice the amount of her real damages was exorbitant and contrary to public policy.[78]

E. Foreign Judgment not Against Natural Justice

This requirement has been set separately from the requirement of public policy, although one might argue it constitutes a subcategory of public policy.[79] However, the requirements can be applied to different situations. In the case of *Jones v Krok*, the Court examined natural justice and public policy separately. The Court found that the defendant (party contesting enforcement) has the onus to establish a failure of natural justice. In this case the defendant sought to establish this by inviting the court to re-assess the facts. The Court refrained from doing so, finding that there had been sufficient evidence in the foreign Court to award compensatory damages to the claimant. Thus, the Court found that the judgment by the foreign Court was not irrational. The Court did not assess whether punitive damages would be contrary to natural justice, but continued to assess the award of punitive damages in the light of public policy (see above).

As can be seen in this case "natural justice" is understood as procedural natural justice.[80] The requirement thus differs from public policy. It requires that the proceedings were led by an impartial tribunal, that the defendant was informed in due time of the proceedings against him and that he has been given a chance to defend himself and present his case.[81] This precludes the recognition and enforcement of so-called *cognovit* proceedings in which the defendant in advance waives his or her right to notice of the proceedings, consents to any lawyer (for instance the creditor's lawyer) to conduct the proceedings, and consents to judgment against him or her.[82]

It is clear that the exception of natural justice, like that of public policy, is one of last resort and is to be used only in extreme cases. The enforcing court may not reconsider the merits of the case.

In the *Duarte v Lissack* case[83] the Courts considered natural justice. Lissack, resident and domiciled in Durban, South Africa, hired a car in Mozambique and drove with it to Swaziland, where he was involved in an accident and the car was damaged beyond repair. The company having hired the car to him subsequently

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[77] *Jones v Krok* 1996 (1) SA 504 (T) at 515; *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) at 413.

[78] 1996 (1) SA 504 (T) at 516-518.

[79] See C.F. Forsyth (note 18), at 462 and C. Schulze (note 12), at 29-30 who discuss natural justice as a subcategory of public policy.

[80] This is in line with the English common law; see J. Fawcett/ J.M. Carruthers (note 27), at 564.

[81] *Jones v Krok* 1995 (1) SA 677 (A) at 511.

[82] C. Schulze (note 12), at 30.

[83] *Duarte v Lissack* 1973 (3) SA 615 (D); on appeal 1974 (4) SA 560 (N).

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sent him several letters, culminating in correspondence about litigation in Lorenço Marques (today Maputo), Mozambique. Thereafter Lissack received several documents in Portuguese. One of them was translated, but the actual summons was not and Lissack did not understand Portuguese. This turned out to be a summons to appear on the Lorenço Marques court. Lissack followed the instructions in the translated document and wrote a letter to the court indicating his resistance. However, the next thing he heard was that default judgment had been obtained against him. The question was whether judgment had been obtained contrary to natural justice. The first Court held that there was no offence to natural justice, and that the defendant had received sufficient information to realise that he should obtain legal advice.[84]

On appeal, the full bench accepted that the defendant bears the onus that there has been a failure of natural justice.[85] It further found that the mere fact that the defendant had not sought legal advice is not sufficient to deny the claim of a failure of natural justice. Where a default judgment has been granted against a defendant living in another country, the Court said that the enforcing court must regard the possible failure of natural justice in light of all the circumstances, of which the defendant's failure to seek legal advice timely, is only one element. Even assuming that the facts on the translated letter were sufficient for the defendant to know what the action against him was about, the Court found that he has no way of knowing that he had to refute or contest the action in a particular way. Leon J concluded by stating: "fundamental principles of fairness required the Lourenço Marques Court to apprise the defendant of the correct procedure after his letter had been received. The grant of a default judgment against him after failing so to apprise him offends my sense of justice."

In *Corona v Zimbabwe Iron & Steel Co Ltd*[86] the Court refused recognition and enforcement of a judgment because the plaintiff had obtained two judgments on exactly the same facts and the same causes of action. The plaintiff did this innocently, not knowing who was liable. The Court held that it was "clearly contrary to natural justice for a litigant who obtains judgment against one defendant, to seek judgment against another for the same sum and one [sic] the same grounds as happened here."[87]

This judgment has been criticised on the basis that the procedure in the foreign (Zimbabwean) court was not procedurally unfair, while the requirement of natural justice is in fact aimed at procedural fairness. The plaintiff had brought the second set of proceedings merely because he could not be satisfied out of the first judgment; he did not try to claim more than what was rightfully his.[88] If a judge had erred about factual or legal matters, this should not lead to a rejection of recogni-

[84] *Duarte v Lissack* 1973 (3) SA 615 (D) at 623.

[85] *Duarte v Lissack* 1974 (4) SA 560 (N) at 564.

[86] *Corona v Zimbabwe Iron & Steel Co Ltd* 1985 (2) SA 423 (TkA).

[87] *Ibid,* at 426.

[88] T. DOSER, *Gegenseitigkeit und Anerkennung ausländischer Entscheidungen (§ 328 Abs. 1 Nr. 5 ZPO)*, Frankfurt am Main 1999, p. 356.

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tion of the judgment but rather provide a reason for appeal in the country of origin.[89]

F. Foreign Judgment not Obtained by Fraud

South African Courts will not recognise and enforce foreign judgments obtained by fraud. This category is also seen by some as a subcategory of public policy.[90] There is a distinction between extrinsic and intrinsic fraud. Extrinsic fraud is where the judgment was obtained by fraud committed in the foreign proceedings by the creditor. Examples include perjury, forgery in the course of the proceedings, fraudulent suppressing of essential documents, fraudulently misleading the defendant and inducing him or her not to appear, and without the defendant's knowledge obtaining a judgment contrary to a prior agreement between the parties.[91] Intrinsic fraud is where the fraud was committed by the foreign court, for instance by accepting a bribe.[92] This situation is more complicated in case of an intrinsic fraud. If the fraudulent behaviour was raised and rejected in the foreign court that was internationally competent, the South African court should recognise the judgment and not re-assess the merits of the case by examining the fraud again.[93] If the judgment debtor wants to avoid such judgment from being enforced, he or she must appeal the judgment in the country of origin.

G. No Penal or Revenue Law of Foreign State

Due to the purely territorial operation of penal law, foreign judgments dealing with criminal matters will not be recognised and enforced in South Africa, whether directly or indirectly.[94] Similarly, foreign revenue judgments are not recognised or enforced. Although there is no recent case law directly in point, the Appellate Division (as it was then called) confirmed this.[95]

H. Conflicting Judgments?

It is not certain under South Africa law what the situation would be in cases where two conflicting foreign judgments are in existence.[96]

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[89] *Ibid* and C.F. FORSYTH (note 18), at 463.

[90] C.F. FORSYTH (note 18), at 463; C. SCHULZE (note 12), at 30.

[91] H.R. HAHLO/ E. KAHN, *The South African law of husband and wife*, 4th edn (1975), p. 667; C. SCHULZE (note 12), at 30.

[92] Discussion Paper 106 (Project 121) (note 1), at 48.

[93] C. SCHULZE (note 12), at 30.

[94] C.F. FORSYTH (note 18), at 123.

[95] *Jones v Krok* 1995 (1) SA 677 (A).

[96] Discussion Paper 106 (Project 121) (note 1), at 35.

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I. Protection of Business Act

The Protection of Businesses Act[97] has been introduced with the intention to protect South African companies from United States' anti-trust legislation through non-recognition and mainly non-enforcement of certain judgments.[98] In order to pursue this goal the South African legislator created a rather extensive instrument, which has even been described as a "legislative overkill" by some legal scholars.[99]

The Act covers a broad range of measures:

> "[…]except with the permission of the Minister of Economic Affairs no judgement, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic."[100]

Also the temporal scope and the nature of the covered activity are extremely broad:

> "In the application of subsection (1)(a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic."[101]

Because of this broad but vague provision, it seems that the scope of application of this Act embraces nearly all fields of human activity. The result would be that permission of the Minister of Economic Affairs would be required for nearly every civil judgment in order to recognise or enforce it in South Africa.[102] The Act even also applies to the recognition and enforcement of foreign arbitral awards.[103] However, South African courts have consistently interpreted this Act restrictively.[104]

The first reported case in which the Protection of Businesses Act was dealt with was *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax) and*

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[97] Act 99 of 1978.

[98] J. DUGARD, Public International Law, *Annual Survey of South African Law* 1978, p. 59, at 67; see also preamble of the Act itself, although its wording is more general.

[99] P.S.G. LEON, Roma non Locuta est: The Recognition and Enforcement of Foreign Judgments in South Africa, *The Comparative and International Law Journal of Southern Africa* 1983, p. 325, at 347; C.F. FORSYTH (note 18), at 466.

[100] Protection of Businesses Act, s 1(1)(a).

[101] Protection of Businesses Act, s 1(3).

[102] C. SCHULZE (note 12), at 31.

[103] See *Seton Co v Silveroak Industries Ltd* 2000 (2) SA 215 (T) 226, in which the Minister's permission was requested and given for the recognition of a foreign arbitral award.

[104] C.F. FORSYTH (note 18), at 466.

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Others.[105] In this case the term "any matter and material" was interpreted quite narrowly as being limited to raw materials or substances physical things are made of but not manufactured things. According to the Court even the words "of whatever nature" does not extend this restrictive meaning as it merely emphasises that everything within this narrow category was embraced.[106] This interpretation was followed as convincing and correct in *Chinatex Oriental Trading Co. v Erskine*.[107]

In *Jones v Krok* the Court gave the scope of application of the Protection of Businesses Act a narrow interpretation. The case concerned contractual and delictual damages that arose from a joint venture in which the claimant said that the defendant had wrongfully misappropriated her share. The Court found that such action did not fall within the ambit of the Act.[108] The issue of the punitive damages that the Californian court had awarded was dealt with under the exception of public policy rather than under the Act.[109]

Similarly, the Supreme Court of Appeal interpreted the Act narrowly in *Richman v Ben-Tovim*.[110] The Court found that the Act did not apply to a claim for "services and disbursements related to negotiations, advice, drafting of contract documents, and incidental matters pertaining to a restructuring, rearrangement, and (ultimately) dissolution of joint ventures." It stated that "[i]f manufactured goods are sufficiently remote from «matter» and «material» within the meaning of the Act, by parity of reasoning there can be no scope for applying it to a claim for payment sounding in money where the claim is one for professional services rendered."[111]

In some cases on recognition and enforcement the Act is simply not mentioned.[112] There is no case known to us in which the Act in fact prevented recognition or enforcement.

Even though this Act is interpreted strictly and not used often, the Act sends a discouraging message of possible uncertainty to judgment creditors about the prospect of enforcement in South Africa.[113]

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[105] *Tradex Ocean Transportations SA v MV Silvergate (or Astyanax) and Others* 1994 (4) SA 119 (D) at 120-121.

[106] See also C. SCHULZE (note 12), at 31.

[107] *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C). This judgment was reversed by the full bench of the Cape High Court (2001 (1) SA 814 (C)), but only on the question of the international competence of the foreign court: the full bench did not consider the application of the Protection of Businesses Act.

[108] *Jones v Krok* 1996 (1) SA 504 (T) at 510.

[109] See discussion of public policy above.

[110] 2007 (2) SA 283 (A).

[111] At 290.

[112] Discussion Paper 106 (Project 121) (note 1), at 52.

[113] Discussion Paper 106 (Project 121) (note 1), at 66.

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IV. Conclusion

As is typical for common law and its particular way of development, there is still a great amount of uncertainty with respect to the recognition and enforcement in South Africa of foreign judgments. There are a few cases which have clarified matters. However, the legislative potential has not been used fully. The legislator can, by using the existing legislative frameworks, designate more countries and in this way facilitate the registration of foreign judgments in order to easily give them effect in South Africa. Moreover, the reader will have noticed that not much was said about treaty law: there are no relevant conventions applicable in South Africa. There are many useful conventions that South Africa will benefit from ratifying, among others on maintenance.

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RECOGNITION AND ENFORCEMENT OF FOREIGN COURT DECISIONS IN TURKEY

Ceyda SÜRAL[*] / Zeynep Derya TARMAN[**]

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I. Introduction

One of the core consequences of globalisation has been the rapid increase in transnational litigation and the associated need to enforce judgments across national borders. Recognition and enforcement of foreign countries' court decisions in another country has always been a delicate and difficult issue. It is known that the system does not have a universal rule and each country adopts its own valued judgment with regard to foreign decisions.

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The recognition and enforcement of foreign court judgments in Turkey have been regulated by the International Private and Procedural Law Act, which entered into force on 4 December 2007 (hereafter: PILA).[1] The requirements of granting an *exequatur* for a foreign judgment are stipulated in Articles 50-59 PILA.

Recognition of foreign court judgments means recognition of the *res judicata* effect of that judgment in Turkey, whereas, enforcement introduces the executive force of the foreign judgment in Turkey.[2] The enforcement in Turkey of court judgments pertaining to civil suits granted by foreign courts and having become final under the laws of that State are subject to a judgment of enforcement pronounced by a competent Turkish court. Recognition is prescribed in Articles 58 and 59 of the PILA. The acceptance of a foreign court judgment as conclusive evidence or as a final judgment shall be subject to the confirmation by the court that the foreign judgment fulfils the conditions for enforcement. Recognition of a foreign court judgment not subject to enforcement, such as divorce, annulment of marriage, establishment of parentage, or guardianship decisions, will suffice in these cases.[3] Recognition of foreign court judgments can be sought either within a pending proceeding or as a separate court action.[4] The provisions of PILA regarding the enforcement will be also applicable for recognition except for Article 54(a) pertaining to reciprocity (Article 58(1) PILA). Therefore, the explanation concerning enforcement is also valid for recognition, unless stated otherwise.

Turkey is a party to a number of bilateral and multilateral conventions dealing with recognition and enforcement that provide for a facilitated procedure. These international conventions will prevail on the matters that fall under their scope (Article 1(2) PILA).[5] Turkey has bilateral conventions with forty-two countries including Austria, Germany, Romania, Croatia, China, Slovakia, Ukraine and Poland.[6] Some of the multilateral conventions in force in Turkey are:[7] Hague

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[1] The law has entered into force as of the date of its publication in the Official Gazette (OG) on 12 December 2007 No 2678.

[2] E. NOMER, *Devletler Hususi Hukuku*, Istanbul 2013, p. 489; A. ÇELIKEL/ B. ERDEM, *Milletlerarası Özel Hukuk*, Istanbul 2012, p. 607; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE, *Milletlerarası Özel Hukuk,* Istanbul 2013, p. 456-458; V. DOĞAN, *Milletlerarası Özel Hukuk*, Ankara 2013, p. 101; N. EKŞI, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi,* Istanbul 2013, p. 1-2; P. GÜVEN, *Tanıma – Tenfiz,* Ankara 2013, p. 27.

[3] A. ÇELIKEL/ B. ERDEM (note 2), at 608; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 457; N. EKŞI (note 2), at 5.

[4] E. NOMER (note 2), at 525; N. EKŞI (note 2), at 55; P. GÜVEN (note 2), at 174.

[5] However, Kadıköy Fourth Commercial Court of First Instance, in its decision dated 17 June 2008, applied the provisions of the PILA instead of the bilateral agreement between Turkey and Uzbekistan, on the ground that the conditions for enforcement provided by the bilateral agreement (the enforcing court is entitled to review the jurisdiction of the foreign court) is stricter than those provided in the PILA. Kadıköy 4. ATM., E.2007/1020, K.2008/386, T.17 June 2008. See N. EKŞI, *5718 Sayılı Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun'a İlişkin Yargıtay Kararları*, Istanbul 2010, p. 109. This decision is criticized in the doctrine because international conventions prevail regardless of their content due to Article 1/2 of the PILA. N. EKŞI (note 2), at 483.

[6] For further information on the bilateral conventions, see N. EKŞI (note 2), at 417-478.

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Convention of 1 March 1954 on Civil Procedure,[8] Convention on the Contract for the International Carriage of Goods (CMR),[9] Convention concerning International Carriage by Rail (COTIF),[10] International Convention on Civil Liability for Oil Pollution Damage,[11] Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to the Duty of Maintenance Towards Children,[12] Hague Convention of 2 November 1973 concerning the Recognition and Enforcement of Decisions relating to the Duty of Maintenance,[13] CIEC Convention of 8 September 1967 Concerning the Recognition of Decisions Pertaining to the Bond of Marriage[14] the European Convention of 20 May 1980 Concerning the Recognition and Enforcement of Decisions on the Custody of minors and the Re-establishment of the Custody of Minors,[15] and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.[16]

II. Prerequisites of Recognition and Enforcement

A. Claims Pertaining to Civil and Commercial Matters

Article 50 PILA requires that the decision must be granted in a civil action; Turkish law determines whether an action is a civil action.[17] Court judgments regarding administrative and criminal matters are not subject to recognition and enforcement under the PILA.[18] Court judgments rendering punitive damages that are issued in common law jurisdictions will not be enforced in Turkey due to their punitive character.[19] In civil law jurisdictions compensation can be claimed only for the damage suffered. In this case, partial enforcement of the judgment is permitted.[20]

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[7] For further information on the multilateral conventions, see N. EKŞI (note 2), at 353-417.

[8] OG 23 May 1972 No 14191.

[9] OG 4 January 1995 No 22161.

[10] OG 1 July 1985 No 18771.

[11] OG 24 June 2001 No 24472.

[12] OG 11 January 1973 No 14418.

[13] OG 16 February 1983 No 17961.

[14] OG 14 September 1975 No 15356.

[15] OG 2 November 1999 No 23864.

[16] OG 20 January 2004 No 25352.

[17] E. NOMER (note 2), at 484; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 464; N. EKŞI (note 2), at 125; P. GÜVEN (note 2), at 39.

[18] N. EKŞI (note 2), at 121.

[19] E. NOMER (note 2), at 484.

[20] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 465.

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B. Court Decisions

According to Article 50 PILA, to seek recognition and enforcement, firstly the existence of foreign court's decision is required. Whether the foreign decision is a court decision shall be determined in accordance with the law of the country where it was rendered.[21] Decisions issued by administrative bodies such as the municipality,[22] governorship or notary cannot be enforced in Turkey pursuant to the PILA.[23]

Decisions granted by international courts such as the International Court of Justice and the European Court for Human Rights are dealt with in accordance with the relevant special procedures provided by these international conventions.[24]

Settlement agreements are not subject to recognition and enforcement. If the parties have reached a settlement agreement in the course of litigation, they may petition the court to record the terms of the settlement agreement in a court judgment. Such a court judgment will be enforceable under the PILA. On the other hand, the settlement agreement, in itself, does not benefit from such enforceability.[25]

In order to enforce a foreign court judgment, the judgment in question has to be enforceable in accordance with the law of the country of origin. Judgments forfeited by prescription in accordance with the law of the state where it was rendered will be not enforced in Turkey.[26]

Recognition and enforcement of foreign arbitral awards are subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter: New York Convention),[27] which entered into force on 30 September 1992. In respect of enforcement of foreign arbitral awards in Turkey, Articles 60-63 PILA pertaining to the recognition and enforcement of arbitral awards are applicable only if the award is decided by a non-contracting State to the New York Convention. It should also be noted that there are no significant differences between the rules of enforcement provided in the PILA and the provisions of the New York Convention.

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[21] C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 461; N. Ekşi (note 2), at 109; P. Güven (note 2), at 29.

[22] Second Civil Chamber of the Court of Cassation, in its decision dated 13 April 1995, decided that a foreign divorce decision issued by the Copenhagen municipality could not be recognised in Turkey. 2.HD, 13.4.1995, E. 3612, K.4567. See A. Çelikel/ E. Nomer/ F.K. Giray/ E. Esen, *Devletler Hususi Hukuku*, İstanbul 2010, p. 493.

[23] However, some international conventions such as the Hague Convention of 2 November 1973 concerning the Recognition and Enforcement of Decisions relating to the Duty of Maintenance include provisions to allow the enforcement of decisions issued by administrative bodies.

[24] E. Nomer (note 2), at 491; C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 462; N. Ekşi (note 2), at 111; P. Güven (note 2), at 38.

[25] E. Nomer (note 2), at 492.

[26] E. Nomer (note 2), at 491; C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 520; N. Ekşi (note 2), at 156; P. Güven (note 2), at 73.

[27] OG 25 September 1991 No 21002.

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C. Final Decisions

Article 50 PILA stipulates that only foreign court judgments, which are final according to the law of the state of the court that issued the judgment shall be allowed to be recognised and/or enforced before the courts of Turkey.

The foreign judgment, for which an *exequatur* is sought, must be final and enforceable under the law of the state where the judgment was rendered.[28] In practice, the wording and attestation of the court officials indicating that the judgment is final under the wording "This judgment has been finalised" shall be sufficient for the requirement of the PILA in respect of the judgment being final.[29]

The recognition and enforcement of foreign provisional and protective measures under Turkish private international law is not accepted.[30] However, some international conventions to which Turkey is a party to include provisions to ensure the enforceability of such decisions and orders.[31]

III. Procedure

The procedure to be applied by the Turkish courts is governed by the Turkish procedural law (principle of *lex fori*), which is provided by Turkish Code of Civil Procedure[32] (hereafter TCCP). This principle also applies to the proceedings brought before Turkish courts for recognition or enforcement of a foreign judgment. However, certain issues relating to the recognition and enforcement of judgments are regulated by the PILA, as will be explained below.

A. Jurisdiction

According to Article 51 PILA, the enforcement decision may be sought from the civil courts of first instance[33] located in the Turkish domicile of the person against

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[28] For further information, see B. Şit, Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kesinleşme Şartı, *Gazi Üniversitesi Hukuk Fakültesi Dergisi,* C. XV, 2011/1, p. 61 *et seq*.

[29] 11.HD., E.2012/3713, K.2012/8328, T.18 May 2012.; 2.HD., E.2008/18047, K.2009/5488, T.25 March 2009; 2.HD., E.2007/9930, K.2008/8463, T.12 June 2008. See Kazanci Caselaw Database at <www.kazanci.com>.

[30] E. Nomer (note 2), at 491; A. Çelikel/ B. Erdem (note 2), at 613; C. Şanlı/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 465; P. Güven (note 2), at 67.

[31] Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to the Duty of Maintenance Towards Children, and Hague Convention of 2 November 1973 concerning the Recognition and Enforcement of Decisions relating to the Duty of Maintenance.

[32] OG 4 February 2011 No 27836.

[33] According to the Act on the Establishment, Jurisdiction and Procedure of the Family Courts Article 4, the family courts have jurisdiction on the recognition and

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whom enforcement is sought. If the person against whom enforcement is sought does not have his or her domicile in Turkey, then the court where he or she is resident shall be the competent court. If the relevant person is neither domiciled nor resident in Turkey, then the enforcement decision may be required from the civil courts of first instance located in Ankara, Istanbul or Izmir. Although these three courts may have no connection with the parties or the relevant dispute, jurisdiction is granted to these courts in order to ensure that there is always a competent court that the parties may resort to for recognition or enforcement of a judgment.[34]

This rule on jurisdiction is not relevant with the public policy and does not grant absolute jurisdiction to the relevant courts. Therefore, if the enforcement proceedings are initiated at a court other than those indicated in Article 51, the party against whom enforcement is sought shall object to the jurisdiction of the court as a preliminary objection, *i.e.*, until the first hearing and before the court proceeds to the examination of the merits (Articles 116 and 317(2) TCCP). Therefore, the court shall take into account the objection to jurisdiction made by the respondent until or during the first hearing.[35] However, if no such objection is made, the court may not review its jurisdiction *ex officio* and is, therefore, competent.[36]

B. Claimant

According to Article 52(1) PILA, anybody who has a legal interest in the enforcement of the foreign judgment may apply for its enforcement.

It is obvious that the parties to the dispute have a legal interest in enforcement of a judgment. However, in some cases, persons other than the parties may have a legal interest in recognition or enforcement as well. For example, the heirs of divorced spouses may have a legal interest in recognition of the divorce decree for the resolution of intestate succession, parental authority, maintenance or liquidation of matrimonial property issues.[37] This has been subject to the General Assembly of Civil Chambers of the Court of Cassation's decision dated 30

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enforcement of foreign judgments concerning family law. This rule is respected by the Second Civil Chamber of the Court of Cassation. 2.HD., E.2008/4922, K.2008/8982, T.19 June 2008; 2.HD., E.2009/611, K.2009/9872, T.25 May 2009. See N. EKŞI (note 5), at 67-68; 70-71.

[34] A. SAKMAR, *Yabancı İamların Türkiye'deki Sonuçları,* İstanbul 1982, p. 127-128; N. EKŞI (note 2), at 48.

[35] 2.HD., E.2007/7851; K.2008/7080, T.15 May 2008; E.2010/14820; K.2011/4955, T.21 March 2011. See Kazanci Caselaw Database at <www.kazanci.com>.

[36] 2.HD., E.2012/9753, K.2013/4186, T.20 February 2013. See Kazanci Caselaw Database at <www.kazanci.com>. 2.HD., E.2013/15238, K.2013/20575, T.11 September 2013; 18.HD., E.2012/3839, K.2012/6013, T.21 May 2012. See N. EKŞI (note 2), at 50-52.

[37] E. NOMER (note 2), at 515. For further information, see N. EKŞI, Yabancı Boşanma Kararının Türkiye'de Tanınması Davasının Mirasçılar Tarafından Açılabileceğine İlişkin Yargıtay 2. Hukuk Dairesi'nin 3.4.2012 Tarihli Kararının Değerlendirilmesi, *Milletlerarası Özel Hukuk ve Usul Hukuku Bülteni*, 32/1, 2012, p. 33 *et seq*.

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November 2011.[38] According to this decision, if one of the spouses dies after a divorce decision granted by a foreign court becomes final and binding, but before that decision is recognised in Turkey, the heirs of the deceased spouse have a legal interest in the recognition or enforcement of the foreign judgment. The Second Civil Chamber followed the General Assembly's precedent with its decision dated 3 April 2012[39] and annulled the decision of the first instance court that rejected the recognition of a divorce decision sought by the statutory representative of one of the spouses who had passed away. The Second Civil Chamber of the Court of Cassation, in its decision dated 16 September 2009,[40] held that the Social Security Institution has a legal interest in the recognition of a divorce judgment in a case where the woman requests a monthly wage from the Institution due to the death of her husband although they have divorced before a foreign court prior to the death of the husband.

What if one of the spouses initiates a proceeding for the recognition of a divorce judgment and dies during the recognition proceedings? The answer of the Second Civil Chamber to this question is that the heirs of the deceased spouse have a legal interest in continuing with the recognition proceedings.[41]

The existence of a legal interest is a prerequisite of any type of proceedings under Turkish law (Article 114 TCCP). Therefore, if there is no legal interest in the recognition or enforcement of a foreign judgment, the request shall be denied. In a case before Thirteenth Civil Chamber of the Court of Cassation,[42] the foreign judgment rendered by the Dessau Court in Germany only determined the party who was responsible for the payment of credit provided for the establishment of a cattle farm. The recognition of the Dessau court's judgment was required by the Turkish court in order to use this judgment as binding evidence before the Turkish courts. The Thirteenth Civil Chamber decided that, as there were no pending proceedings concerning the relevant credit agreement before the Turkish courts, the party seeking recognition had no legal interest in the recognition of the foreign judgment.

The nationality of the parties is irrelevant. In other words, one need not be a Turkish citizen in order to apply for the enforcement of a foreign judgment in Turkey.[43] However, it must be noted that the foreign parties are under the

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[38] YHGK., E.2011/2-593, K.2011/726, T.30 November 2011. See Kazanci Caselaw Database at <www.kazanci.com>.

[39] 2.HD., E.2011/21901, K.2012/8257, T.3 April 2012. See Kazanci Caselaw Database at <www.kazanci.com>.

[40] 2.HD., E.2009/11856, K.2009/15802, T.16 September 2009. See N. EKŞI (note 5), at 76-77.

[41] 2.HD., E.2012/4025, K.2012/8133, T.3 April 2012. See Kazanci Caselaw Database at <www.kazanci.com>.

[42] 13.HD., E.2009/4434, K.2010/5, T.7 January 2010. See Kazanci Caselaw Database at <www.kazanci.com>.

[43] E. NOMER (note 2), at 515; N. EKŞI (note 2), at 62. 2.HD., E.2007/20375, K.2008/4214, T.27 March 2008; E.2008/9629, K.2008/9345, T.25 June 2008; E.2008/19620; K.2010/1034,T.20 January 2010. See Kazanci Caselaw Database at <www.kazanci.com>.

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obligation to deposit a warranty, to guarantee the payment of procedure and execution expenses and the loss of the other party, in order to initiate a lawsuit before Turkish courts according to Article 48 PILA.

C. Petition

Enforcement must be sought by a petition including the following information: (i) the names, surname and addresses of the person seeking enforcement, the person against whom enforcement is sought and their statutory representatives as well as the relevant attorneys-at-law if any; (ii) the state where the court that rendered the foreign judgment is located, the name of the court and the date, number and summary of the judgment; (iii) if partial enforcement is sought, an indication as to which part is sought to be enforced (Article 52 PILA).

Article 53 PILA lists the documents that need to be attached to the petition for enforcement. Those are (i) the original or duly authorised copy of the foreign judgment and its duly authorised translation; and (ii) duly authorised letter or document certifying that the foreign judgment is final and binding and its duly authorised translation.

The duly authorised copy of the foreign judgment shall bear both an authorisation from the court that has rendered it and an apostille.[44] A simple copy of the foreign judgment not bearing an authorisation from the original court is not sufficient.[45]

The Second Civil Chamber of the Court of Cassation, in its decision of 6 October 2010[46] stated that the enforcement decision may not be given based on a summary of the original decision.

If any of the documents listed in Article 53 are not attached to the petition, the court must grant a one-week period to the claimant in order for him or her to provide the missing documentation. If the claimant is unable to provide the relevant documentation, the request for enforcement shall be deemed non-existent.[47]

D. Court Fees and Expenses

According to Article 4 Charges Act[48] and the Tariff Number 1, in the proceedings initiated for the enforcement of a foreign judgment, if the subject matter of the proceedings has a certain value, a proportional fee shall accrue.

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[44] 2.HD., E.2010/22330, K.2011/12754, T.20 July 2011. See EKŞI (2012), 110-111; 3.HD., E.2012/11697, K.2012/16596, T.2 June 2012. See Kazanci Caselaw Database at <www.kazanci.com>.

[45] 2.HD., E.2010/20342, K.2011/9075, T.25 May 2011; E.2010/20341, K.2011/10152, T.9 June 2011. See Kazanci Caselaw Database at <www.kazanci.com>. 19.HD., E.2012/5077, K.2012/10499, T.24 May 2011. See N. EKŞI (note 2), at 82.

[46] 2.HD., E.20110/4666, K.2010/16233, T.6 October 2010. See N. EKŞI, *Milletlerarası Özel Hukuk I Pratik Çalışma Kitabı*, Istanbul 2012, p. 109-110.

[47] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 517.

[48] OG 17 July 1964 No 11756.

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This provision has been criticised in academic literature as it causes the claimant to pay court fees twice; first when proceedings for the resolution of the dispute before a foreign court are initiated and secondly for the enforcement of the judgment in Turkey.[49]

As mentioned above, the foreign parties must deposit a warranty according to Article 48 PILA. Foreign natural or legal persons filing or participating in suits or pursuing enforcement proceedings before Turkish courts shall be required to provide the security determined by the court in order to cover litigation and proceeding costs and the loss and damages of the opposing party. The court shall exempt the plaintiff, the intervening party or the party pursuing enforcement proceedings from providing security on the basis of reciprocity (Article 48 PILA). For example, Turkey is a party to the Hague Convention on Civil Procedure 1954.[50] The foreign claimants who are nationals of a contracting state to this Convention shall be exempt from warranty. Furthermore, the Turkish citizens who do not have their domicile in Turkey shall deposit a warranty to cover the possible expenses of the respondent when they initiate legal proceedings before Turkish courts (Article 84 TCCP). Foreign claimants[51] and those who do not reside in Turkey shall be exempt from warranty in the following cases: (i) if he or she is in receipt of legal aid; (ii) if he or she has real property or a credit guaranteed with a right *in rem*, the value of which is sufficient to cover the amount of the warranty; (iii) if the proceedings are initiated solely with the purpose of protecting a child's rights; and (iv) for the execution proceedings based on a court decision (Article 85 TCCP). The judge determines the amount and type of the warranty (Article 87(1) TCCP). If the warranty is not deposited within the definite period granted by the judge, the proceedings shall be rejected (Article 88(1) TCCP).

E. Service

The petition for enforcement shall be served on the party against whom enforcement is sought. The date of hearing shall also be notified (Article 55(1) PILA).

If the person against whom enforcement is sought resides abroad, the service shall be made in accordance with the bilateral or multilateral agreements pertaining to service that both Turkey and the state where the defendant resides are parties to,[52] or Article 25 Service Act[53] [54].

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[49] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 517.

[50] According to Article 17 of the Convention, no security, bond or deposit of any kind, may be imposed by reason of their foreign nationality, or of lack of domicile or residence in the country, upon nationals of one of the Contracting States, having their domicile in one of these States, who are plaintiffs or parties intervening before the courts of another of those States.

[51] The provisions of the TCCP pertaining to warranty shall be applicable also to the warranty prescribed in the PILA. N. EKŞI (note 2), at 92.

[52] Turkey is a party to the Hague Convention on Civil Procedure and 1965 The Hague Convention on the Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters 1954 (OG 17 June 1972 No 14218).

[53] OG 19 February 1959 No 10139.

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F. Plea

The party against whom enforcement is sought may submit that one of the grounds for non-enforcement exists, or that the foreign judgment has already been wholly or partly executed, or that an impediment has arisen to prevent its execution (Article 55(2) PILA).

The party against whom enforcement is sought may not submit any objections concerning the content of the foreign judgment or the merits of the dispute.[55] The Second Civil Chamber of the Court of Cassation, in its decision of 16 June 2008[56] clearly stated that the "non-application of the competent law" may not constitute a valid objection against the enforcement of a foreign judgment and may not be taken into account by the court.

In principle, the Turkish court shall *ex officio* review the existence of grounds of non-recognition and non-enforcement. However, the party against whom enforcement is sought may object to the enforcement on two grounds, namely that the foreign court has exercised an exorbitant ground of jurisdiction or that the right of defence of the party against whom enforcement is sought has been violated as prescribed in Article 54(ç). The court may not review these grounds *ex officio*.

The court shall not take into account the pleas of the parties that are not in compliance with the principle of good faith. The Second Civil Chamber of the Court of Cassation in its decision of 8 March 2005[57] stated that it is contradictory to the principle of good faith if the woman objects to the recognition of a divorce judgment that was rendered by the Belgian court as a result of the proceedings initiated by her due to severe defamation and ill-treatment by her husband.

According to Article 55(1), the court must examine the claim of enforcement and pleas against it in a simple litigation procedure provided in Articles 316-322 TCCP that is a more facilitated procedure than the principal litigation procedure provided in Articles 118-186 TCCP.

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[54] 2.HD., E.1994/6788, K.1994/7204, T. 7 July 1994. See C. Şanlı/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 515. For further information, see B.B. Erdem, *Türk Milletlerarası Usul Hukukunda Tebligat*, Istanbul 1992.

[55] E. Nomer (note 2), at 518.

[56] 2.HD., E.2008/5111, K.2008/8673, T.16 June 2008. See N. Ekşi (note 46), at 113.

[57] 2.HD., E.2005/17045, K.2005/3504, T.8 March 2005. See A.İ. Özuğur, *Türk Medeni Kanununun Yeni Düzenlemeleri ile Açıklamalı İçtihatlı Velayet-Vesayet-Soybağı ve Evlat Edinme Hukuku*, Ankara 2003, p. 1292.

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IV. Grounds for Non-Recognition and Non-Enforcement

The Turkish judge may not review the merits of the foreign judgment. The Turkish judge may not verify whether the foreign judge complied with the applicable procedural rules or whether the applicable law was correctly implemented to the facts of the dispute. This is called as "prohibition of *revision au fond*".[58]

There are only four grounds provided by Article 54 PILA that will render the recognition and/or enforcement of the foreign judgment impossible. Therefore, an examination of the foreign judgment in order to verify its compatibility with PILA Article 54 shall suffice and the Turkish judge may not proceed to any further review. The Turkish judge has no discretion in this matter; he or she may not refuse enforcement upon any ground other than those listed in Article 54, nor may he or she decide on enforcement despite a ground for refusal being present.[59] These grounds provided in Article 54 are explained below.

A. Reciprocity

According to Article 54(a), a multilateral or bilateral agreement between Turkey and the State from whose courts the foreign judgment was given provides for the mutual enforcement of foreign judgments. If no such agreement is in place, a statutory provision must be in place in the relevant foreign State enabling the enforcement of Turkish court decisions in the relevant foreign state; or at least the Turkish court decisions shall *de facto* be enforced in that state.

Reciprocity is not one of the grounds for refusal of recognition (Article 58(1) PILA). The distinction between recognition and enforcement becomes important if there is no reciprocity between Turkey and the State from whose courts the judgment has been rendered. For example, although divorce judgments are subject to recognition, the Second Civil Chamber of the Court of Cassation, in its decision of 10 October 2004,[60] mistakenly stated that the enforcement of a divorce judgment given by the Bulgarian court must be refused due to non-existence of reciprocity between Turkey and Bulgaria. Notwithstanding, divorce judgments are not subject to enforcement; therefore, their recognition is sufficient to accept the *res judicata* effect of the divorce judgment in Turkey.

Reciprocity must exist between Turkey and the foreign State from whose courts the relevant judgment was rendered. The nationality of the parties is of no

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[58] E. NOMER (note 2), at 495; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 469; V. DOĞAN (note 2), at 125; P. GÜVEN (note 2), at 81.

[59] A. ÇELIKEL/ B. ERDEM (note 2), at 653; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 470.

[60] 2.HD., E.2004/9389, K.2004/11706, T.12.10.2004. See A. İ. ÖZUĞUR (note 57), at 1297.

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significance. In other words, the existence of reciprocity cannot be required between Turkey and the State that the parties to the dispute are nationals of.[61]

The reciprocity shall be deemed as evident if the foreign court judgment may be enforced in the relevant foreign state with similar conditions as Turkish law. In other words, the foreign state does not require the existence of further conditions in order to enforce Turkish judgments.[62] For example, if the relevant State does not apply the prohibition of *revision au fond* principle, reciprocity will be deemed not to exist.

The non-existence of reciprocity shall be sufficient for the rejection of enforcement of the foreign judgment. The Turkish judge shall first examine the condition of reciprocity and only if this condition is fulfilled, will further review take place.[63]

In practice, the courts always inquire into the existence of reciprocity from Ministry of Justice General Directorate of International Law and Foreign Relations.[64] Although its opinions are not binding on the courts,[65] the courts always prefer to act in accordance with the opinion of the General Directorate. However, in some cases the opinion of the General Directorate may not be clear or sufficient to determine the statutory or *de facto* situation in the relevant foreign law.[66] The court may also seek assistance of the comparative law and private international law departments or institutes of the law faculties, the diplomatic representatives of the relevant foreign countries, or experts. The parties may also assist the court by providing expert opinion on the statutory provisions or the case law of the relevant foreign law.[67]

The requirement of reciprocity has been criticised in the Turkish doctrine. It is not easy for the Turkish judge to ensure the existence of reciprocity; the information provided by Turkish authorities may not be reliable on this matter and the application in different countries may rapidly change.[68] Furthermore, most states would first expect the other State to start enforcing its judgments.[69] Additionally, the other grounds of non-enforcement aim to protect either the interests of Turkish citizens or the public policy. However, reciprocity in no way serves to the interests

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[61] A. Çelikel/ B. Erdem (note 2), at 626.

[62] E. Nomer (note 2), at 499; A. Çelikel/ B. Erdem (note 2), at 625; C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 473.

[63] E. Nomer (note 2), at 498.

[64] N. Ekşi (note 2), at 107; P. Güven (note 2), at 87.

[65] N. Ekşi (note 2), at 169.

[66] For example, Second Civil Chamber of the Court of Cassation, in its decision of 16 February 2011, states that the opinion of the Ministry of Justice General Directorate of International Law and Foreign Relations found in the case file does not indicate whether there is a statutory impediment to the recognition of Turkish judgments in North Carolina and does not provide any information on the *de facto* situation. 2.HD., E.2010/11237, K.2011/2718, T.16 February 2011. See Kazanci Caselaw Database at <www.kazanci.com>.

[67] C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 473, 479.

[68] E. Nomer (note 2), at 498; N. Ekşi (note 2), at 174.

[69] E. Nomer (note 2), at 498.

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of persons, as it is an entirely political criterion.[70] On the other hand, others believe reciprocity does serve a purpose, especially in enforcing of foreign judgments concerning property rights, as the exercise of jurisdiction and execution of judgments is part of the sovereignty of the State; all states are free to exercise such power only with respect to judgments of foreign states which would mutually exercise the same power.[71]

One of the most influential decisions concerning statutory reciprocity is the decision of the Eleventh Civil Chamber of the Court of Cassation of 2 March 2007.[72] In this decision, the Eleventh Chamber held that statutory reciprocity with United Kingdom existed. The grounds of that decision were the existence of the following requirements in UK law: (a) the foreign judgment shall be notified to the parties without examining the merits of the dispute, (b) it shall be evidenced that the right to defence has not been violated before the foreign court, and (c) no objection on the merits may be heard by the UK court, but are instead limited to procedural aspects. In a more recent decision of 25 April 2012,[73] the Eleventh Civil Chamber referred to its earlier decision to accept that reciprocity is present between Turkey and the United Kingdom.

However, statutory reciprocity will not be sufficient in certain cases where despite the existence of statutory provisions in the foreign law enabling enforcement of Turkish court judgments in that foreign country, the Turkish court decisions are not being enforced in practice. For example, the Eleventh Civil Chamber of the Court of Cassation, in its decision of 30 January 2009[74] stated that the court should also have inquired with the Ministry of Justice General Directorate of International Law and Foreign Relations whether the Syrian courts currently enforce Turkish court decisions in practice and the court should have not limited itself to the existence of certain statutory provisions concerning enforcement of foreign judgments in Syrian law.[75]

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[70] A. SAKMAR, *Yabancı İlamların Türkiye'deki Sonuçları*, Istanbul 1982, p. 88; E. NOMER (note 2), at 499; N. EKŞI (note 2), at 177.

[71] T. ARAT, Yabancı İlamların Tanınması ve Tenfizi, *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, C. 21/01-04, 1964, p. 502; A. ÇELIKEL/ B. ERDEM (note 2), at 625; P. GÜVEN (note 2), at 86.

[72] 11.HD., E.2007/1335 K.2007/3808, T.2 March 2007. See E. NOMER (note 2), at 500.

[73] 11.HD., E.2011/76, K.2012/6825, T.25 April 2012. See N. EKŞI (note 46), at 131-132.

[74] 11.HD., E.2008/1284, K.2009/980, T.30 January 2009. See N. EKŞI (note 46), at 114-117.

[75] This decision has been criticised in academic literature. According to these scholars, the existence of reciprocity may be based on a convention, statutory rule or *de facto* practice. These are prescribed in a way to be alternatives to each other. Therefore, if there is statutory reciprocity, the further search for *de facto* reciprocity is contrary to the PILA. N. EKŞI (note 2), at 161. Furthermore, there are decisions of the Court of Cassation where it is stated that statutory reciprocity is sufficient without further review of the *de facto* situation. 2.HD. E.1996/2955, K.1996/5085, T.14 May 1996; E.11442, K.1293, T.6 February 2007. See N. EKŞI (note 2), at 161-163.

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B. Jurisdiction

1. *Exclusive Jurisdiction*

According to Article 54(b) PILA, foreign judgments given on issues that the Turkish courts have exclusive jurisdiction to resolve may not be enforced.

For a jurisdictional rule to be deemed as granting exclusive jurisdiction to the Turkish courts, its purpose shall be to ensure that all disputes arising out of the relevant matter are to be resolved by the Turkish courts only. In line with this purpose, the parties should always be able to find a competent Turkish court to resort to for the resolution of the matter.[76]

The Turkish courts have exclusive jurisdiction to resolve disputes arising out of rights *in rem* over immovable property located in Turkey. Therefore, any foreign judgment concerning rights *in rem* over immovable property in Turkey may not be enforced.[77]

The Court of Cassation has accepted that Turkish courts have exclusive jurisdiction over disputes arising out of guardianship. The General Assembly of Civil Chambers, in its decisions of 8 July 2009[78] and 18 November 2009,[79] refused the recognition of a foreign judgment pertaining to appointment of a guardian due to the following reasons: (i) the approval of the court is necessary for certain actions of the person under guardianship that are listed in the Turkish Civil Code; (ii) this authority for approval granted to the Turkish court is related with public policy and the Turkish courts have exclusive jurisdiction; (iii) in the event that the exclusive jurisdiction of the Turkish courts is not recognised, this would mean that the approval of the foreign court would be necessary for the listed actions and any approval given by the foreign court would be subject to individual recognition and enforcement procedure.[80] However, the Eighteenth Civil Chamber of the Court of Cassation, in a more recent decision from 17 January 2013,[81] denied that the Turkish courts have exclusive jurisdiction to decide on appointment of guardian to Turkish citizens. Accordingly, the Eighteenth Civil Chamber stated that Turkish courts shall recognise a foreign court judgment pertaining to the appointment of a guardian. Otherwise, Turkish citizens will have to come to Turkey and start new

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[76] E. NOMER (note 2), at 500; A. ÇELIKEL/B.B.ERDEM (note 2), at 632; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 481.

[77] E. NOMER (note 2), at 500; A. ÇELIKEL/B.B. ERDEM (note 2), at 632; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 481.

[78] YGHK., E.2009/2-280, K.2009/326, T.8 July 2009. See Kazanci Caselaw Database at <www.kazanci.com>.

[79] YHGK., E.2009/2-557; K.2009/527, T.18 December 2009. See Kazanci Caselaw Database at <www.kazanci.com>.

[80] For further information, see C. DEMIR GÖKYAYLA, Milletlerarası Özel Hukukta Vesayet, *Galatasaray Hukuk Fakültesi Dergisi, Prof. Dr. Ata Sakmar'a Armağan*, 2011/1, p. 403 *et seq.*; M. AYGÜL, Yabancı Mahkemeden Verilen Vesayet Kararlarının Tanınması (Yargıtay Hukuk Genel Kurulunun Bir Kararının Değerlendirilmesi), *Tuğrul Arat'a Armağan*, Ankara 2012, p. 146 *et seq*.

[81] 18.HD., E.2012/12365, K.2013/483. See Kazanci Caselaw Database at <www.kazanci.com>.

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proceedings for guardianship in Turkey. In the case before the Eighteenth Civil Chamber, the foreign judgment was granted in Germany and the guardianship matters are regulated in a similar manner in German and Turkish law. The German judgment served the protection of interests of the relevant person both in Germany and in Turkey. To force Turkish citizens to come to Turkey and initiate new proceedings for guardianship is burdensome for Turkish citizens and may be considered as violation of right to fair trial within the meaning of European Convention on Human Rights.

According to Article 43 PILA, the Turkish court located at the latest domicile of the deceased shall have jurisdiction in disputes arising out of inheritance. If the deceased's last domicile was not in Turkey, then the court where the estate of the deceased is located shall have jurisdiction. If this provision is deemed to grant exclusive jurisdiction to Turkish courts, as is believed to be the case by some scholars,[82] then any foreign judgment concerning immovable and movable property located in Turkey may not be enforced. According to another opinion, a two-tier jurisdictional rule may not be regarded as an exclusive jurisdiction rule and it does not prevent enforcement.[83] Others believe that the judgments of a foreign court pertaining to the immovable property of the deceased may not be enforced in Turkey because the acquisition of immovable property by foreigners is subject to certain restrictions and only Turkish courts can make a decision bearing in mind such restrictions.[84]

Whether exclusive jurisdiction forms an impediment to enforcement in disputes where one of the parties shall be protected due to its vulnerable position has been discussed in Turkey. These are the disputes arising out of employment contracts, consumer contracts and insurance contracts. Articles 44, 45 and 46 PILA, respectively, provide for jurisdiction of certain Turkish courts in these disputes.[85] According to Article 47, the jurisdiction of these courts may not be set aside by any jurisdiction agreement. Therefore, it is set forth that Turkish courts

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[82] A. ÇELIKEL, Yeni Kanuna Göre Yabancı Mahkeme Kararlarının Tenfiz Şartları, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, 1982/2, p. 9-10; C. ŞANLI, Yabancı Veraset İlamlarının Türk Mahkemelerinde "Tanınması" veya "Delil" Olarak Kullanılması, *İlhan Postacıoğlu'na Armağan*, Istanbul 1990, p. 301.

[83] E. NOMER (note 2), at 502.

[84] N. EKŞI (note 2), at 193-194; P. GÜVEN (note 2), at 95.

[85] The Turkish court that is located where the employee habitually carries out his work shall have jurisdiction in disputes arising out of employment contracts. In lawsuits initiated by the employee, the Turkish courts located at the domicile of the employer or domicile or habitual residence of the employee shall also have jurisdiction (Article 44 PILA). A consumer may bring proceedings against the other party in the Turkish courts located either in his domicile or habitual residence or the place of business, domicile or habitual residence of the other party. The other party may bring proceedings against the consumer in the Turkish court where the consumer habitually resides (Article 45 PILA). The Turkish courts located at the principal place of business or the agency or branch that had concluded the relevant insurance contract have jurisdiction over disputes arising out of insurance contracts. Proceedings may be brought against the policyholder, the insured or the beneficiary in the Turkish courts located at their domicile or habitual residence (Article 46 PILA).

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have exclusive jurisdiction in these matters.[86] However, it must be noted that the Turkish courts' exclusive jurisdiction is limited with the purpose of protecting the vulnerable party. Consequently, that purpose shall always be taken into account at the enforcement stage. For example, if the employee habitually carries out his work in Turkey, any foreign judgment rendered against him by a foreign court may not be enforced in Turkey. However, if the employee seeks the enforcement of a foreign judgment in his favour and against the employer, the enforcement of such judgments will not be refused due to exclusive jurisdiction.[87]

The jurisdiction for the disputes arising out of violation of trademarks, patent, industrial design and geographical indications rights are provided by the relevant decrees.[88] These jurisdictional rules also aim to protect the vulnerable party whose rights have been violated and ensure that there is always a competent Turkish court that the vulnerable party may resort to. However, if the vulnerable party, instead of resorting to the Turkish court, applied to a foreign court and obtained a judgment in their favour, then these jurisdictional rules may not be regarded as an impediment to enforcement against the rights of the vulnerable party.[89] On the other hand, the courts in Ankara have exclusive jurisdiction in all cases that are brought against the Turkish Patent Institute (registration, deletion of registry or annulment of registry) arising out of all of its decisions given in accordance with all of these decrees.[90]

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[86] In contrast see N. EKŞI (note 2), at 207, 210, 214.

[87] E. NOMER (note 2), at 501; A. ÇELIKEL/ B.B. ERDEM (note 2), at 633-634; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 481-482.

[88] According to Article 63 of the Decree on the Protection of Trademarks, Article 137 of the Decree on the Protection of Patent Rights, Article 49 of the Decree on the Protection of Industrial Designs, Article 25 of the Decree on the Protection of Geographical Indications, the protected parties may bring proceedings against third parties at their own domiciles or where the act of violation occurred or caused effects. If the protected party is neither domiciled in Turkey nor is a Turkish citizen, the Turkish court located at the place of business of the registered representative; and if he is not registered any more, the Turkish court located at the center of the Turkish Patent Institute shall have jurisdiction. Third parties may bring proceedings against the protected parties at the domicile of the respondent (protected parties). If the respondent does not have a domicile in Turkey, the Turkish court located at the place of business of the registered representative; and if he is not registered any more, the Turkish court located at the center of the Turkish Patent Institute shall have jurisdiction.

[89] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 481-482; N. EKŞI (note 2), at 215.

[90] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 482. For further information on the international jurisdiction of Turkish courts on intellectual property law, see N. EKŞI, *Fikri Hukukta Türk Mahkemelerinin Milletlerarası Yetkisi*, Istanbul 2003; B.B. ERDEM, *Fikri Hukukta Türk Mahkemelerinin Milletlerarası Yetkisi*, Istanbul 2003.

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2. Exorbitant Jurisdiction

According to Article 54(b) PILA, if the foreign court's jurisdiction is based on an exorbitant jurisdiction rule,[91] and the party against whom enforcement is sought objects to the enforcement, the foreign judgment may not be enforced in Turkey.

There is yet no case law where the enforcement of a foreign judgment was refused due to exorbitant jurisdiction.

The rule has been criticised in academic literature as it is not clear according to which law the Turkish judge will determine whether the jurisdiction is based on an exorbitant rule; is it Turkish law or the law of the State from whose court the relevant judgment is given?[92]

C. Public Policy

Article 54(c) of the PILA allows for the refusal of recognition and enforcement of foreign judgment based on the ground that it is manifestly contrary to Turkish public policy.[93] The limits of the public policy concept are neither clear, nor defined in Turkish law. The discretion of the judge on the assessment of the violation of Turkish public policy plays a very important role. Therefore, it is provided that the contradiction to public policy must be "manifest" in order to ensure its strict application in practice by the judges.[94]

It should be emphasised that the examination as to the contradiction of Turkish public policy is related to whether the results of the implementation of such a judgment in Turkey would give rise to any public policy infringement. The effects or consequences of foreign judgments should be manifestly incompatible with the fundamental principles of Turkish law, human rights[95] and ethics of

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[91] For example, Article 14 of the French Civil Code grants jurisdiction to the French court on the sole ground that the claimant is a French national. Article 23 of the German Code of Civil Procedure lays down that, where no other German court has jurisdiction, actions relating to property instituted against a person who is not domiciled in the national territory come under the jurisdiction of the court for the place where the property or subject of the dispute is situated. Dutch Code of Civil Procedure Article 127 provides that a foreigner, even if he does not reside in the Netherlands, may be sued in a Netherlands court for the performance of obligations contracted towards a Dutch citizen either in the Netherlands or abroad. C. SÜRAL, *Avrupa Birliği'nde Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi,* İzmir 2007, p. 127. For further information on exorbitant jurisdiction rules see N. EKŞI, Devletler Özel Hukukunda Aşırı Yetki Kuralları, *Selahattin Sulhi Tekinay'ın Hatırasına Armağan*, İstanbul 1999; N. EKŞI, *Türk Mahkemelerinin Milletlerarası Yetkisi*, 2nd Ed., Istanbul 2000, p. 50 *et seq.*; N. EKŞI (note 2), at 235 *et seq.*

[92] N. EKŞI (note 2), at 272.

[93] For further information, see C. DEMIR GÖKYAYLA, *Yabancı Mahkeme Kararlarının Tanınması ve Tenfizde Kamu Düzeni,* Ankara 2001.

[94] E. NOMER (note 2), at 505.

[95] Foreign court decisions that violate rights and freedoms secured by the decisions of the European Court of Human Rights based on European Convention on Human Rights and Fundamental Freedoms may not be enforced by Turkish courts. E. NOMER (note 2), at 505.

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Turkish society.[96] A foreign court decision, which violates the main principles classified as undeniable in Turkish Law, cannot be recognised or enforced. For example, in the case where the procedure followed by the foreign court violates the rights of defence of the defendant pursuant to the Turkish law of procedure, the judgment of the foreign court would be regarded as contrary to Turkish public policy.

In Turkish private international law, public policy also prevents the application of a foreign law pursuant to Article 5 PILA. Foreign law rules, which must be applied according to the conflict of law rules, but are later regarded as violating Turkish public policy, will not be applied. Public policy has a weaker interference effect in recognition and enforcement law than Article 5 PILA. In cases, which are resolved by a foreign court, the weak relationship between the subject matter of the dispute and the enforcing state weakens the public policy interference's effectiveness. In that case, it may be expected to be more tolerant in recognition and enforcement of foreign court decisions. If the subject matter of the decision is completely related to a foreign legal order, infringement of public policy is required to be more tolerant and consequences of the court decisions may be considered as more acceptable. In other words, public policy preventing the application of foreign law may not be sufficient to restrain enforcement of the court decision based on the related legal rule. At that point, when it is compared with private international law, public policy has a weaker effect in recognition and enforcement law (*effét atténué de l'ordre public*).[97]

However, in recognition and enforcement law, the scope of application of the public policy is broader than that of Article 5 PILA.[98] In prevention of recognition and enforcement, public policy infringement might occur both in substantive law and procedural law aspects of the judgment. Examination is not based on whether it is complied with foreign procedural law rules or whether those procedural rules are breached. Compliance with the basic principles of Turkish procedural law such as the impartiality of the judges or the non-restriction of parties' right of defence is expected from foreign procedural rules. Generally, recognition and enforcement of a foreign court decision, which is passed down in accordance with foreign procedural rules that are not the same as the Turkish procedural rules, can be considered as acceptable, unless the decision is against the basic principles of the Turkish procedural law. For example, temporary disqualification of the defendant from trials or the prohibition of calling witnesses in cases regarding small claims (those which are below a certain limit) are not considered to breach the rights of defence and decisions based on such procedural rules can be recognised and enforced in Turkey.[99] Furthermore, the application of a substantial law rule, which is different from that in Turkish law, cannot be deemed to be

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[96] E. Nomer (note 2), at 507; C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 486; N. Ekşi (note 2), at 280.

[97] E. Nomer, at 508.

[98] E. Nomer, at 508.

[99] E. Nomer (note 2), at 508; C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 486.

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contrary to Turkish public policy and a foreign court judgment resolving the dispute different than a Turkish court is acceptable.[100]

However, Turkish courts have refused to enforce foreign court judgments on the grounds that the applicable substantive or procedural law applied by the foreign court was different. For example, the foreign court judgment that granted parental authority rights to a third person has been refused enforcement arguing that according to Turkish law the parental right can only be granted to the minors' parents with the exception of adoption.[101] Moreover, a foreign divorce decree granting parental authority to both parents has been refused arguing that a common parental right after divorce is contrary to Article 336 Turkish Civil Code.[102] In another judgment regarding custody, the General Assembly of the Civil Chambers of Court of Cassation placed emphasis on a child's own intent, as long as children posses the capacity to choose between mother and father, and refused to enforce a foreign judgment given without taking the child's opinion into account.[103] A foreign court judgment on adoption was neither recognised nor enforced due to contradiction to the conditions of adoption set in Article 308 Turkish Civil Code.[104] The Court of Cassation, which decided that capacity and conditions of adoption are related to public policy, in a case where the age difference was less than eighteen years between the adopter and adoptee (Article 308 Turkish Civil Code), rejected enforcement due to public policy considerations.[105] The court decision is also considered to infringe Turkish public policy if the decision is given without considering the interests of the adopted child in adoption cases.[106]

On the other hand, the Court of Cassation apparently considers that contradiction to Turkish public policy does not occur in recognition of foreign court decisions that apply foreign law rules against Turkish Civil Code's rules regarding parentage.[107] The Court of Cassation decided for the enforcement of a foreign court decision regarding an action for the denial of paternity,[108] despite the fact that at the time of the enforcement, the former Turkish Civil Code was in effect and it did not

[100] C. Şanli/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 486; N. Ekşi (note 2), at 282.

[101] 2.HD, E. 2004/9168, K.2004/10346, T.21 September 2004; 2.HD, E.3784, K.4670, T.2 April 2003. See Kazanci Caselaw Database at <www.kazanci.com>.

[102] 2.HD, E. 2003/2818, K.2003/3889, T.20 March 2003; 2.HD, E. 2004/13947, K.2004/5854, T.27 December 2004. See Kazanci Caselaw Database at <www.kazanci.com>. For opposing view see E. Nomer (note 2), at 509, fn. 272.

[103] HGK, E.2-513, K.521, T.1 October 2003. See *Istanbul Barosu Dergisi*, Istanbul 1/2005, p. 140-141.

[104] 2.HD, E.2004/9169, K.2004/10282, T.20 September 2004. See Kazanci Caselaw Database at <www.kazanci.com>.

[105] 2.HD, E.2006/14063, K.2007/6141, T.12 April 2007. See OG 8 April 2007 No 26516.

[106] E. Nomer (note 2), at 510.

[107] 2.HD, E.2008/4290, K.2009/10608, T.2 June 2009. See Kazanci Caselaw Database at <www.kazanci.com>.

[108] 2.HD, E.2009/6063, K.2009/8609, T.4 May 2009. See Kazanci Caselaw Database at <www.kazanci.com>.

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entitle children the right to deny paternity. The same applies equally to the recognition of foreign court decisions regarding gender reassignment. According to the Court of Cassation, even if the procedure in Article 40 Turkish Civil Code was not followed in gender reassignment process, the relevant judgment may be enforced.[109]

It is observed that, the wrong application of Turkish law as applicable substantive law according to the foreign conflict of laws rules by the foreign court does not trigger an infringement of Turkish public policy. According to the decision of the Court of Cassation,[110] the wrong application of substantive law is principally one of the grounds to apply to a higher court in the relevant foreign country. Therefore, the defendants shall assert this objection before the higher courts in the foreign jurisdiction. However, if the defendant has asserted his objection before a competent higher court in due time and his objection has been refused, the Turkish public policy would prevent the enforcement of the foreign judgment in Turkey.

Enforcement of court judgments from common law jurisdictions in accordance with some procedures not known in Turkey may be subject to the public policy exception. For example, class action cases infringe Turkish public policy and cannot be enforced because of the contradiction to Turkish procedural law system regulating the principle of hearing the case from both parties and accepting the *res judicata* effect only for the determined parties of the case.[111] Enforcement of American court decisions issued on the basis of a "pre-trial discovery proceeding", which extensively gives *ex officio* examination and investigation power to the judge, is contrary to one of the main principles of Turkish procedural law, namely the prohibition of *ex officio* examination and investigation by the judge, and may contravene Turkish public policy.[112]

In principle, every court applies its own procedural rules. For this reason, the differences between procedural provisions applied by foreign courts and Turkish procedural law rules are not sufficient to raise the public policy exception. The same principle is also applicable with respect to the rules regarding the taking of evidence, which is applied in foreign court decisions.[113] However, if the foreign procedural law rules are contrary to the principle of fair trial, the public policy exception may be invoked successfully. For example, enforcement of a foreign

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[109] 2.HD, E.2009/9678, K.2009/22090, T.21 December 2009. See Kazanci Caselaw Database at <www.kazanci.com>.

[110] YHGK, E.1994/2-262, K.1994/358, T.18 May 1994; 2.HD, E.12536, K.14410, T.20 November 2000; 2 HD, E.14491, K.1324, T.7 February 2000; HGK, E.2000/2-1051, K.2000/1068, T.21 June 2000; 2.HD, E.2007/5600, K.2008/5494, T.17 April 2008; 2.HD, E.2007/7758, K.2008/7134, T.15 May 2008; 2.HD, E.2007/16684, K.2008/16665, T.4 December 2008. See Kazanci Caselaw Database at <www.kazanci.com>.

[111] E. NOMER (note 2), at 510-511; P. GÜVEN (note 2), at 156.

[112] E. NOMER (note 2), at 510-511; N. EKŞI (note 2), at 281. For an opposing view, see M. AYGÜL, Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi Davalarında Bazı Usul Hukuku Problemleri, *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni,* Istanbul 2011, p. 108, fn. 91.

[113] 11.HD, E.2011/2822, K.2012/9027, T.28 May 2012; 11. HD, E.2012/3175, K.2012/5547, T.6 April 2012. See Kazanci Caselaw Database at <www.kazanci.com>.

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court decision may be rejected if it was given in a foreign system that does not grant the parties the opportunity to present themselves.[114]

If the foreign decision is deemed contrary to public policy, material facts that have been determined by the foreign court and used to justify the decision may still play an important role. If the causal connection or the relationship between material facts as determined and examined by the foreign court and the judgment itself does not exist, this may in and of itself cause an infringement of the public policy exception.[115] It is beyond doubt that the enforcement judge does not have the authority to examine and evaluate the material facts determined by the foreign court. The judge is only entitled to investigate and determine non-conformity between the material facts and the decision. Since the enforcement judge is bound by the material facts as determined and evaluated by the foreign court's judge, parties claiming contradiction to Turkish public policy can not allege new legal facts or evidences.[116] However, if the foreign judgment has been obtained by means of fraud in connection with a procedural matter, the principle of prohibition of *revision au fond* will be ignored. By taking into account the presence of false witnesses or false documents, the Turkish judge has to assess the new evidence that had not been submitted before the court of origin at the stage of recognition and enforcement.[117]

Another issue that has to be discussed is the effect of inconsistent judgments in the field of recognition and enforcement. It is accepted in Turkish case law that Turkish public policy may intervene, when there is a foreign judgment that is inconsistent with a prior judgment rendered by a Turkish court in a legal dispute between the same parties on the same cause of action.[118]

It was highly disputed among the Turkish scholars whether foreign judgments without legal reasoning could be enforced in Turkey. Case law on this issue was also often at odds.[119] The decision of the General Assembly of the Court of Cassation put an end to this discussion on 10 February 2012. In this decision, it has been decided that the absence of legal reasoning in and of itself does not constitute a breach of public policy.[120]

Despite all of the abovementioned explanations, the situations in which the public policy exception will apply to the enforcement of foreign decisions depends on to a great extent on the individual enforcement judge's decision.

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[114] E. NOMER (note 2), at 511; P. GÜVEN (note 2), at 145.

[115] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 489.

[116] E. NOMER (note 2), at 512.

[117] C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 490.

[118] E. NOMER (note 2), at 512.

[119] 2.HD, E.1999/5858, K.1999/7609, T.30 June 1999; 2.HD, E.2006/2612, K.2006/9147, T.8 June 2006; 13. HD, E. 2001/9007, K.2001/11406, T.5 December 2001; 13. HD, E.2003/6226, K.2001/11095, T.2 October 2003. See Kazanci Caselaw Database at <www.kazanci.com>.

[120] YHGK, E.2010/1, K.2012/1, T.10 February 2012. See OG 20 September 2012 No 28417. For an opposing view see C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 486, fn 285.

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Therefore, if the infringement of Turkish public policy is not explicitly determined, it is appropriate that the breach of public policy shall not be used in that situation.[121] It has been observed that the Turkish courts shifted to a narrower application regarding the public policy exception in recent years.

D. Breach of Right of Defence

In Article 54(ç) PILA some procedural requirements pertaining to the defence rights of the person against whom enforcement is sought are formulated as conditions to enforcement. The procedural requirements pertaining to the defence rights of the person against whom the enforcement is sought should have been duly fulfilled. The main principle of protection of the rights to a fair trial, including the right of defence, an important fundamental human right protected by the Turkish Constitution,[122] is reflected in this Article.

In the case where the person against whom enforcement is being sought has not been duly summoned to the court rendering the judgment or if he has not been properly represented before the court, or where a default judgment has been unduly rendered against him, it is accepted that his rights of defence may have been violated. The Turkish judge will determine whether the defendant against whom the judgment should be enforced, was duly defended or given the opportunity of defending himself or was represented in the court properly.[123] If the defendant has not been duly served to appear before the court according to the law of the state of which the judgment rendered and given opportunity to be represented or if the judgment was rendered in the absence of defendant in contrary to the law, and if the defendant has objected to the enforcement before the Turkish court then it is assumed that the defendant was not duly granted the right or possibility of defending himself (Article 54(ç) PILA).[124]

According to Article 54/ç only certain procedural requirements are considered as impediments to enforcement. These are "the judgment given in default in absence of appearance", "improper notification"[125] and "improper

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[121] E. Nomer (note 2), at 512.

[122] Article 36 Constitution of the Turkish Republic 1982 states that "everyone has the right of litigation either as plaintiff or defendant before the courts through lawful means and procedures".

[123] C. Şanlı/ E. Esen/ İ. Ataman Figanmeşe (note 2), at 496.

[124] This provision is applied in the following decisions of the Court of Cassation: 2.HD, E.2009/532, K.2009/6718, T.8 April 2009; 11.HD, E.2011/2822, K.2012/9027, T.28 May 2012; 11.HD, E.2012/3175, K.2012/5547, T.6 April 2012. See Kazanci Caselaw Database at <www.kazanci.com>.

[125] Turkey is a party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. However Turkey deposited a reservation to Article 10(a) that allows sending judicial documents by postal channels, directly to persons abroad.

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representation". The evaluation of other procedural rules that violate the right of defence is subject to Article 54/c of the PILA.[126]

The Court of Cassation has also considered the issues of notifying the defendant of the proceedings and his proper defence before the court of a foreign jurisdiction to be a matter of public policy.[127] In these cases, the objection of the party against whom enforcement is sought is not required; the Turkish court may *ex officio* take the breach of right of defence into account.

V. Enforcement Decision and its Appeal

According to Article 56 PILA, the court may decide on the enforcement of the whole or part of the foreign judgment; or refuse enforcement. If the enforcement is refused, new proceedings may be brought against the Turkish courts between the same parties and concerning the same subject matter with those of the foreign judgment. In other words, refusal of enforcement does not prevent re-litigation of the dispute in Turkey.[128]

The decision of enforcement is written under the foreign judgment and undersigned and stamped by the judge (Article 56 PILA).

The foreign judgment that is deemed enforceable may be executed as if it were a Turkish court judgment (Article 57(1) PILA). The *res judicata* and conclusive evidence effect of a foreign judgment shall be recognised retroactively as of the date of finalisation of the foreign judgment (Article 59 PILA).

According to Article 57 PILA, the court decisions pertaining to the enforcement or refusal of enforcement may be subject to appeal in accordance with Code of Civil Procedure. In other words, there is no special procedure for the appeal of enforcement decisions. However, the enforcement may not proceed if the enforcement decision has been appealed against (Article 57(2) PILA).

VI. Conclusion

The recognition and enforcement of foreign court judgments in Turkey is regulated in the PILA. There are only four grounds provided by Article 54 PILA that will render the recognition and/or enforcement of the foreign judgment impossible. Therefore, an examination of the foreign judgment in order to verify its compatibility with Article 54 PILA shall suffice and the Turkish judge may not proceed

[126] E. NOMER (note 2), at 506; C. ŞANLI/ E. ESEN/ İ. ATAMAN FIGANMEŞE (note 2), at 495.

[127] 2.HD, E.11341, K.68, T.19 January 1987; 2.HD, E.10735, K.13428, T.4 October 2005; 2.HD, E.2009/8144, K.2009/12603, T.25 June 2009. See Kazanci Caselaw Database at <www.kazanci.com>.

[128] A. ÇELIKEL/ B. ERDEM (note 2), at 655.

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with any further review. In other words, the prohibition of *revision au fond* is accepted under Turkish law. The provisions of the PILA regarding recognition and enforcement are not very different from those rules of the European legislation. It is observed that the Court of Cassation has taken a more favourable position regarding the enforcement of foreign court decisions in the recent years.

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NATIONAL REPORTS

THE ALBANIAN PRIVATE INTERNATIONAL LAW OF 2011

Aida GUGU BUSHATI*

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I. Introduction

The rules of Albanian private international law date back to the early 1960s. The law entitled "On the rights of foreigners and the application of foreign law"[1] ("old law") constituted at that time the only source of private international rules in Albania. The old law contained provisions on the applicable law for civil and commercial cases with foreign elements, as well some aspects of international civil procedures. Although limited in scope and institutions, the old law remained in force even after the fall of the communism and it was replaced only in 2011. There were two main reasons for that. First of all, Albania was coming from a totalitarian regime, and it took some time for the country to engage fully in civil and commercial matters with the rest of the world, and as a result, the adoption of new rules on private international law was not an emergency. Secondly, after 1990 Albania ratified many international agreements, including some of the Hague Conventions on private international law which supplemented the existing national rules of private international law.[2] In addition, some aspects of international civil procedure such as the recognition and enforcement of foreign judgments and arbitration procedures were included in the Civil Procedure Code adopted in 1996.

Nevertheless, the rapid development of the country and in particular its engagement in the Stabilization and Association Process with the European Union determined the need of revising the existing rules on private international law. The main concern of the Albanian authorities was to reform the old law with the primary goal of modernizing it and approximating it with EU regulations in this area.

The approximation of Albanian legislation with the EU *acquis* is one of the key conditions for EU accession and one of the obligations deriving from the Stabilization and Association Agreement (SAA). Article 70 of the SAA stipulates that Albania shall endeavour to approximate its existing and future legislation to make it gradually compatible with Community *acquis.*[3]

After several years of intensive work by national and international experts, the Albanian Parliament finally approved a new law in 2011, Law No 10 428 dated 2 June 2011 "On private international law" (PIL Act).[4] In drawing up this law, the experience of other European states (for example, the Italian, German and Belgian laws) and those that have adhered recently to the European Union (for example, the

[1] "On the enjoyment of civil rights by foreigners and on application of foreign laws", Law No 3920 dated 4 December 1964, *Official Journal of the Republic of Albania* No 09, p. 217.

[2] Available at <www.hcch.net>. Albania is a member of The Hague Conference on Private International Law since 2002.

[3] *Official Journal of the Republic of Albania* No 87 ratified with Law No 9590 dated 27 July 2006, "On ratification of the Stabilization and Association Agreement between the European Communities and their member states on the one part and the Republic of Albania on the other part".

[4] *Official Journal of the Republic of Albania* No 82, dated 17 June 2011, p. 3319.

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Romanian and Slovenian law) were utilized, as well as a series of European and international legal instruments in the field of private international law. As is made clear by the footnote inserted at the beginning of the text of the law, this law has been approximated with Rome I (on the law applicable to contractual obligations) and Rome II (on the law applicable to non-contractual obligations).[5]

II. Contents of the 2011 PIL

The new Albanian PIL differs significantly from the old law. The changes brought about by the new Albanian PIL in comparison with the old one are of both a quantitative and qualitative nature. New civil law institutes have been introduced and the existing ones have been improved, adapting them or broadening their content in conformity with the new developments of private international law. The norms of conflict stipulated by this law are the norms of private international law through which the state regulates civil legal relations with foreign elements (that is, where one of the parties to the relationship is a foreign citizen).

In such a relationship, there inevitably exists a potential conflict between the legal provisions of the legal orders that pertain to different states. Precisely by means of these norms, it is intended to solve the conflict, determining the cases in which that relationship should be regulated by domestic law and the cases when the norms of the foreign law should be applied, based on the connecting criteria that exist between the relationship and the law of the foreign state.

The determination of the law applicable to a case with foreign elements is based on these so-called connecting factors, which are factual and legal circumstances that serve to determine the connection between the legal civil relationships with foreign elements with the applicable law of a state. In addition to the frequently used connecting factors such as habitual residence and citizenship (*lex nationalis*), the PIL also uses other important connecting factors such *lex rei sitae, lex loci actus, lex locu solutionis* and *lex loci commissi delicti*.

The law has been divided into two parts: the first defines the applicable law as far as the substantive institutes of civil and commercial law are concerned, while the second part defines the procedural rules related to the jurisdiction of the Albanian courts in the adjudication of judicial cases with foreign elements. Again,

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[5] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I), *OJ* L 177 of 4 July 2008.

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 of 31 July 2007.

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other rules of international civil procedure are left with the Civil Procedure Code (recognition and enforcement of foreign judgment and arbitration.).[6]

The Albanian PIL Law contains 11 chapters, which are the following:

Chapter I (arts 1-7):	General Provisions.
Chapter II (arts 8-17):	Subjects of the Law.
Chapter III (arts 18-20):	Legal Actions.
Chapter IV (arts 21-32):	Provisions about Marriage and the Family.
Chapter V (arts 33-35):	Inheritance.
Chapter VI (arts 36-44):	Property Provisions.
Chapter VII (arts 45-55):	Contractual Obligations.
Chapter VIII (arts 56-70):	Non-Contractual Obligations.
Chapter IX (arts 71-81):	Jurisdiction of Courts of the Republic of Albania in Examining Cases with Foreign Elements.
Chapter X (arts 82- 86):	Procedural Provisions.
Chapter XI (arts 87-89):	Transitional Provisions.

A. General Rules on Choice of Laws

General rules on the choice of the applicable law are spread out in the general and specific parts of the PIL Act. From the point of view of legal structure, it would have been better for the general provisions to be gathered in the first part of the law. However, some of those general principles as they have been defined by the PIL will be discussed below.

1. Renvoi

Article 3 of the PIL Act covers "renvoi". It explicitly provides the possibility of referral to another law (*renvoi*) according to which the latter is applied when according to Albanian law, the law of another state should be applied. In cases when the rules of that state refer back to Albanian law, the rules of Albanian law are applied, except when it is otherwise provided.

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[6] Civil Procedure Code, adopted as Law No 8116 dated 29.03.1996, as amended; see consolidated publication of the Official Publication Center of Albania, 2010. Note that a separate law about domestic and international arbitration is being drafted, which will replace the respective provisions of the Civil Procedure Code on those subjects.

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Paragraph 2 of article 3 of the law provides the following categories of cases in which the rules of private international law of another country will not apply: the status of legal persons; the form of the legal action; issues related to maintenance obligations; and contractual and non-contractual obligations. This formulation is rather unclear and does not reflect the practice of the laws of other countries in the region, which have linked the exception clause with parties' autonomy.[7]

2. Application of Foreign Law

The content of a foreign law is interpreted and applied in compatibility with the criteria for interpretation and application in the state of origin (article 6 of the PIL Act). The content of the foreign law may be determined in several different ways. Firstly, the court may determine on its own initiative the content of the foreign law that will be applied. The information may be obtained from the Ministry of Justice. Secondly, the parties may obtain documents verified by the competent organs of the other state in connection with the provisions of the required foreign law.

Finally, the law provides a solution that offers an option for reverting to the *lex fori*. This applies in cases when the court does not succeed in obtaining the content of the foreign law, either on its own initiative or with the help of the parties (article 5 para. 3), for reasons that are beyond its control. Albanian courts also have a number of international conventions at their disposal that provide efficient instruments for ascertaining foreign law. Albania, like other countries of the region, has ratified the European Convention on Information on Foreign Law of 1968, which it did in 2001; and it has signed several mutual assistance agreements with other countries of the Balkans and European Union member states on civil and commercial matters.

*3. Public Policy (***ordre public***)*

Article 7 of the PIL Act contains a provision on public policy. This provision is similar to the public policy provision of the old law (art. 26 of the 1964 law). According to this rule, a foreign law will not apply when the effects of applying it are openly in violation of public order or might bring consequences that are openly incompatible with the fundamental principles defined in the Constitution or in Albanian law.

Thus, in a case of incompatibility, another appropriate provision belonging to the law of that state is applied, and when that is absent, Albanian law is applied. This provision instructs courts to examine whether the application of those rules in

[7] For example according to the Slovenian law and Macedonian law on private international law, *renvoi* is excluded when the parties are permitted to choose the applicable law. See Slovenian and Macedonia Private International Laws, English version, at D. BABIC/ Ch. JESSEL HOLST, Medunarodno Privatno Pravo, Zagreb, Croatia 2011.

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the specific case would lead to consequences that are incompatible with the fundamental principles of Albanian legislation.

4. *Habitual Residence*

Habitual residence has been introduced by the new PIL Act as a connecting criterion for both conflict of laws rules and for the determination of jurisdiction. Special definitions for both habitual residences of natural and legal persons are given in article 12 (habitual residence of natural persons) and article 17 (habitual residence of legal persons) in chapter II of the PIL Act (subjects of law).

According to the Albanian PIL Act, the habitual residence of a natural person is the country where he has decided to stay the greatest part of the time even in the absence of registration or permission to stay. In determining such country the professional and personal circumstances of the person should be taken into accounts that show a sustainable connection with this country or an intention to establish such a connection.[8] It will remain for the Albanian judges further to clarify the concepts of "greatest part of the time", or "sustainable connections" and the "intention to do so" used in the definition.[9]

The habitual residence of a legal person or person without legal personality will be the country where the central administration of the legal person is located. The habitual residence of a legal person performing business activities is where his central business activity is conducted. In cases of the conclusion or performance of a contract by a branch or agency, the law of the country where the branch or the agency is located will be applied.[10]

5. *Principle of Closet Connection*

Unlike the private international law of some other countries of the region, the Albanian PIL Act does not provide a general provision for the principle of closet connection or the so called escape clause.[11] In a rather unclear formulation, paragraph 2 of article 12 of the PIL Act (habitual residence and closest connection) provides that for the purpose of this law the closest connection is determined by the court according to the factual circumstances. However, specific provisions on contractual and non-contractual obligations do contain clear provisions on the principle of closet connection. For example, paragraph 3 of article 46 (applicable

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[8] This definition was modeled after the Private International Law of Belgium. See Art. 4 of the *Code de droit international privé*, Dossier No 2004-07-16/31, of 16 July 2004.

[9] A. TARTARI, Connecting criteria in private international law, *Journal Avokatia* 2013, p. 141.

[10] See article 17 of the Albanian PIL Act.

[11] See article 2 of the Macedonian act on private international law and article 2 of Slovenian act, D. BABIC/ Ch. JESSEL HOLST (note 7), at 50 and 118.

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law in the absence of choice) says that when it is clear from all the circumstances that the contract is obviously closely related to a country rather than the one of paragraphs 1 and 2, the law of that country will apply.[12]

B. Specific Rules on Conflict of Laws

1. Natural and Legal Persons

The PIL Act uses the concept of nationality or *lex nationalis* as the main connecting factor for the legal status of a natural person. The legal capacity of Albanian citizens should be determined by the law of nationality (article 10). Furthermore, the provisions of the PIL Act have priority for Albanian citizens with dual citizenship (article 8 para. 1). In cases when the person has two or more nationalities, the law of the state where this person has his habitual residence should be applied (article 8 para. 2). This also applies to stateless persons. When neither of them can be determined, the law of the country with which there is a closer connecting relation governs (article 9).

Moreover, the name and surname of a natural person are determined by national law (article 13), and Albanian law is applied upon the request of a foreigner who has his habitual residence in Albania.[13] In the cases of declaration of the disappearance or death of a natural person, article 14 provides that the applicable law would be the law of the state whose nationality this person had on the day of the last news about him. However, an exception from the rule has been provided according to which a citizen of another state may be declared dead according to Albanian law if a justified interest exists for this (article 14 para. 2).

Under article 15 of the PIL Act the status and activities of legal persons are regulated by the law of the state in which they are registered. Those associations and organizations without legal personality are regulated by the law of the state in which they are organized (article 16). It has been provided that the habitual residence of legal persons or bodies without a legal personality is the country where their headquarters are located (article 17).

2. Marital and Family Issues

The provisions related to marital and family issues cover marital relations with foreign elements, including the form and conditions of marriage, personal and property relations, divorce, family issues such as maintenance obligations, child adoption, custody of children and parental relations.

The substantive requirements of marriage are governed by the national law (the law of citizenship) of each spouse at the time of marriage (article 21 para. 1), while the form of the marriage is governed by the *lex loci celebrationis* (art 22).

[12] See article 46 of the PIL Act.

[13] See article 13 paras 1 and 2 of the PIL Act.

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Foreign or stateless persons who enter into a marriage in the territory of the Republic of Albania must fulfil the substantial conditions for entering into marriage according to the Albanian Family Code (article 21 para. 2). Certain impediments to a marriage provided by the Albanian Family Code are applicable, such as:

(1) the existence of an earlier marriage;

(2) consanguinity;

(3) being a minor under 18 years of age (allowed only in very particular situations).

These impediments constitute examples of Albanian public policy in the field of substantive conditions for marriage. But it is clear that the role of public policy is much broader and is not limited to only the application of the impediments mentioned above.

The conflict rules for divorce are regulated by article 25 of the PIL Act. The common *lex patriae* (the law of nationality) of the spouses is the primary conflict rule. Thus, the dissolution of a marriage is regulated by the law of the spouse's nationality at the time of the submission of the lawsuit. The same criterion was also provided by article 7 of the old law of 1964.

In cases when spouses have different nationalities, the dissolution of the marriage is regulated by the law of the state in the territory of which the spouses have their habitual residence at the moment of filing of the lawsuit. There is an exception to this rule provided in paragraph 3 of this article. According to it, when the law does not permit the dissolution of the marriage, it is done in compliance with the Albanian law, if the one who seeks it is an Albanian citizen or was an Albanian citizen at the moment the marriage was entered into.

The personal relations of the spouses are regulated by the law of the common nationality of the spouses. There are two subsidiary connecting criteria that apply as alternatives. First, if the spouses do not have a common nationality, the law of the country where they have their common habitual residence applies. Second, if the applicable law cannot be determined by virtue of the previous rule, the applicable law will be the law of the state with which the spousal relations had the closest connection. Article 8 of the old law of 1964 provided the nationality of the spouses as the main connecting criterion, and in the cases of different nationality, the *lex fori* was applicable.

The marital property regime is determined by the law of the state that regulates personal relations of the spouses. A change of the property regime does not affect the rights previously earned by the spouses (article 24 para. 1). By a notarial agreement between them or another equivalent act issued by a public organ, spouses may chose to apply the law of the following states:

(1) whose citizenship one of the spouses has;

(2) in which one of the spouses has his ordinary domicile/ habitual residence;

(3) in which the immovable property is located.

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Article 26 of the PIL Act provides the connecting factor for determination of the law applicable to maintenance obligations. They are governed by the law of the state in which the person who has the right to benefit from the obligation (the creditor) has his habitual residence at the moment when he seeks it (para. 1). When the debtor and the creditor have the same nationality and the debtor has his habitual residence in that state, the law of this state applies (para. 2). The third alternative provides that in cases when the creditor does not benefit from this right according to paragraph 1 or 2, Albanian law is applied (para. 3). In case the marriage was dissolved or declared invalid in the Republic of Albania, or when the decision for its dissolution or declaration as invalid has been recognized in the Republic of Albania, maintenance obligations are regulated by the law of the state where its dissolution was sought or where it was declared invalid (para. 4).[14]

Habitual residence is the connecting factor for determining the law applicable to the relationship between parents and children. However, priority has been given to the nationality if this might be more favourable, taking into consideration that the best interest of the child prevails (article 29).

The law applicable to the conditions for the creation and termination of an adoption is provided in article 30 of the PIL Act. The primary connecting factor is the *lex nationalii*. Thus, the conditions for adoption and its conclusion are regulated by the law of the state whose citizenship/nationality the adopting persons have at the moment of adoption (para. 1). The same criterion had been provided also by the old law of 1964, specifically described in its article 10.

If the adopting persons have different citizenship/nationality, the adoption will be regulated by the law of the state in which the adopting persons have a joint habitual residence (para. 2). However, in any case the adoption must not be one of the cases of prohibition of cross border adoption as determined by the Family Code (para. 3).[15] The last part of this article is slightly different from what was provided in article 10 of the old law. The later law has given the possibility of applying the *lex fori* based on the application of the principle of *favor negotii* considering the interest of protection of the adopting person.

3. Succession Law

Chapter V of the PIL Act regulates the institute of inheritance. The applicable law that regulates inheritance concerning movable property has been provided according to article 33 to be, as a rule, the law of the citizenship of the testator at the moment of death. So far as the inheritance of immovable objects is concerned, it has been provided that the applicable law is the law of the state where the objects are located. The capacity to make a disposition by will provided in article 33 is regulated by the law of the citizenship of the testator.

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[14] This article was drafted after the international standards of The Hague Protocol of 2007, and reference was also made to the Belgian Code on Private International Law (note 8) Chapter V.

[15] Again, this formulation has been drafted after the Belgian law (note 8), article 72.

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Article 34 of the PIL Act provides that the capacity to make a disposition by will is regulated by the law of the state whose citizenship the testator has at the moment of making, changing or revoking the will.[16]

The form of the will is valid, if it meets the criteria of validity according to one of the following laws:

(1) the law of the state in which the testator has made a disposition by will;

(2) the law of the state whose citizenship the testator has at the moment of making a disposition by will or at the time of his death;

(3) the law of the state in which the testator, at the moment of making a disposition by will or at the time of his death, had an ordinary domicile or habitual residence; or

(4) the law of the state in which the immovable property disposed of by will is located (article 35). The provision was shaped after the provisions of the Hague Conventions on the Conflict of Laws relating to the Form of Testamentary Dispositions of 1961, although Albania joined the Convention only recently.[17]

4. Property Rights and Rights on Intellectual Property

The PIL Act contains provisions on property rights in general, as well as particular categories of rights, including intellectual property rights. Following the tradition of the old law, the new PIL Act uses the *lex rei sitae* as the general connecting factor.[18] The acquisition, transfer, loss and possession of real rights are regulated by the law of the state where the objects are located.[19] Real rights over objects in transit are regulated by the law of the state of destination (*res in transitu*).[20] Rights over transport vehicles are regulated by the law of the state to which the vehicles pertain (where the vehicles have been registered).[21]

A revolutionary step marked in Albania's new private international law is the full coverage of choice of law rules for IP rights. The existence, validity, transfer and violation of intellectual property rights are regulated by the law of the state where registration was sought. Registered property rights are regulated by the law of the state that has given or registered the right.[22] Rules about the applicable law

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[16] The same criteria were found in the law of 1964, article 15/1.

[17] Albania deposited its accession instruments on 25 October 2013, and the Convention will enter into force only in December 2014.

[18] See article 16 of the old law of 1964 (note 1).

[19] See article 36 of the PIL Act.

[20] See article 39 of the PIL Act.

[21] See article 41 of the PIL Act.

[22] See article 42 of the PIL Act.

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for contractual[23] and non-contractual[24] obligations deriving from IP rights are part of the specific rules on contractual and non-contractual obligations of the PIL Act.

5. *Contractual Obligations*

The provisions of the PIL Act on choice of law for contractual obligations are drafted in line with the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Albania's PIL Act, like other similar acts on private international law, is based on the fundamental principle of party autonomy.

It is important to underline here that party autonomy was also considered as one of the fundamental principles of Albania's old law on private international law.[25] However, party autonomy of the old law had a limited content, compared to that provided in article 45 of the new PIL Act. Article 45 of the PIL Act of 2011 maintains party autonomy[26] as the primary connecting factor for determining the applicable law for contracts, providing that a contract shall be governed by the law chosen by the contracting parties (para. 1 of article 45). Parties choose, of their own free will, the applicable law for all or a particular part of the contract, giving the parties the possibility to choose different law for different parts of the contract (*depeçage)* (para. 1 of article 45).

The following paragraphs of article 45 regulate the modalities for the expression of will by the parties. According to these provisions, the choice should be made either explicitly or be provable with reasonable certainty by the conditions of the contract, the conduct of the parties or other circumstances of the case (para. 2).

The contracting parties may agree at any time for the contract to be regulated by another law, different from that which was determined at the beginning of the contract. However, every change to the applicable law after the conclusion of contract does not affect the formal validity of the contract or the rights of third parties (para. 3). When at the moment of the choice of law all the other important elements of the situation are in another country, the choice of law by the parties does not affect the implementation of the provisions of the law of the other state that cannot be avoided by the agreement (para. 4). This is known as the mandatory provision/rule. Although the Albanian PIL Act has failed to define the mandatory

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[23] See article 44 of the PIL Act.

[24] See article 65 of the PIL Act, which contains a formulation similar to that of article 8 of the Rome II (note 5), providing that the applicable law of non contractual obligations deriving from IP rights is the law of the state in which the protection is claimed and the applicable law cannot be derogated from by an agreement between the parties.

[25] Sanctioned also in article 17 of the law of 1964, with the following formulation: "parties may chose the law which will apply to their property relations even by silent consent, provided that there is enough evidence of the expression of their will to do so".

[26] In compliance with article 3 of Rome I (note 5).

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rules, legal doctrine has given many definitions about them.[27] Finally, the existence and validity of a contract or of one of its conditions is regulated by the law chosen by the parties (para. 5).

In the absence of a choice of law, article 46 establishes other possibilities for applicable law based on different connecting criteria. The first connecting factor for choosing applicable law is the habitual residence of the party in charge of performing the contract.

For example:

(1) a contract of sale will be regulated by the law of the country in which the seller has his habitual residence;

(2) a contract of furnishing services will be regulated by the law of the country where the supplier has his habitual residence;

(3) the second connecting factor for property related contracts is the place where the property is located (*lex rei sitae*);

(4) a lease for the temporary personal use of immovable property for a period of no more than six consecutive months will be regulated by the law of the country in which the lessor has his ordinary domicile/habitual residence, provided that the lessee is a natural person and has his ordinary domicile in the same country;

(5) a franchise contract will be regulated by the law of the country in which the franchisee has his ordinary domicile;

(6) a contract for furnishing goods will be regulated by the law of the country in which the one who furnishes the goods has his ordinary domicile; and

(7) a contract for selling goods at auction will be regulated by the law of the country in which the auction take place, if this country can be determined.[28]

Contracts that have not been specified in article 46 (para. 1), or when the elements of the contract include the characteristics of more than one contract foreseen above, will be regulated by the law of the country in which the party who is to fulfil the service that characterizes the contract has his ordinary domicile at the time the contract is entered into. The characteristic performance notion will be the performance for which the payment is due.[29]

Article 46 (para. 3) introduces the exception clause (*clause d'exception*) into the contractual obligation part of the PIL Act. According to this paragraph, when it is clear from all the circumstances that the contract is obviously connected with a law different from law determined in the paragraphs 1 and 2 of the article,

[27] T.C. Hartley, Mandatory Rules in international contracts: the common law approach, *Recueil des Cours* vol. 268 (1997), p. 348.

[28] In comparison with article 4 of Rome I.

[29] J.F. Garcimartín Alférez, The Rome I Regulation: Much ado about nothing?, *The European Legal Forum* (E) 2008/2, p. 61-80.

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the law of that country will apply. Thus, it establishes as a secondary main connecting factor for contractual obligations the "closest connection" principle.

Following the solutions offered by the Rome I Regulation, the Albanian PIL Act introduces specific choice of law rules for the so called protected contract,[30] namely consumer contracts, individual employment contracts, contacts of carriage and insurance contracts (articles 48 and 52). These provisions fully approximate the corresponding provisions of the Rome I Regulation.[31]

6. Non-Contractual Obligations

The provisions of the Albanian PIL Act on choice of law rules for non-contractual obligations mirror the solutions offered by the rules of the Rome II Regulation.[32] The law applicable to a non-contractual obligation that derives from non-contractual damage (for example, torts, traffic accidents) will be the law of the country where the damage has occurred, notwithstanding the country in which the event happened and notwithstanding the country or countries in which the indirect consequences (such as financial consequences) of this event occurred (article 56).

The primary connecting factor (*de legge lata*) determined by the new PIL Act is different from the connecting factor used under the old law of 1964 (*lex loci delicti commissi).* In cases when the person who claims that he is responsible and the person who has suffered damage have their ordinary residence in the same country, the law of that country will be applied (article 56 para. 2).

Furthermore, paragraph 3 of this article provides that when it is clear from all the circumstances of the case that the non-contractual damage is obviously more closely related to another country than that which is indicated in the above-mentioned paragraphs, the law of that country is applied. An obviously closer connection with another country may be based on an agreement that has previously existed between parties, such as a contract that was closely related to the non-contractual damage in question (para. 4).

The Albanian PIL Act provides party autonomy for determining the applicable law for non-contractual relations (article 57). This should be done in one of two ways:

(1) by agreement entered into after the event that has caused the damage;

(2) by agreement freely entered into before the event that has caused the damage, when all the parties pursue a commercial activity (para. 1). The choice of law should be expressed or verified with reasonably certainty by all the circumstances of the case and should not violate the rights of third parties (para. 2).[33]

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[30] P. STONE, *EU Private International Law* (2nd ed.), United Kingdom 2010.

[31] These rules fully comply with article 6 and 8 of the Rome I Regulation (note 5).

[32] Rome II Regulation (note 5).

[33] Fully approximated with article 14 of Rome II (note 5).

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Concerning liability for damages that derive from products, the law has provided various solutions based on the combination of two or more connecting factors. According to article 63, the applicable law will be:

(1) the law of the state in which the person who suffered the damages has his ordinary domicile at the time the damage occurred, if the product was put into the market in that country;

(2) the law of the state in which the product was purchased, if the product was put into the market in that country;

(3) the law of the state in which the damage occurred, if the product was put into the market in that country. However, the applicable law will be the law of the state in which a person who is claimed to be liable has his ordinary domicile, if he could not have foreseen in a reasonable manner that the product or a product of the same kind would be put into the market (para. 2).

This paragraph is similar to what is provided by article 7 of *The Hague Convention on the law applicable to product liability*. In paragraph 3, the closest connection principle prevails. That paragraph indicates that when it is clear from all the circumstances of the case that the non-contractual obligation is obviously more closely connected to another country; the law of that country will be applied.[34] *Renvoi* is excluded for non-contractual obligations, and thus in all cases the law refers to the substantive law of the other country.[35]

C. Jurisdiction of the Albanian Courts in Examining Cases with Foreign Elements

1. Jurisdiction and Procedural Provisions

The PIL Act addresses the question of applicable law in civil and commercial matters as well as the question of jurisdiction and the procedures before the Albanian courts in disputes with foreign elements (article 1).[36]

As a general rule, the Albanian courts have jurisdiction over the resolution of civil legal disputes with foreign elements, if the defendant has a habitual residence[37] in the Republic of Albania. The PIL Act has kept habitual residence as the basic connecting factor for determining the jurisdiction of the Albanian courts (article 71).

Notwithstanding the general rule, the law on private international law foresees in article 72 the cases in which the Albanian courts have exclusive

[34] Fully approximated with article 5 of Rome II (note 5).

[35] See article 3 paragraph 2 of the PIL Act.

[36] Jurisdiction in regulated by articles 71-81 of the PIL Act.

[37] The definition of habitual residence is given in articles 12 and 17 of the PIL Act.

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jurisdiction: disputes involving property rights and other related rights, immovable objects, rent issues, as well as rights stemming from the use of immovable property for compensation, if located in the Republic of Albania; cases involving decisions of the bodies of commercial companies, if the company has its habitual place of residence in the Republic of Albania; cases regarding the establishment or winding up of legal entities and lawsuits regarding the decisions of their bodies, when the legal person has its headquarters in the Republic of Albania; cases regarding the validity of registration in the registries of courts or of Albanian state bodies; cases regarding the validity of registration of intellectual rights, so long as those registrations or applications for them are made in the Republic of Albania; and cases relating to the enforcement of executive titles in the Republic of Albania.

An agreement on the choice of court has been provided for under certain conditions by article 73 of the PIL Act. Such an agreement may be concluded in writing or verbally, but if the latter, it has to be confirmed in writing and comply with the international commercial practices which are considered as recognized by the parties.

Special jurisdiction of the Albanian courts has been provided in case of family and civil matters, such as the announcement of the disappearance or death of a person; marriage; relationships between spouses, parents and children; maternity; adoption; waiver or limitation of the capacity to act; and custody (articles 74-79 of the PIL Act). As a rule, the members of diplomatic and consular representations in the Republic of Albania are not subject to the jurisdiction of the Albanian courts. Nor are the property and assets of natural persons and legal entities that enjoy diplomatic immunity subject to the jurisdiction of the Albanian courts, unless this is provided by rules specified in international agreements ratified by the Republic of Albania or if voluntarily accepted (article 84 of the PIL Act).

Civil proceedings in Albania with an international element are conducted according to the domestic rules on civil procedure. In this case the *lex fori* applies, and the PIL Law provides several rules that govern certain situations that appear only in cases with an international element.

As a general principle, the adjudication of judicial cases with foreign elements before the Albanian courts is done according to the Albanian procedural law (article 82 para. 1 of the PIL Act). In civil adjudications that are held before Albanian courts, foreign subjects as well as stateless persons enjoy the same rights and procedural guarantees as Albanian subjects (para. 2).

Provisions about judicial expenses are contained in article 83 of the PIL Act. According to this article, if the plaintiff is a natural person or a foreign legal person, or is a stateless person and does not have a domicile or headquarters in the Republic of Albania, then at the request of the defendant party, the court decides that the plaintiff party, within an appropriate/reasonable time period set by it, shall deposit as a guaranty for covering judicial expenses in a specified sum or an object.

The defendant party does not have the right to ask for the plaintiff party to make a deposit: when the law of the state whose citizenship the plaintiff party has does not require a deposit to be made for Albanian legal persons or citizens, or when the guaranty is excluded based on the principle of reciprocity with the state whose citizenship the defendant holds; if he has not submitted a request for the making of a deposit in the judicial session at the moment when the right arises for

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him to do so; when the plaintiff party has gained the right of political asylum (asylum) in the Republic of Albania; if he is not in a condition to show that, based on the circumstances of the case, he has a lawful interest in the making of the deposit; or when making the deposit has been excluded on the basis of international agreements recognized by the Albanian state (para. 2). If the deposit is not made within the time period set at the request of the defendant party, the court dismisses the adjudication (para. 3).

Moreover, the mutual legal assistance of foreign courts is allowed so far as it is regulated by the international agreements ratified by the Republic of Albania and the legislation in force (article 86 of the PIL Act).

2. Lis pendens

The Albanian PIL Law does not contain a provision on foreign *lis pendens*. Controversial regulations on *lis pendens* are, however, provided by the Albanian Criminal Procedure Code (CPC). Article 58 of the CPC provides that when disputes involving same parties and same matters are being adjusted at the same time in the same court or in different courts, the court must dismiss the later initiated proceeding. However, article 38 of the CPC foresees that Albanian courts do not dismiss or suspend a dispute when this dispute or disputes related to it are being adjudicated before a foreign court. It would have been better for a provision on foreign *lis pendens* to have been included in the PIL Act.

D. Recognition and Enforcement of Foreign Judgments

1. Procedures for the Recognition of Foreign Judgments According to the CPC

Foreign judgments are recognized and enforced in the Republic of Albania according to the provisions of the national law and the international law applicable in Albania. The Civil Procedure Code (CivPC) in articles 393-399 stipulates the rules and procedures for the recognition and the enforcement of foreign judgments in civil and commercial matters in Albania. As a general rule the recognition of foreign decisions is based on the CivPC provisions (article 393). However, in cases where an international agreement has been entered into on that matter, the provisions of the agreement will be applied (article 393 para. 2).

According to the CivPC, the recognition of the foreign decision is subject to conditions specified in the CivPC and in separate laws (article 393/1). Reciprocity is excluded by the CivPC as a condition for recognition and enforcement of foreign judgements. The term “separate laws” implies the multilateral and bilateral agreements as well as domestic laws that lay down the conditions and procedures for the recognition and enforcement of foreign decisions. The CivPC does not contain any specific provision which indicate the conditions under which a foreign judgment can be recognized and enforced.

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Nevertheless, by a simple interpretation of the provisions covering that matter, we can conclude that the authenticity of the decision for which the recognition is required for the purpose of creating the belief that the decision has become final and has the effects of *res judicata* in the state of origin, and also that the legitimacy of the litigant claiming the recognition should taken into consideration.

Following the same logic, the CivPC provides that the refusal of recognition and enforcement[38] of a foreign judgment is based on the principles of *public order* and *due process of law*.

In addition, the CivPC foresees in article 396 that a request for the recognition of the judgment shall be accompanied by a number of documents that should be authentic and at the same time translated and notarized by a public notary. These documents include a copy of the decision which is going to be enforced, a certificate issued by the court certifying that the judgment in question is final and a power of attorney is cases when the concerned party is represented by a lawyer. In any case, the copy of the decision and the confirmation by the court that the decision is final should be certified by the Albanian Ministry of Foreign Affairs (article 396 CivPC).

2. Responsible Body to Give Effect to a Foreign Judgment (Exequatur)

A decision of an Albanian court of appeal is needed in order to give effect to and enforce a foreign judgment within the territory of the Republic of Albania (*Exequatur*). Therefore, a request to give effect to the foreign judgment is submitted to the court of appeal (article 395 CivPC). A request for the recognition and enforcement of a foreign decision may also be submitted through diplomatic channels, if this is allowed by the international treaties and on the basis of the principle of reciprocity. The CivPC does not foresee any formalities regarding the request. However, in any event the request should be submitted by a lawyer, and in cases when the interested party is not represented by a lawyer, the chairman of the court of appeal can appoint a lawyer to submit the request on his behalf (article 395 CivPC)

The role of the court of appeal as to the recognition and enforcement of the foreign court decision is limited only to the verification of the fact that the decision does not fall under one of the situations provided in article 394 of the CivPC (conditions for refusal of recognition and enforcement). The court does not enter into the merits of the case, and it issues the decision based on the request submitted (article 397 CivPC).

3. Enforcement of Foreign Judgments

The decision of the court of appeal on a request for the recognition of a foreign court decision gives effect to the foreign decision for being enforced in Albania.

[38] More specifically, article 394 of the CivPC lists the situations in which the recognition and enforcement of foreign court decisions can be refused.

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The enforcement of foreign judgments is subject to the general enforcement rules foreseen in the Civil Procedure Code (article 510 *et seq.*).

Article 510 of the CivPC stipulates that enforcement can be done based on the executive titles that are listed in that article. The decisions of foreign courts constitute executive titles once they are given effect based on the rules provided in the CivPC (article 510/c). The executive title is enforced upon the creditor's request (article 511 CivPC). The executive order is issued within five days by the court of appeal (article 511/b CivPC). The court decision refusing an execution order can be appealed according to the provisions regulating special appeals (article 512 CivPC).

The executive title is enforced by state or private bailiffs based on the request of the creditor. The request of the creditor must be accompanied by the executive title (original and duly notarised), the enforcement fee and the power of attorney of the person representing the creditor (article 510 CivPC). The order is executed within 15 days from the submission of the request by the creditor (article 515 CivPC). The Albanian legislation provides for voluntary execution of the titles, while obligatory execution can be applied only after the deadlines for voluntary execution have expired. Obligatory execution can start before the voluntary deadlines only when there is a risk that the execution will become impossible (articles 517 and 519 of the CivPC). The Civil Procedure Code provides detailed rules about the execution of titles in specific fields (Title III).

4. *Multilateral Agreements on the Recognition and Enforcement of Foreign Judgments*

Albania is one of the countries that has ratified the Hague Conventions on the recognition and enforcement of court decisions. The provisions of these agreements will be applied alongside the provisions of the CivPC. Both the Albanian Constitutions and the Code give priority to the application of the provisions of multilateral agreements dealing with the conditions and procedures for recognition and enforcement of foreign decisions in civil matters. They are directly applicable, unless they contain provisions that are not self executing and which require the issuance of a law (Article 122/1 of the Constitution).

The Civil Procedure Code provides (article 394/2) that in case of the existence of special agreements containing rules on the recognition of foreign judgments between the Republic of Albania and a foreign state, the provisions of the agreement shall apply. In the absence of international agreements, the CivPC provisions regulating the recognition and enforcement of civil and commercial judgments of foreign courts apply (articles 393-399 CivPC).

The Code gives room for the recognition of the judgments of foreign courts also to be established in separate laws. Those provisions are applicable, except for the case of the existence of an agreement on the recognition of foreign judgments

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on the dissolution and annulment of a marriage, divorce, parental responsibility, maintenance obligation, custody, adoption and similar matters.[39]

5. *Bilateral Agreements on the Recognition and Enforcement of Court Decisions*

Part of the Albanian legislation covering the rules and procedures for the recognition and enforcement of foreign judgments in civil and commercial matters includes bilateral agreements that Albania has signed with countries of the region such as Greece, Macedonia, Turkey and so forth.[40]

It should be emphasised that most of the bilateral agreements are not limited only to cross border cooperation in civil and commercial matters; they include criminal cross border issues as well. In general, all the bilateral agreements contain provisions on the recognition and enforcement of court decisions in civil matters. The bilateral agreements provide similar conditions to the ones included in the Civil Procedure Code as to the recognition and enforcement of decisions. For example, a request for the recognition and enforcement can be refused in situations when:

– the decision has not entered into force or is not enforceable under the legislation of the contracting party in the state where it was rendered;

– the court of other country is not competent to assess the request for that proceeding or the defendant was not duly notified according to the legislation in force in the country when the decision was taken, or

– the court has already issued a final decision for the same parties or for the same object, or proceeding are pending before the court, or court decision of

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[39] Albania has ratified the following multilateral conventions, among others: Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, enforced by Law No 10194 dated 10 December 2009; Hague Convention on the Applicable Law Relating to Maintenance Obligation ratified by Law No 10397 dated 17 March 2011; Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, enforced by Law No 10398 dated 17 March 2011; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, enforced by Law No 9443 dated 16 November 2005; Hague Convention on Civil Aspects of International Child Abduction, enforced by Law No 9446 dated 24 November 2005; Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, enforced by Law No 8624 dated 15 June 2000.

[40] Bilateral Agreement between the Republic of Albania and Greece "On ratification of the Convention between the Republic of Albania and Greece for legal assistance in civil and criminal matters", Law No 7760 dated 14 October 1993; International Agreement between the Republic of Albania and the Republic of Macedonia "On mutual legal assistance in criminal and civil matters", Law No 8304 dated 12 March 1998; Bilateral Agreement between the Republic of Albania and Turkey "On mutual legal assistance in civil, criminal and commercial matters", Law No 8036 dated 22 November 1995.

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a third jurisdiction in respect of the same Parties on the same subject has been recognised, it is in compliance with legal and constitutional principle.[41]

A request for recognition and enforcement is submitted to the competent court through the Ministry of Justice. The request should be accompanied by the final decision or a copy of it, a certificate certifying that a party not present in the trial against whom a final decision was issued has been notified in due time and according to the law, and in cases when the party was present in the court, a certificate that he/she has been given legal advice.

III. Conclusion

The Albanian Private International Law of 2011 has made significant improvements compared to the old law. New concepts have been introduced and complete provisions have been provided for civil and commercial issues. The law tries to approximate the provisions of Albanian private international law with the best European and international provisions on these matters. Concerning foreign judgments, they are recognized and enforced according to the provisions of the national law (the Civil Procedure Code) and the international law (multilateral and bilateral agreements) applicable in Albania. Despite the improvements, the PIL Act will necessarily continue to be subject to further revision and clarification needed not only further to approximate it with developing European regulation but also to correct and improve some of the existing provisions.

[41] See for example article 22 of the bilateral agreement on Mutual Legal Assistance in Criminal and Civil matters with Macedonia (note 40).

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COURT DECISIONS

LATEST DEVELOPMENTS IN THE ECJ CASE LAW ON JURISDICTION CONCERNING CONSUMER CONTRACTS

Raffaella DI IORIO*

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I. Introduction: The Legal Context

In two recent rulings, the Court of Justice of the European Union has added some extra clarification to the interpretation of the provisions of Regulation No. 44/2001 (hereinafter: Brussels I Regulation) that regulate the exercise of jurisdiction in disputes relating to consumer contracts (Articles 15-17),[1] confirming the principle of favouring maximum consumer protection.

In the jurisdictional system designed by the Brussels I Regulation, the general forum is the domicile of the defendant,[2] since the natural foundation of the jurisdiction of the judicial body is its link with the territory.[3]

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[1] ECJ, 17 October 2013, C-218/12, *Lokman Emrek c. Vlado Sabranovic*; ECJ, 14 November 2013, C-478/12, *Armin e Marianne Maletic c. lastminute.com GmbH e TUI Österreich GmbH*.

[2] See Article 2 Brussels I Regulation.

[3] See recital 8 Brussels I Regulation.

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With regard to consumers, an additional forum was also conceived with a view to ensuring a more effective protection of the weaker party.[4] Its purpose is to protect the consumer, deemed to be the weaker party,[5] through rules of jurisdiction more favourable to his or her interests than those provided for by the general rules.[6] In this perspective, Article 16 Brussels I Regulation provides that the consumer may bring proceedings against the other party to the contract either, according to the general rule, in the courts of the Member State in which that party is domiciled or alternatively in the courts for the place where the consumer is domiciled. On the contrary, proceedings against the consumer may only be brought in the courts of the Member State of his or her domicile.[7]

It is worth noting that from 10 January 2015, Regulation No. 1215/2012 (hereinafter: Brussels I-*bis* Regulation) will be applicable. The above mentioned Article 16 will be replaced by Article 18 Brussels I-*bis* Regulation, which reproduces the same rule with the sole, relevant, amendment that the consumer may initiate proceedings against the other party to the contract in the courts where the consumer is domiciled "regardless of the domicile of the other party". Under Brussels I Regulation the protective rules apply only if the defendant has his domicile or a branch, agency or other establishment in a Member State. In contrast, a consumer cannot invoke the above-mentioned rules if the counter-party is domiciled in a third State. In order to ensure the consumer is afforded better protection and despite the general rule according to which a defendant not domiciled in a Member State should be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seized,[8] the Brussels I-*bis* Regulation provides for the applicability of the protective rules wherever the defendant is domiciled.

The scope of application of the above-mentioned rules is defined in Article 15 Brussels I Regulation, which identifies typical circumstances of weakness of the consumer. These are:

(a) contracts for the sale of goods on instalment credit terms;

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[4] See recital 11-14 Brussels I Regulation.

[5] The consumer is economically weaker and less experienced in legal matters than the other, commercial, party to the contract. See, *inter alia,* ECJ, 20 January 2005, C-27/02, *Petra Engler v. Janus Versand GmbH*, *ECR* [2005] I-00481, para. 39.

[6] See A. Bonomi, in A. Bucher (ed.), *Loi sur le droit international privé. Convention de Lugano*, Bâle 2011, Art. 15 CL Nos 1 *et seq.*

[7] These provisions can be derogated from by the will of the parties only on the basis of the restrictive conditions of Article 17 Brussels I Regulation.

[8] See recital 14 Brussels I-*bis* Regulation. Regarding this Regulation see H. Gaudemet-Tallon/ C. Kessedjian, La refonte du règlement Bruxelles I, *Revue trimestrielle de droit européen*, 2013, p. 435 *et seq.;* J.-P. Beraudo, Regard sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Clunet* 2013/3, p. 741 *et seq*.

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(b) contracts for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods;[9]

(c) all other contracts provided that have been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

These jurisdictional rules are referred to as "exhaustive", meaning that they cannot be amended or supplemented by other rules of jurisdiction laid down in the Regulation unless an explicit reference to that effect is made in the same provisions.[10]

Moreover, these rules are mandatory; they can only be derogated from in the limited cases mentioned in Art. 17. Moreover, any decision that violates the rules of jurisdiction in matters of consumption will not benefit from the simplified system of recognition and enforcement afforded by the Brussels I Regulation.[11]

This enhanced protection of the consumer is considered "exceptional"; the Court of Justice of the European Union has stressed that, as the rules on jurisdiction concerning consumer contracts derogate from the general rule of jurisdiction (Article 2) and from the rule of special jurisdiction for contracts (Article 5), they have to be interpreted strictly[12] and independently, with reference to the system and the purposes of the Regulation, in order to ensure its uniform and effective application in all the Member States.[13]

In *Lokman Emrek v. Vlado Sabranovic* the Court of Justice made it clear that, in order to benefit from the protection, the consumer is not obliged to prove the existence of a causal link between the conclusion of the contract and the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, but that such a link constitutes evidence of the connection between the contract and such activity.

In *Armin and Marianne Maletic v. lastminute.com GmbH e TUI Österreich GmbH* the Court specified that the protective rules also apply to the contracting partner of the operator with which the consumer concluded the contract and which has its registered office in the Member State where the consumer is domiciled. In this way the concentration of the disputes is allowed when the legal transaction

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[9] In cases *sub* a) and b) the consumer needs particular protection as he or she buys a good without having the necessary finances available.

[10] ECJ, 15 January 2004, C-433/01, *Freistaat Bayern v. Jan Blijndenstein*, *ECR* [2004] I-00981, para. 28; ECJ, 22 May 2008, C-462/06, *Glaxosmithkline, Laboratoires Glaxosmithkline v. Jean-Pierre Rouard*, *ECR* [2008] I-03965, para. 18 (hereinafter *Glaxosmithkline*).

[11] See Article 35 Brussels I Regulation

[12] See ECJ, 7 December 2010, C-585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG*, and C-144/09, *Hotel Alpenhof GesmbH v. Oliver Heller*, *ECR* [2010] I-12527, para. 53 (hereinafter *Peter Pammer and Hotel Alpenhof*).

[13] See *Peter Pammer and Hotel Alpenhof* (note 12), at para. 55.

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concerns a consumer and two professionals, one of which is established in the same Member State as the consumer.

These cases will also be relevant in the interpretation of the new provisions on jurisdiction on consumer contracts laid down in the Brussels I-*bis* Regulation. They further strengthen the principle of *favor consumatoris*. However, the *Maletic* case raises some considerations on the missed opportunity to admit the applicability of the provision on joinder, when an action is brought against the consumer.

II. *Lokman Emrek v. Vlado Sabranovic*

A. The Facts

Mr Emrek, domiciled in Germany, went to a border town located in France and, as a consumer, concluded a contract for the sale of a second-hand motor vehicle with the enterprise of Mr Sabranovic. Subsequently, the buyer brought an action before the German courts, making claims against the seller under the warranty, applying the rule of jurisdiction laid down in Article 15(1)(c) Brussels I Regulation. Mr Sabranovic, indeed, had an internet site whose content was appropriate to suggest that his business was directed at Germany.[14]

The peculiarity of this case lies in the fact that Mr Emrek learned of the existence of the Mr Sabranovic's company, through acquaintances and not through the website.

These facts raised the question whether Article 15(1)(c) requires, as a further unwritten condition, that the website of the trader has induced the consumer to enter into a contract, therefore ensuring that a causal link is established between the website and the conclusion of the contract.

B. Article 15(1)(c) of Regulation No 44/2001

To fully understand the meaning of the judgment *Lokman Emrek v. Vlado Sabranovic* it is necessary to provide a brief account of the interpretation of Article 15(1)(c) Brussels I Regulation, having regard to its relationship to Article 13(1)(3) Brussels Convention of 17 September 1968.[15]

Under Article 13 Brussels Convention, the special jurisdiction rules only applied to contracts for the supply of goods or services, when the conclusion of the

[14] The website contained the contact details of the company, including French telephone numbers and a German mobile telephone number, together with the respective international codes.

[15] Regulation No 44/2001, which entered into force on 1st March 2002, replaced, in relations between the Member States, the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. On the continuity of the interpretation that characterizes the two instruments see recital 19 of Regulation No 44/2001.

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contract was preceded by a specific invitation addressed to the consumer or by advertising in the State of his domicile,[16] and when the consumer took the steps necessary for the conclusion of the contract in that State.[17]

In order to afford consumers better protection with regard to new means of communication and the development of electronic commerce, which make it more difficult to determine the place where the acts necessary for the conclusion of the contract were taken and that increase the vulnerability of the consumer, the Brussels I Regulation expanded the scope of the judicial privilege, which now includes all consumer contracts to the sole condition that the contracts are concluded with a person whose commercial or professional activities are directed, by any means, to the Member State where the consumer is domiciled. The link with the consumer's State is no longer given from the place of accomplishment of the steps necessary for the conclusion of the contract,[18] but it is created by the counter-party of the consumer by directing its activities to that State.[19] These new rules, according to which the jurisdiction depends on the specific geographical destination of the supply of goods or services to the State of the consumer's domicile, on one hand, allow the professional to predict the forum, whilst on the other, allow the consumer to benefit from the protection afforded by the Brussels I Regulation when, from his home, he concludes a contract by electronic means of communication.

As the Brussels I Regulation does not define the concept of activity "directed to" the Member State of the consumer's domicile, the case law of the Court of Justice on Article 15(1)(c) is fundamental.[20] In its well-known judgment

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[16] On the notions of "advertising" and specific "invitation" see ECJ, 11 July 2002, C-96/00, *Rudolf Gabriel*, *ECR* [2002] I-06367, paras 44 and 45.

[17] See P. KAYE, *Civil Jurisdiction and Enforcement of Foreign Judgments*, Abingdon 1987, p. 835 *et seq.*; P. ARNT NIELSEN, in U. MAGNUS/ P. MANKOWSKI, *Brussels I Regulation*, Munich 2012, Art.15 Nos 13 *et seq.*

[18] P. SCHLOSSER, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, *OJ* C 59 of 5 March 1979, p. 118, para. 158, (hereinafter Schlosser Report).

[19] A. BONOMI, in A. BONOMI, *Diritto internazionale privato e cooperazione giudiziaria in materia civile*, Torino 2009, p. 83 *et seq.* esp. at 86.; E. MERLIN, Novità sui criteri di giurisdizione nel Regolamento CE "Bruxelles I", *Int'l Lis* 2003, p. 46 *et seq.*

[20] In doctrine see, *i.a.*, K. VASILJEVA, 1968 Brussels Convention and EU Council Regulation No. 44/2001: Jurisdiction in Consumer Contracts Concluded Online, *European Law Journal* 2004, p. 123; M. FOSS/ L.A. BYGRAVE, International Consumer Purchases through the Internet: Jurisdictional Issues Pursuant to European Law, *International Journal of Law and Information Technology (8)* 2000, p. 99; G.A.L. DROZ/ H. GAUDEMET TALLON, La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Rev. crit. dr. int. pr.* 2001, p. 638 *et seq.*; J.-P. BERAUDO, Le Règlement (CE) du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale, *Clunet* 2001, p. 1056.

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of 7 December 2010, in joined cases C-585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* e C-144/09, *Hotel Alpenhof GesmbH v. Oliver Heller*, the Court made it clear that for Article 15(1)(c) to apply it is necessary that the trader envisaged doing business and, therefore, concluding contracts with consumers domiciled in one or more Member States, including the one in which the particular consumer is domiciled. The mere accessibility of the trader's website is not a decisive factor in determining whether an activity is directed towards another Member State,[21] while it is necessary to consider the specific content of the webpage.

The "directing test"[22] can be based, among others, on the international nature of the activity, mention of itineraries from other Member States in order to attend the place where the trader is established, use of a language or a currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is, therefore, not necessary that the contract was concluded at a distance.[23]

C. Exclusion of the Need to Prove the Causal Link between the Advertising Medium and the Conclusion of the Contract

In *Emrek v. Sabranovic* the Court of Justice affirmed that Article 15(1)(c) must be interpreted as meaning that it does not postulate the existence of a causal link between the means (*e.g.*, the website) employed to direct the commercial or professional activities to the Member State of the consumer's domicile and the conclusion of the contract by the same consumer. However, the existence of such a

[21] It is not enough the simply accessibility of a web site, the notice of an e-mail address or other contact details, the use of a language or a currency which are generally used in the Member State where the trader is established. See also, in this sense, the recital 24 of Regulation No 593/2008 on the law applicable to contractual obligations (so-called Rome I).

[22] U. KOHL, Jurisdiction and the Internet. A Study of Regulatory Competence over Online Activity, *Cambridge University Press* 2007, p. 76.

[23] ECJ, 6 September 2012, C-190/11, *Daniela Mühlleitner c. Ahmad e Wadat Yusufi*, (hereinafter *Mühlleitner*) about which see S. TASSONE, Il regolamento Bruxelles I e l'interpretazione del suo ambito di applicazione: un altro passo della Corte di Giustizia sul cammino della tutela dei diritti del consumatore, *Giurisprudenza di merito* 2013/1, p. 104 *et seq.*; B. DE CLAVIÈRE, Confirmation de la protection du consommateur actif par les règles de compétence spéciales issues du règlement 44/2001, *Revue Lamy Droit des Affaires* 2012, No. 77, p. 48 *et seq.*; A. SYNAY-CITERMANN, De la compétence judiciaire européenne en matière de contrat conclu par un consommateur, *Rev. crit. dr. int. pr.* 2013, p. 506 *et seq. Contra* see recital 24 of the Rome I Regulation, which recalls the Joint Declaration of the Council and the Commission on Article 15 Brussels I Regulation.

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causal link constitutes evidence of the connection between the contract and such activity.

This conclusion is reached on the basis of literal and teleological arguments. Firstly, the wording of Article 15(1)(c), does not mention the existence of a causal link between the advertising medium and the conclusion of the contract as a condition for applying the protective provisions.

Secondly, the addition of an unwritten requirement on the existence of a causal link appears to be incompatible with the rationale of the provision, which is to protect the consumers as the weaker parties to contracts concluded with professionals. Indeed, when the contract has not been concluded at a distance through the website itself,[24] it would be a *probatio diabolica* for the consumer to prove that he decided to conclude the contract after having examined the website. This would discourage consumers from using the rules of jurisdiction laid down in Articles 15 and 16 of Brussels I Regulation, with a consequent reduction of the protection.

The only relevant behaviour, in order to apply the special rules of jurisdiction in matter of consumer contracts is, therefore, that of the seller of the goods or of the service provider.[25] These considerations seem perfectly consistent with the statement that even a contract not concluded at a distance is relevant under the Brussels I system.

It has critically been argued that the requirement of a causal link, necessary in order to not extend far beyond the protection of the consumer, is implicit in Article 15(1)(c), and in particular in the phrase stating that the contract must fall within the scope of the commercial or professional activities directed to the Member State of the consumer's domicile.[26]

However, the abovementioned phrase, should rather be understood as not requiring a causal link between the marketing activities and the conclusion of the contract, but only a correspondence between the object of the trader's commercial activity and the object of the contract.[27]

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[24] That the initiation of contact at a distance and the conclusion of a contract at a distance constitute evidence of the amenability of the contract to an activity directed towards the Member State of the consumer's domicile has been stated by Court of Justice in *Peter Pammer and Hotel Alpenhof* (note 12), at para. 93. On contract concluded at a distance see the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13 EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

[25] Opinion of Advocate General Pedro Cruz Villalón, delivered on 18 July 2013 in case C-218/12, *Lokman Emrek v. Vlado Sabranovic*, para. 17; *Peter Pammer and Hotel Alpenhof* (note 12), at para. 55; *Mühlleitner* (note 23), at para. 28. See also the Opinion of Advocate General Darmon, delivered on 27 October 1992 in case C-89/91, *Shearson Lehman Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH.*, paras 81-85.

[26] In this sense, it seems, G. RÜHL, Kausalität zwischen ausgerichteter Tätigkeit und Vertragsschluss: Neues zum situativen Anwendungsbereich der Art. 15 *et seq*. EuGGVO, *IPRax* 2014, p. 42 *et seq.*

[27] Concerning this requisite two different interpretations are possible. In a more restrictive sense, see P. ARNT NIELSEN (note 17), at Art. 15 No. 37, according to whom if the professional party directs advertisements for TV sets to the Member State, a consumer is

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Therefore, it seems preferable to agree with the opinion according to which the causal link between the advertising medium and the conclusion of the contract is *in re ipsa* when three conditions are met, all with regard to the seller or the service provider:

(a) existence of a commercial or professional activity,

(b) activity directed to the Member State of the consumer's domicile or to several States including that Member State, and

(c) a contract falling within the scope of such activities.[28]

III. *Armin and Marianne Maletic v. lastminute.com GmbH e TUI Österreich GmbH*

A. The Facts

The Maletics, domiciled in Bludesch (Austria), bought a package holiday to Egypt on the website of lastminute.com, a company based in Germany, which specified that it acted as the travel agent and that the trip would be operated by TUI, a company based in Vienna (Austria).

The Maletics received confirmation of the booking from lastminute.com and a "confirmation/invoice" from TUI that mentioned the name of another hotel, while reporting the data of the travel booked with lastminute.com.

The couple noted the mistake only after they had arrived in Egypt and paid a surcharge to stay at the hotel originally booked on the website of lastminute.com.

In order to recover the surcharge paid and to be compensated for the inconvenience that affected their holiday, the Maletics brought an action against lasminute.com and TUI jointly before the court of Bludenz,[29] whose jurisdiction was identified in accordance with Article 16(1) Brussels I Regulation.

The peculiarity of this case lies in the fact that the joinder of parties would require the application of the rules on jurisdiction over consumer contracts both towards lasminute.com, established in Germany, and TUI, based in Vienna and thus in the same Member State in which the consumer is domiciled. This raises the question of the applicability of Articles 15 and 16 Brussels I Regulation to a controversy that seems to have a purely domestic nature. The issue was, therefore,

covered by Article 15(1)(c) if he buys a TV set, but not if he buys a radio, for which no advertisements have been directed to the Member State where the consumer is domiciled. An interpretation more favourable to the consumer is preferable and is proposed by A. Layton/ H. Mercer, *European Civil Practice*, London 2004, p. 589, para. 17.023, who observe that it "will be a question of fact and degree for the courts to determine whether that is the same or a distinct commercial activity for the purposes of this provision".

[28] See Opinion of Advocate General Pedro Cruz Villalón (note 25), at para. 23.

[29] Bludesch, the applicant's domicile, lies within the jurisdiction of the District Court (*Bezirksgericht*) of Bludenz.

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whether Austrian national law was actually applicable instead of the Brussels I Regulation, in which case the court with jurisdiction is that of the defendant's domicile, *i.e.*, the court of Vienna.

The question that the Court of Justice was called upon to answer was whether the circumstances described involve a "purely domestic situation" and how the notion of "other party to a contract" laid down in Article 16(1) Brussels I Regulation is to be interpreted in a situation whereby a person who pursues commercial or professional activities, situated in a Member State other than that of the consumer's domicile, provides the services of another person who pursues commercial or professional activities, whose registered office is situated in the latter State, where a consumer brings proceedings against this "other party", since that provision allows him to bring an action before the courts of the place of his domicile.

B. The Decision of the Court of Justice of the European Union

The Court of Justice stated that the concept of "other party to the contract" laid down in Article 16(1) Brussels I Regulation must be interpreted as meaning, in circumstances as those in issue in the main proceedings, that it also covers the contracting partner of the operator with which the consumer concluded the contract and which has its registered office in the Member State where the consumer is domiciled.

To reach this conclusion the Court emphasised the principles of procedural economy and proper administration of justice. In this perspective it is argued that a solution imposing the Maletics to bring parallel actions both in Bludenz (their domicile) and in Vienna (seat of TUI) by means of connected proceedings against the two operators involved in the booking and execution of the same trip, would be incompatible with the objectives of the consumer protection[30] and of the reduction in the possibility of parallel proceedings in order to prevent that irreconcilable judgments are issued in two Member States.[31]

The Court justified the *simultaneus processus* before the court identified in accordance with Article 16(1) by using the concept of "international nature of the dispute".

The Court of Justice recalled the principle stated in the famous *Owusu* judgment, according to which the international nature of the legal relationship need not necessarily derive from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Member States,[32] and concluded that the main procedure is international in character and is suitable to entrench the applicability of the Brussels I Regulation.

[30] See recital 13 Brussels I Regulation.

[31] See recital 15 Brussels I Regulation.

[32] ECJ, 1 March 2005, C-281/02, *Andrew Owusu v. N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, *ECR* [2005] I-01383, esp. para. 26 (hereinafter *Owusu*). This judgment applies Article 2 of Brussels Convention of 1968. However, since the Brussels I Regulation replaces the Brussels Convention, the interpretation given by the

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While the international character of the dispute involving lastminute.com is obvious, with regard to TUI the foreign element was identified in the inescapable link between the two contractual relationships, namely the relationship of the consumers with the online travel agency lastminute.com and with the tour operator TUI. The latter relationship had been achieved in particular as a result of the mediation of the travel agency situated in another Member State.

The Court's decision raises some questions and the need for reflection on the concept of the international character of the dispute and on the connection between claims.

C. The Requirement of the International Character of the Dispute as a Surrogate of the Connection between Claims

The Court of Justice recognises the applicability of the jurisdiction criterion laid down in Article 16(1) Brussels I Regulation when the defendant is domiciled in the same State of the consumer using arguments that evoke the requisite of the international character of the dispute.[33]

The principle that the Brussels I jurisdictional rules do not apply to purely domestic situations is almost undisputed.[34] Equally undisputed is the fact that this Regulation applies not only to intra-Community disputes, but also to those involving a Member State and a non-Member State,[35] for instance, when the domicile of the claimant and the defendant are located in the same Member State and the only international element of the dispute is represented by its connection with a third, non-Member State.[36]

Court of Justice in relation to the provisions of the Convention also applies to those sections of the Regulation that can be regarded as equivalent.

[33] This is a concept that, without ever being defined or specified, is mentioned in the preamble of the Brussels Convention of 1968, stating that it is necessary "to determine the international jurisdiction of their [of the contracting States] courts". The reference to the "international jurisdiction" is not mentioned in the Brussels I Regulation, whose recital 8 states that "there must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation".

[34] See P. JENARD, Report on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, *OJ* C 59, 5 March 1979, (hereinafter Jenard Report), p. 8; Schlosser report (note 18), at 81 para. 21. See also, *i.a.*, A. LAYTON/ H. MERCER (note 27), at 287 *et seq*. *Contra* L. MARI, *Il diritto processuale civile della Convenzione di Bruxelles I. Il sistema della competenza*, Padova 1999, p. 587, affirms that the idea that the Brussels Convention concerns only disputes international in character is due to the inadequate perception of the deep changes that the Convention brought in the regulation of the exercise of the jurisdictional power in the European Community.

[35] See ECJ, 7 February 2006, opinon 1/03; M. FALLON, L'applicabilité du règlement "Bruxelles I" aux situations externes après l'avis 1/03, in *Liber amicorum Hélène Gaudemt-Tallon*, Paris 2006, p. 241 *et seq*.

[36] *Owusu* (note 32); see further T. BALLARINO, I limiti territoriali della Convenzione di Bruxelles secondo la sentenza *Owusu*, *Int'l Lis*, 2, 2006, p. 93 *et seq.*; G.P. ROMANO, Le

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The requirement of internationality is mostly identified through a pragmatic approach.[37] This is also the case for the decision under consideration.

Here the Court of Justice identifies the international element in the fact that the contract concluded between the parties domiciled in the same Member State is inextricably linked – as if it was a unique legal transaction – with the contract concluded between the claimant and another defendant, domiciled in a different Member State. In such a case, the applicability of national laws would compromise the attainment of the objectives pursued by the Brussels I Regulation.

Indeed, the outcome reached by the Court can be supported, although it would have been preferable to rely on a different reasoning. In particular, the criterion of the "internationality of the dispute" is not entirely convincing, because it is undoubtedly difficult to delineate.

In our opinion, a strong case can be made to make reference to the notion of connection between claims. In the present case, in fact, "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". In this case, according to Article 6(1) Brussels I Regulation, a person domiciled in a Member State is sued, "where he is one of a number of defendants, in the courts for the place where anyone of them is domiciled".

This provision, however, does not apply if based on connecting factors other than those laid down in Article 2,[38] so, the special fora could serve as the basis on which to hear other actions only if they themselves are able to justify their operation in relation to each of these actions.

In particular, the Court of Justice excluded the applicability of Article 6(1) when the rules affording protection to another weak category of persons operate, namely employees.[39] The protective provisions may be modified or supplemented by other rules of jurisdiction laid down by the Regulation only if there is an express reference to that effect. In the absence of such a reference, the applicability of Article 6(1) must be excluded, even if, in the Court's opinion, the possibility to

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principe de securité juridique à l'épreuve des arrêts Gasser et Owusu, *Cahiers de droit européen* 2008, p. 507 *et seq.;*

[37] Jenard Report (note 34), at 8, according to which "the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised". T. BALLARINO/ S. MARI, Uniformità e riconoscimento. Vecchi problemi e nuove tendenze della cooperazione giudiziaria nella Comunità europea, *Riv. dir. int.* 2006, p. 7 *et seq.*, underline that the empiricism that afflicts the research of the internationality factors contrasts with the legal certainty, which is one of the object of the Brussels Convention.

[38] ECJ, 27 October 1998, C-51/97, *Réunion Européenne SA and Others v. Spliethoff's Bevrachtingskantoor BV,and the Master of the vessel Alblasgracht V002*, *ECR* [1998] I-06511, para. 44; ECJ, 11.10.2007, C-98/06, *Freeport plc v. Olle Arnoldsson*, *ECR* [2007] I-08319, para. 46.

[39] See *Glaxosmithkline* (note 10), and the comment by *inter alia* P. FRANZINA, Sul carattere "esaustivo" della disciplina comunitaria della giurisdizione in materia di contratti di lavoro, *Nuova giurisprudenza civile commentata* 2008, p. 1091 *et seq*. Article 16(2) of Regulation No 44/2001 is the only provision on the connection that applies in matter of jurisdiction over consumer contracts. It states that the counter-party can bring a counter-claim in the court in which the original claim is pending.

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bring before a single judge claims related to a number of defendants responds to the general objective of sound administration of justice, which implies the respect of the principle of procedural economy.[40]

Regulation No. 1215/2012, accepting the proposal made during the elaboration of the draft reform of Regulation No. 44/2001[41] has introduced[42] the possibility to apply the provision on the joinder[43] if an action is brought against the employer, albeit limited to jurisdiction in respect to individual contracts of employment.[44]

The same provision, perhaps, could have been extended to the consumer contracts in order to allow the concentration of claims in cases where the transaction relates to a consumer and two professionals, one of which is established in the same Member State where the consumer is domiciled. In the absence of this provision, the possibility of the *simultaneus processus* will depend on the applicable national law and will be realised when this provides, for internal disputes, the jurisdiction of the court of the consumer's domicile.[45]

Finally, it can be observed that, as previously mentioned,[46] Article 18(1) Brussels I-*bis* Regulation, which will replace Article 16(1) Brussels I Regulation, states that the action of the consumer against the other party to the contract may be brought, "regardless of the domicile of the other party", before the courts of the place where the consumer is domiciled.[47] The wording of the provision does not seem to exclude its applicability in circumstances such as those of the decision under consideration. However, it should be noted that the change was made with reference to professionals based outside the European Union.

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[40] *Glaxosmithkline* (note 10), at para. 27.

[41] The Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation No 44/2001, affirms that "the operation of certain jurisdiction rules could be improved. For instance, in Case C-462/06 (*Glaxosmithkline*), the Court of Justice confirmed that Article 6 (1) does not apply in the context of employment matters". See COM(2009) 174 final, para. 3.8.2. The Green paper on the review of the same Regulation underlines that "with respect to employment contracts, it should be reflected to what extent it may be appropriate to allow for a consolidation of actions pursuant to Article 6(1)". See COM(2009)175 final, para. 8.2.

[42] See Article 20 Regulation No 1215/2012.

[43] See Article 8(1) Regulation No 1215/2012, corresponding to Article 6(1) Regulation No 44/2001.

[44] This restriction is justified because if the employer could take advantage of the provision on the connection, the objective of protection sought with the introduction of a special Section for contracts of employment could be compromised. See *Glaxosmithkline* (note 10), at paras 28-30.

[45] This is the case in the Italian legal system. According to Article 33(2)(u) *Decreto legislativo* 206/2005, the exclusive forum of the consumer is his place of residence or his elective domicile. See F. MÉLIN, Contrat de voyage souscrit par internet et compétence, *Dalloz actualité* 25 novembre 2013.

[46] See *supra* I.

[47] See H. GAUDEMET-TALLON/ C. KESSEDJIAN (note 8), at 439 *et seq.*

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FORUM

INTERNAL CONFLICTS OF LAWS

Valérie PARISOT*

I. Features of Internal Conflicts of Laws
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"One of the most important, and perhaps the primary foundation of a republic, is to design the State to fit the nature of the citizens, and the edicts and ordinances to fit the nature of the place, the people and the time [...] which also means that one must vary republican States as the places vary: like good architects, who design buildings according to the materials found locally."[1] Four centuries later, this is still good advice and naturally guides thinking about what is traditionally called the "internal conflicts of laws." Unlike international conflicts of laws, which involve competition between laws issued by independent sovereign States, internal conflicts arise from the co-existence *within the same State* of laws specific to

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[1] J. BODIN, *Les Six livres de la République – Livre Cinquième* [Text of the tenth edition published in Lyon in 1593], Paris 1986, Chap. I, esp. p. 11.

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different areas of the country ("inter-local conflicts of laws") or different categories of persons according to whether they belong to a particular community or not ("inter-personal conflicts of laws"). This article summarises my doctoral dissertation on "internal conflicts of laws."[2]

Analysing such conflicts is of undeniable practical and theoretical interest, as evidenced by The Hague Academy's numerous courses on this topic.[3] In fact, internal conflicts of laws are quite widespread. Most countries, including France, are, or were in the past, "plurilegislative" States, that is, for various reasons they agreed to have a plurality of laws within their territory. For example, a number of old, *territorial* internal conflicts were created in countries that annexed territory after the major European wars. In States created by uniting various, previously independent territories, the annexing sovereign generally kept the laws and customs of the annexed regions.[4] Such "pluri-legislation" disappeared only with the unification of private law, which sometimes occurred only much later. Thus, for nearly thirty years, Polish civil law was comprised of five different bodies of law (the Napoleonic Code of 1804 and Austrian, German, Hungarian, and Russian civil law). While such conflicts are temporary, others are not, in particular those that result from the State's structure itself (federalism being the most frequent source of such conflicts, described for these reasons as "inter-federal conflicts of laws"). In the United States for example, there is not one U.S. law but as many U.S. laws as there are constituent States.[5] Similar observations may be made with respect to Canada,[6] the Commonwealth of Australia,[7] and Mexico.[8] But territorial internal

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[2] The dissertation was presented and defended at the University of Paris 1 – Panthéon-Sorbonne on 27 February 2009 before a jury composed of professors Paul LAGARDE (director of research), Pierre MAYER (examiner and president of the jury), Bertrand ANCEL (rapporteur), Pascale DEUMIER (rapporteur), Georges KHAIRALLAH (examiner), and Alegría BORRÁS (examiner). This work was updated and published with a preface by Professeur Paul LAGARDE by IRJS (Bibliothèque de l'Institut de Recherche Juridique de la Sorbonne – André TUNC, vol. 46, November 2013, 2 volumes, XXXV-3061 p.). Due to the necessarily limited scope of this article, the bibliographical references will be very succinct. A complete bibliography concerning the domestic conflict of laws appears in volume 2 of the book, p. 2523-2884.

[3] See most recently, A. BORRAS, Les ordres plurilégislatifs dans le droit international privé actuel, *Recueil des Cours* vol. 249 (1994), p. 145-368. See also E. VITTA, *Conflitti interni ed internazionali – Saggio comparativo*, Torino, G. Giappichelli (Università di Torino – Memorie dell'istituto giuridico, serie II – memoria LXXXVII), vol. 1: 1954; vol. 2: 1955, an undeniable authority on these issues.

[4] See M. ELIESCO, *Essai sur les Conflits de lois dans l'espace, sans Conflit de souveraineté (les conflits d'annexion)*, Paris 1925.

[5] On solving conflicts of laws in the United States, see: Eug. F. SCOLES/ P. HAY/ P.J. BORCHERS/ S.C. SYMEONIDES, *Conflict of laws* (4th ed.), St. Paul 2004.

[6] See J.-G. CASTEL, *Canadian Conflict of Laws* (4th ed.), Toronto/ Vancouver 1997.

[7] M. DAVIES/ A. BELL/ P.L.G. BRERETON, *Nygh's Conflict of Laws in Australia* (9th ed.), Chatswood 2014.

[8] On pluri-legislation in Mexico, see K.A.VON SACHSEN GESSAPHE, Verweisung auf einen Mehrrechtsstaat im Lichte des neuen mexikanischen interlokalen Privatrechts, in

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conflicts are not the prerogative of federal States. They also arise in politically unified countries and are called "inter-regional conflicts of laws", Spain being particularly pertinent in this regard since the laws of seventeen fora co-exist there.[9]

Personal internal conflicts of laws arise when individuals are assigned to human communities defined by ethnicity or "race" (when the pluralism results from colonial law) or by religious denomination (when it stems from the legal effects attributed by the State to religion). The former situation arises mostly in African and Asian countries that were colonised by or placed under the protection of European countries. In Sub-Saharan Africa, the failure of the French colonial policy of assimilation resulted in indigenous customs being recognised. When these African countries gained independence, their legislators usually re-instituted the old law under the principle of the continuity of the old legal order: the customary law continued to co-exist with the European law and even continues to co-exist with the newly developed modern law.[10] In Indonesia, legal pluralism also originated with colonial law but differed markedly from that of the francophone African States because the Indonesian people were categorised according to different ethnic groups: Europeans, indigenous peoples, and foreign Orientals. The relationships between these various categories of people, the observance of which gave rise to so-called "inter-racial" law, could be further complicated by religious conflicts since the religion a person professed governed the law applicable to him or her. Gaining independence did not eliminate all internal conflicts of laws in the Dutch West Indies: in the most delicate areas of the law, such as family law and estate law, complete unification of the law was not possible.[11]

The latter situation of inter-personal conflicts affects religious countries more particularly, and specifically Arab-Muslim countries. Inherited from the Muslim conquests of the 7th century, pluralism with regard to religious laws is a fundamental organising principle in most of the non-European countries that came after the Ottoman Empire: each religious community obeys its own religious rules. Moreover, this plurality of religious laws is combined – or not – with a plurality of religious courts. In Egypt for example, the important law of 21 September 1955, which repealed the law of 29 January 2000 while maintaining its principles, eliminated the various religious courts but left the laws of fourteen religious communities in place.[12] And in Lebanon, where the non-Muslim courts sit beside Muslim

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H.-P. Mansel/ Th. Pfeiffer/ H. Kronke/ Ch. Kohler/ R. Hausmann (eds), *Festschrift für Erik Jayme*, vol. 1, München 2004, p. 773-791, esp. p. 775-784.

[9] See D. De Ricci, *Les conflits interprovinciaux en Espagne*, Paris 1949, and, more recently, A. Borras, Non-discrimination à raison du sexe et modification du droit international privé espagnol, *Rev. crit. dr. int. pr.* 1991, p. 626-634.

[10] For a study of the law applicable in the francophone Sub-Saharan African States see G.A. Kouassigan, *Quelle est ma loi? Tradition et modernisme dans le droit privé de la famille en Afrique noire francophone*, Paris 1974.

[11] See D.T. Surianegara, *La pluralité des statuts personnels dans le droit indonésien (conflits internes et internationaux)*, doctoral dissertation directed by P. Lagarde, University of Paris 1 – Panthéon-Sorbonne, 1986.

[12] On Arab-Muslim countries in general and Egypt in particular, see the authoritative works by S.A. Aldeeb Abu-Sahlieh, written in several languages and available on the

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and Druze courts, every Lebanese citizen is necessarily assigned to one of the seventeen officially recognised religious communities on the basis of texts dating from the mandate period.[13]

France, which is traditionally described as both unitary and secular, is not free from a plurality of laws.[14] This has some troubling consequences, and it must be admitted that both types of conflicts described above exist. Some territorial internal conflicts arise directly from the colonial principle of "legislative particularity", (*spécialité législative*) which developed in the late 17th century to take into account the colonies' specificities. It meant that legal texts elaborated on the mainland did not automatically apply in the colonies: applicability required an express statement to that effect and promulgation of the text by the governor of the colony. Internal conflicts of laws therefore inevitably arose between the laws of the mainland and those of the colonies every time at least one of these two requirements was not met. And this rule of non-automatic applicability of mainland texts is still valid in New Caledonia, French Polynesia, and Wallis and Futuna. This is why the failure to expressly extend the scope of Civil Code Article 1152(2) (introduced by the laws of 9 July 1975 and 11 October 1985 to give the courts power to temper penalty clauses) to New Caledonia means it is not applicable there,[15] and why it is impossible to register a civil solidarity pact (PACS) in French Polynesia.[16]

But not all territorial internal conflicts result from "legislative particularity". Some are the result of territorial changes that followed the First World War. When Alsace-Moselle was returned to France in 1918, several German laws remained in force there – at first temporarily, but they eventually became permanent.[17] And more recent internal conflicts have arisen as certain French territories have gained greater autonomy (though not yet full independence). For example, many areas of civil and commercial law have been transferred to the New Caledonian Congress, which may, in the very near future, pass laws that differ from those passed by the

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website <http://www.sami-aldeeb.com/>, in particular *L'impact de la religion sur l'ordre juridique: cas de l'Égypte. Non-musulmans en pays d'Islam*, Fribourg 1979.

[13] See P. GANNAGE, *Le pluralisme des statuts personnels dans les États multicommunautaires – Droit libanais et droits proche-orientaux*, Beyrouth/ Bruxelles 2001.

[14] For an overview of conflicts specific to France, see V. PARISOT, Le pluralisme juridique au sein de la République française. Invitation au voyage dans les outre-mer, in R.M. BECKMANN/ H.-P. MANSEL/ A. MATUSCHE-BECKMANN (eds), *Weitsicht in Versicherung und Wirtschaft. Gedächtnisschrift für Ulrich Hübner*, Heidelberg 2012, p. 733-760.

[15] See Cass. 3rd civ., 8 Apr. 2010: *Bull. civ.* 2010, III, No 75, p. 69-70 and Cass. Advisory op. No 01000007P, 10 Jan. 2011 [excerpts of the preparatory report by R. LAFARGUE are reprinted in *Revue juridique, politique et économique de Nouvelle-Calédonie* (*RJPENC*) 2011, No 17, Doctr. p. 124-142].

[16] The application of law No 99-944 of 15 November 1999, which instituted the PACS, was not expressly extended to this territory. However, the text was (finally) extended to New Caledonia and Wallis and Futuna by Law No 2009-594 of 27 May 2009 for the economic development of the overseas territories.

[17] For an exhaustive but relatively old presentation of the various solutions to the resulting inter-provincial conflicts, see J.-P. NIBOYET, *Conflits entre les lois françaises et les lois locales d'Alsace et Lorraine en droit privé – Commentaire de la loi du 24 juillet 1921*, Paris 1922.

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national parliament with respect to individuals' legal status and capacity, marital property regimes, inheritance, and gifts.[18]

Personal internal conflicts are without a doubt the most frequent type of internal conflict in France. During the colonial era, there were conflicts between the laws of the mainland and those of the colonies, as well as among those of different colonies.[19] Article 75 of the current French Constitution, which claims to be directly inherited from this period, constitutionalises the various personal statuses.[20] By authorizing overseas citizens to keep the personal status they had before colonisation, it keeps the door open to conflicts between French civil status and personal status, on the one hand, and among the different personal statuses on the other. The lack of attention given by legal scholars to this provision is in stark contrast to the effect it has on people's lives. In New Caledonia, almost all the Melanesians have maintained their specific status. The courts therefore legitimately dismiss claims for divorce between Melanesian spouses when the spouses' clans are against it[21] and, on the grounds that Kanak custom is silent on this issue, deny alimony to Melanesian women when their marriage is dissolved according to custom.[22] In Mayotte, the vast majority of the population is Muslim. Invoking Muslim law, the *Cour de cassation* prohibited several Mahorais siblings born out of wedlock from establishing paternity, thereby precluding them from inheriting from their father.[23] And more recently it ruled that a man's refusal to swear under oath that he was not a child's father before the Muslim judge (*Grand Cadi*) of Mayotte was sufficient to establish his paternity.[24]

Some internal conflicts were of course resolved in France and elsewhere once private law was unified, and some have changed as territories have shifted and institutions have been reformed. For example, some internal conflicts of laws became international conflicts when a number of colonies gained independence, as well as when socialist federations split up in the 1990s. These cases must not be

[18] This transfer of jurisdiction to legislate was provided for by organic law No 99-209 of 19 March 1999 concerning New Caledonia and is taking place according to local law (that is, passed by the New Caledonian Congress) No 2012-2 of 20 January 2012. The transfer took effect 1 July 2013 and must be completed by 14 May 2014.

[19] H. SOLUS is still the authority on these old "colonial conflicts": *Traité de la condition des indigènes en droit privé – Colonies et pays de protectorat (non compris l'Afrique du Nord) et pays sous mandat*, Paris 1927.

[20] Article 75 of the French Constitution of 4 October 1958, which has not been affected by any of the twenty-four constitutional revisions made under the Fifth Republic, provides: "[t]he citizens of the Republic who do not have common law civil status, the only one mentioned in Article 34, keep their personal status as long as they do not renounce it."

[21] Nouméa, 11 Dec. 2003, *épx Angexetine*: *Juris-Data* No 2003-247723.

[22] Cass. 1st civ., 1 Dec. 2010, *Alosio* v. *Tokotoko*: *Bull. civ.* 2010, I, No 251, p. 234-235; *Clunet* 2011, comm. 12, p. 589-600, note S. SANA-CHAILLE DE NERE; *Rev. crit. dr. int. pr.* 2011, p. 610-624, note V. PARISOT.

[23] Cass. 1st civ., 25 Feb. 1997, *cts Abdallah*: *Bull. civ.* 1997, I, No 67, p. 43-44; *Rev. crit. dr. int. pr.* 1998, p. 602-609, note G.A.L. DROZ.

[24] Cass. 1st civ., 23 May 2006, *Ahamadi Mohamed* v. *Amina Ahmed*: *Bull. civ.* 2006, I, No 262, p. 230.

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neglected. In fact, while internal conflicts of laws change over time, the issue they raise does not. History therefore seems to be a decisive factor in understanding these changes: yesterday's internal conflicts often explain today's internal conflicts and provide keys for imagining how they may be understood tomorrow.

Studying internal conflicts of laws, whether from the point of view of French law or foreign law, is not only of inarguable practical importance, but it is also very stimulating in terms of theory because several disciplines are involved. First of all, it calls to mind the purpose of international private law. When resolving internal conflicts of laws, courts in a "plurilegislative" State may wonder whether they should refer to that country's rules of private international law. In other words, to resolve internal conflicts of laws, one must analyse how international conflicts of laws are resolved and the relationship between these two types of conflicts. In addition, internal conflicts are of interest to more than just the authorities of countries that do not have unified legislation. Any court with a choice-of-law rule for resolving international conflicts of laws that designates a "plurilegislative" system is concerned! Such a court rules on the general role and function of its choice-of-law rule: does it authorise the court to choose the applicable law in a foreign State, or does it simply provide a general indication of which foreign country's internal choice-of-law rules it must read to find the relevant substantive provision? My conclusions revise the current approach to analysing these two issues.

Furthermore, the analysis of internal conflicts is not reserved to internationalists; it will also no doubt arouse the interest of private-law scholars. A precise understanding of internal conflicts of laws requires us to think about the concept of the scope of legal rules in domestic law and rethink the sources of law. For example, inter-personal conflicts of law that involve legal systems without the same formal value, such as law and custom, encourage thinking in terms of normative hierarchy. But when does the issue shift from normative hierarchy to genuine legal pluralism? More broadly, internal conflicts lead to a questioning of the concept of "legal system", or "legal order". This research contains several forays into constitutional law and includes a few aspects of legal anthropology, in particular in the discussions of French colonial law and the law applicable overseas. It also tries to discern sociological elements that may explain the various types of solutions that exist.

But the real challenge lies in developing, through an innovative methodological approach, a general theory of internal conflicts of laws that does not overlook any of the above-mentioned dimensions and that is based on every existing or previously existing "plurilegislative" legal system. The prevailing doctrine starts with solutions to internal conflicts of laws and deduces the consequences as to the nature of these conflicts. Seeing that internal conflicts are occasionally resolved using criteria other than those used in private international law, it generally contrasts internal conflicts with international conflicts of laws. Within the area of internal conflicts of laws, it distinguishes inter-personal from inter-local conflicts and, within this latter category, inter-federal (federal States) and inter-regional conflicts (unitary States). I believe that this way of proceeding results from faulty methodology. Rather than trying to develop directives as to how to view these conflicts from a few, specific, concrete solutions, it seems more logical to start

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with internal conflicts themselves to determine the similarities and differences in how they are resolved. This makes it possible to suggest a method for treating all internal conflicts of laws the same way, which the traditional positions do not. The article therefore presents the features of internal conflicts of laws, followed by ways to resolve such conflicts.

I. Features of Internal Conflicts of Laws

After identifying the theoretical premises about internal conflicts of laws, I take a critical look at the traditional way of categorizing these conflicts.

A. Theoretical Premises about Internal Conflicts of Laws: Existence of a True Conflict of Laws

The first question that arises about an internal conflict of laws is whether it is indeed a conflict of laws. To answer this question, one must distinguish the jurisdiction of the legal orders or systems involved from the scope of the legal rules competing for application.

Cases involving competing norms are legion in both private international law and domestic law. In private international law, we say there is a "conflict of laws" whenever a legal situation may be resolved by at least two laws produced by different States: a "conflict of laws" necessarily involves the existence of a real possibility of choosing between the two (or more) laws, which may perfectly well provide contradictory solutions since they are the product of independent sovereign States. Resolving international conflicts of laws involves employing specific techniques to choose one of the laws in contact with the dispute to resolve it. The "choice-of-law" or "conflicts" method, which is very frequently used for this purpose, links a set of questions of law to a legal order using connecting factors such as the location of a thing, a person's nationality, or any other factor expressing such a link. For example, Article 3 of the French Civil Code assigns the factor of nationality to an individual's legal status and capacity. The choice-of-law rule therefore does not stem from any application, properly speaking, of substantive rules likely to provide a concrete resolution to the issue in dispute; it merely designates a legal order, or more precisely, a legal system, from which the applicable norm should be drawn. In the domestic legal order, a "conflict of laws" – or more precisely, a "contradiction" – is troubling. The need to maintain consistency in a legal system in which a single legislative body produces norms means that more than one norm should not actually be applicable at the same time. Various interpretive techniques designed to specify the scope of these rules make it possible to select one (and only one) of them, and thereby eliminate any real possibility of choice.

Does "internal conflict of laws" mean a "conflict of laws" in the internationalist sense, or a "contradiction" in the domestic sense? There are two possibilities. To the extent such a conflict is internal to a State, it must be resolved

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according to the techniques specific to that State's domestic law for interpreting rules of law. Thus, to decide whether the law of Nevada or California should govern the marriage of two Californians married in Nevada, the territorial limitations on the applicability of the laws at issue must be taken into consideration. Similarly, to choose which religious laws apply to a mixed marriage celebrated in a religious State, the holders of each of the rights at issue must be identified. In other words, the substantive scope must be defined. But such conflicts, even though internal to a State, are very similar to those seen in the international order between systems produced by independent sovereign States. In both cases, it comes down to connecting a situation to one of the laws it is in contact with (the law of Nevada or California in the inter-local conflict case; the law of the religious authority before which the marriage was celebrated in the inter-personal conflict case; and U.S., Lebanese, Egyptian, or French law in the case of an international conflict), not interpreting the scope of the rules of each country's law taken in isolation.

In other words, identifying the theoretical premises about internal conflicts of laws raises the following fundamental question: do internal conflicts involve legal systems, requiring the court to rule on which one has jurisdiction, or simply rules – even sets of rules – that have a limited scope within the country? I believe the answer to this question is one of the keys to understanding the nature of internal conflicts of laws. The issue of the nature of internal conflicts of laws has not yet been systematised this way, though classical doctrine does provide a few answers. For example, it asserts that only some internal conflicts of laws, namely inter-federal conflicts, are true conflicts of laws similar to international conflicts. Other internal conflicts of laws, especially inter-regional and inter-personal conflicts, are denied this qualification.[25] Readers are then referred to the U.S. concepts of "false conflict" and "true conflict", the latter assuming that at least two norms might apply. In fact, my analysis of cases of domestic "contradictions" with respect to the three dimensions of the scope of legal rules – (1) substantive, (2) territorial, and (3) temporal – led me to conclude that all the cases traditionally considered to be "internal conflicts" of laws fit the definition of a conflict of laws given by private international law. From this perspective, it does not matter that they arise in a federal or a unitary system and involve a territorial connecting factor or the notion of membership in a community.

1. Jurisdiction of a Legal Order and Substantive Scope of Legal Rules

When the so-called complementary rules set out a rule on the one hand and an exception on the other, or a general principle and a specific rule, only the substantive scope of the legal rule is involved, to the exclusion of any other conflict-of-laws issue. In French law, this is the case between civil and commercial law with regard to the rules of evidence. Article 1341 of the Civil Code requires a writing

[25] See for example P. MAYER/ V. HEUZÉ, *Droit international privé* (11th ed.), Paris 2014, esp. Nos 92-94, p. 78-80, and No 250, p. 175; M. FALLON/ Y. LEJEUNE, La pratique belge des conflits interterritoriaux à l'épreuve du droit comparé, *Annales de droit de Louvain* 1982, p. 281-375, esp. No 22, p. 301-302, No 24, p. 304-306 and No 32, p. 314-315.

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for any agreement or act of disposition involving more than a certain amount, whereas Article L. 110-3 of the Commercial Code allows for any kind of evidence to prove the contents of commercial instruments in disputes between merchants. These two provisions, which provide different answers to the question of whether a writing is needed to prove a legal act, are not contradictory but complementary: requiring a writing protects individuals, whereas allowing other methods of proof better suits business needs. There is no conflict (in the internationalist sense) between these laws because they do not have the same scope of substantive application. Similar observations may be made with regard to allowing arbitration clauses depending on whether the dispute is domestic or international.

Another analysis entirely is involved when an internal conflict of laws arises between a law applicable, in theory, throughout a country, and local laws applicable only in a particular territory. In France for example, French law and the local law of Alsace-Moselle are not complementary because they may provide conflicting solutions for the same problem, such as in the area of civil bankruptcy: like companies, individuals residing in Alsace-Moselle may benefit from bankruptcy or recovery and, if applicable, judicial liquidation proceedings. Among other things, all individual claims and civil enforcement proceedings against them are halted. Individuals living outside the eastern departments of France, however, remain liable to their creditors and may be pursued for the full amount of their assets, whether held privately or professionally, except for property declared by law to be exempt from seizure. And in Spain, the fact that the relationship between the Civil Code and local laws is sometimes one of general principle to specific rule, such as in the case of marital property regimes, does not make it possible to resolve internal conflicts simply by looking at the substantive scope of the competing rules. The choice between these two systems therefore constitutes a genuine choice of law in the conflicts sense of the term.

Nor is the relationship between two religious laws a question of interpreting the substantive scope of the personal rules involved. Two complementary arguments have been made in this sense. On the one hand, the inequality of personal systems is often presented as a feature of inter-personal conflicts. But if one accepts that such conflicts involve a law that expresses the general rule and another law that expresses an exception, to choose which one applies in the particular situation one simply has to indicate in which cases the exception (that is, the personal law considered to be inferior) applies. On the other hand, inter-personal conflicts *per se* involve the existence of different legal rules for different categories of people. It may be tempting to conclude that a rule of law that claims to apply to a particular category of people thereby defines its scope. Just as Article L. 110-3 of the Commercial Code provides that the rule of free methods of proof applies only to "merchants", customary law applies only to certain people (those having a particular civil status), and religious law applies only to followers of a given religion.

These arguments, which deny the existence of a genuine conflict of laws, are not convincing. It is true that an individual's religion may seem to be a substantive condition for application of the religious rule. However, it is necessarily defined as a connecting factor to confer jurisdiction on an entire personal legal system. For example, suppose a Muslim Indonesian man marries a Christian Indonesian woman. To decide whether this marriage is polygamous (under Muslim

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law) or monogamous (under Christian law), one must first verify that the marriage can be regulated by both legal systems. This first step, which relates to the substantive jurisdiction – *ratione materiae* – of laws, obviously takes into account the substantive scope of the competing laws. Once it has been established that the religious laws of both spouses govern the marriage, a choice must be made between the two systems. This is no different from resolving a "conflict of laws" in the internationalist sense: the connection between the situation at hand and one of the two religious systems, which may be either the husband's status, applicable as a general rule, or the wife's status, which the husband may, exceptionally, choose, makes it possible to determine the legal system competent to govern the situation. The substantive rule applicable to the issue of law initially raised will then be chosen from within the legal system thus shown to be competent, possibly after a second, deeper analysis of the substantive scope of the rules likely to apply.

The substantive scope of legal rules also becomes an issue when the competing rules have a hierarchical relationship. Such a relationship creates two types of situations that are relatively difficult to qualify: conflicts between supranational norms or between a State's constitution and any legal rule of that State; and conflicts between national rules and the local rules of an autonomous entity. It is generally true that when the central government institutes a system attributing exclusive jurisdiction, all possibility of a conflict of laws is excluded *ab initio:* to the extent a lower-level norm violates a constitutional rule on the distribution of jurisdiction, the hierarchy of norms requires it to be set aside due to its ranking, thereby leaving only one rule – the higher-ranked one. However, when the central government institutes a system of competing jurisdiction or, more broadly, when the hierarchical relationship between the competing rules does not render the lower-ranked norm unconstitutional, a real conflict exists, *in abstracto:* the two competing rules are both legally valid. Such conflicts are usually resolved through the constitutional principle of the primacy of the central norm. Conflicts of laws are therefore not inconceivable in such cases, but they are usually resolved in advance by the constitution. Therefore, and subject to that caveat, conflicts arising between federal law and the law of constituent entities do not constitute genuine conflicts of laws.

2. Jurisdiction of a Legal Order and Territorial Scope of Legal Rules

Determining the territorial scope of a legal rule, which is an issue of domestic law, must be carefully distinguished from the resolution of conflicts of laws specific to private international law. Legal orders have jurisdiction when they are designated by a State's choice-of-law rule so that one of their substantive rules may be applied to the issue of law at hand. In this way, we can say that the French choice-of-law rule gives a foreigner's national law jurisdiction to govern issues of capacity. The territorial scope of rules is set according to a "territorial factor" that is incorporated into the rule's premise and therefore constitutes one of the conditions for giving the rule legal effect. The example most frequently given by French scholars is the law of 1 September 1948, which grants residential lessees the right to stay on leased premises in Paris, communities of more than 4,000 inhabitants, and communities

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located within less than five kilometres of cities having more than 10,000 inhabitants. The distinction between the jurisdiction of a legal order and the territorial scope of a legal rule, familiar to Anglo-American authors, is based on the supposedly universal nature of all legal rules, such that legal rules limiting their own territorial jurisdiction are recognized only as exceptions.[26] This distinction also makes it possible to include internal conflicts in the subject of private international law based on an analysis of three emblematic situations.

In France, centralised law-making power and a centralised court system generally raise doubts as to the existence of genuine conflicts between the general principles of French law and the law of Alsace-Moselle. For a good many authors, when law-making power is centralised, the existence of different rules for different areas of the country simply indicates territorial diversification of the national law. In other words, these authors believe the Alsatian inter-provincial conflict is not a real conflict of laws because the territorial scope of each of the laws involved is clearly defined. Of course, the approach of the local law, as a "national law of territorially limited application"[27] is consistent with the principle of the unity and indivisibility of the Republic, as well as with the principle of equality, since maintaining local law has even been elevated to the rank of "fundamental principle recognised by the laws of the Republic."[28] There are, nonetheless, serious objections to this approach. On the one hand, this local law is not merely a collection of specific rules that are simply a sort of exception to the so-called "generally applicable" French law: it is, in fact, a genuine local legal system that governs a certain number of areas, such as religion, labour law, social-protection legislation, associations, and publication obligations with respect to real property. On the other hand and above all, the scope of this law is not strictly territorial. Far from being limited to the eastern departments, the law of Alsace-Moselle applies in situations arising in "the interior".[29] Conflicts between French and local law must therefore be considered genuine conflicts of laws.

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[26] This distinction was made by R. De Nova, I conflitti di leggi e le norme con apposita delimitazione della sfera di efficacia, *Diritto Internazionale* 1959, p. 13-30. It has since been discussed, in particular, by Fr.A. Mann, Statutes and the conflict of laws, *The British Yearbook of International Law* 1972-1973, p. 117-143, and O. Kahn-Freund, General Problems of Private International Law, *Recueil des Cours* vol. 143 (1974), p. 239-247. It was then taken up and developed in P. Mayer, Les lois de police étrangères, *Clunet* 1981, p. 277-345, to explain the relationship between the conflicts method and police laws.

[27] J.-Fr. Flauss, Droit local alsacien-mosellan et Constitution, *Revue du droit public et de la science politique en France et à l'étranger* 1992, p. 1625-1685, esp. p. 1634.

[28] See, in particular the fourth "whereas" in Decision No 2011-157, preliminary referral to the *Conseil constitutionnel* of 5 August 2011 *Somodia [Interdiction du travail le dimanche en Alsace-Moselle]*: *JORF,* 6 August 2011, p. 13 476; *Petites Affiches* No 230, 18 November 2011, p. 8-21, note M. Verpeaux, Repos dominical en Alsace-Moselle et principe fondamental reconnu par les lois de la République; *Revue française de droit administratif* 2012, p. 131-139, note J.-M. Woerhling, La décision du Conseil constitutionnel sur le droit local alsacien-mosellan: consécration ou restriction? Les difficultés d'élaboration d'un cadre constitutionnel pour une territorialisation du droit.

[29] Translator's note: the French "interior" is the mainland minus Alsace.

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In Belgium, legislative autonomy has not eliminated all doubt as to how to qualify conflicts that arise between norms produced by law-making bodies of the same type (such as conflicts between decrees issued by community and regional parliaments), and between norms produced by different kinds of law-making bodies (such as conflicts between national law, a community decree, and a regional decree). As illustrated by the famous *Vandenplas* and *Van Hoet*[30] cases on the use of languages in workplace relations, the reasoning is usually based on the constitutional distribution of jurisdiction; but authors are divided and positive law is ambiguous. A distinction should, however, be made: the conflicts arising between norms produced by different types of law-making bodies should not, theoretically, cause genuine conflicts of laws because the Belgian government and the constituent entities have exclusive jurisdiction. If such conflicts arise due to overlapping jurisdiction, which can never be completely precluded in practice, they should be governed, in advance, by a principle of primacy of the federal norm. However, conflicts between norms produced by similar types of law-making bodies should be considered genuine conflicts of laws: a choice must be made between the legal systems involved by relying on a connecting factor that is necessarily external to the norms at issue.

In Canada and the United States, the legislative and judicial autonomy of the constituent provinces or States means there has been a rapprochement of the internal conflicts produced there and international conflicts of laws. In Canada, the obstacle to recognizing genuine conflicts of laws may be the principle of territoriality of provincial legislative jurisdiction, which seems to limit the provinces' jurisdiction to situations located exclusively within their territory. This can be overcome by accepting a legal rather than a simply geographical definition of territoriality. Thus understood, the extraterritoriality of provincial laws – and with it the possibility for real conflicts of laws – may be recognised provided the law is not designed mainly to infringe extra-provincial rights and complies with "order and equity."[31] Moreover, the treatment of conflicts between the statutes of different U.S. States[32] as conflicts between substantive legal rules requiring courts to determine the territorial scope of the laws is not convincing. American functional analysis, similar in some ways to Italian theories on statutes, is presented as a

[30] Cass. 3rd civ., 11 June 1979, *Vandenplas*: *Journal des Tribunaux* (*JT*) 1979, p. 637-641, note M. Fallon/ Y. Lejeune, Contradiction entre loi et décret: le décret du 19 juillet 1973 devant les Chambres législatives; Senate Decision of 1 Apr. 1981, *Vandenplas*: *JT* 1981, p. 308-310, note M. Mathieu, Le décret de septembre, la Cour de cassation et le Sénat; Cass. 3rd civ., 30 March 1981, *Van Hoet*: *JT* 1982, p. 411-415, note M. Mathieu, La Cour de cassation connaît pour la seconde fois d'un conflit entre loi et décret; see on this issue M. Uyttendaele, Existe-t-il un droit interrégional privé en Belgique? (Réflexions suggérées par les arrêts de la Cour d'arbitrage du 30 janvier 1986), in *Mélanges offerts à Raymond Vander Elst*, vol. 2, Bruxelles 1986, p. 785-799.

[31] Supreme Court of Canada, 1993, *Hunt*: *Clunet* 1999, p. 833-839; *Revue de droit de McGill* 1995, p. 759-779, note R. Wisner, Uniformity, Diversity and Provincial Extraterritoriality.

[32] Statutes (*lois*) generally codify the basic principles of the common law and create exceptions or additions. To the extent they differ from older common law rules they abrogate them, as they prevail over or common or judge-made law.

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technique for interpreting rules because it starts with each rule's underlying policy to determine its territorial scope. But under cover of interpreting competing rules, these schools use the choice-of-law method in most cases.[33] The analysis of interstate conflicts in the United States in terms of true conflicts of laws is thus confirmed.

3. Jurisdiction of a Legal Order and Temporal Scope of Legal Rules

Questions as to the temporal scope of legal rules may be easier to answer, but to do so, a distinction must be made depending on whether or not the rules (or legal systems) succeeding each other in time were produced by the same law-making body. If so, there is no real conflict of laws: there is no issue as to the applicable law because only one rule applies at any given time. The limits to a rule's temporal applicability thus preclude conflicts. But when a law enters into force at different times in different parts of a country, genuine inter-provincial conflicts of laws may arise. When rules are produced by different law-making bodies, a situation similar to a *conflit mobile* arises. This is typically the case for conflicts due to annexation, which are difficult to qualify because, like *conflits mobiles*, they involve conflicts in both time and space. In any event, interference between rules of transitory law can never be precluded when resolving inter-local conflicts. In Germany for example, the internal conflicts that persisted in the area of inheritance after reunification have been resolved by drawing an analogy to the provisions of transitory law in the law introducing the Civil Code.[34]

The analysis of the theoretical premises about internal conflicts of law leads to a simple conclusion: all these conflicts constitute specific applications of the conflict of laws as understood by international law scholars. They do not involve competition between rules of which the scope (substantive, territorial, or temporal) is limited to a particular territory, but legal systems – territorial or personal – regarding which a decision must be made as to their jurisdiction. The similar nature of all internal conflicts of laws calls for taking a fresh look at how such conflicts are categorised.

B. The Categories of Internal Conflicts of Laws

Two main categories have generally been suggested: one distinguishes between inter-local and inter-personal conflicts (1); the other subdivides inter-local conflicts into inter-federal and inter-regional conflicts (2). To understand the complexity of internal conflicts, these typologies should be refined.

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[33] For a convincing demonstration, see H. MUIR WATT, *La fonction de la règle de conflit de lois*, doctoral dissertation directed by D. HOLLEAUX, University of Paris II – Panthéon-Assas, 1985.

[34] On inter-German conflicts since reunification, see Cl.H. HARTMANN, Innerdeutsches Kollisionsrecht für Altfälle und Vertrauensschutz, *RabelsZ* 1997, p. 454-509, and the abundant bibliography he cites, p. 454-456.

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1. Inter-Local and Inter-Personal Conflicts

Inter-local conflicts are usually distinguished from inter-personal conflicts on the basis of whether the conflict stems from a territorial or a personal factor. This distinction must be qualified. While it does, of course, reflect reality, it does so only partially. It is true that, like international conflicts of laws, inter-local conflicts stem from the existence of a given territory that has its own legislation in force. In fact, historically speaking, private international law was originally an inter-local law. Moreover, the similar treatment of inter-local and international conflicts in contemporary Anglo-American legal systems seems natural. It is also true that inter-personal conflicts of laws arise from linking an individual to a human community defined according to a personal factor, namely, as noted in the introduction, ethnicity, "race", or religion.

But, with regard to the latter type of conflicts, positive law is of such complexity that "secular" States cannot be purely and simply distinguished from "religious" States. The former, in which religion should not, in theory, constitute a connecting factor, frequently take one's religion into account. In France, this occurs indirectly: religion may be considered a fact in the context of applying French law.[35] In Cameroon and Senegal, the situation is harder to grasp due to these countries' pasts and religion's deep roots among the people. Cameroon has evidenced its clear desire to take individual beliefs into account by maintaining some of the traditional courts inherited from the colonial period and continuing to apply different rules in the area of marriage to Muslims and non-Muslims. Officially, however, inter-faith conflicts do not exist: the Supreme Court of Cameroon recognises only inter-custom conflicts. In other words, religion determines applicable law only to the extent that it is incorporated into a custom.[36] In Senegal, however, inter-personal conflicts are indeed a reality, at least in the area of inheritance. To reconcile them with the principle of the separation of church and State, individuals are allowed to break the tie established by the Family Code between the Muslim religion and the application of an essentially Muslim law.[37]

Conversely, in religious States, inter-personal conflicts are not systematic even though they are frequent. In States where there is no non-Muslim religious minority, such as Algeria and Saudi Arabia, Islam's exclusivity, which may be enhanced by a unified national law, keeps inter-personal conflicts from arising, and in the vast majority of the other Arab-Muslim States, such as Egypt, Jordan, Morocco, Palestine and Syria, inter-faith conflicts do not cause problems. And in Lebanon, which is typically considered a "multi-community State," the seventeen religious communities are treated equally.

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[35] See Cass. 2[d] civ., 28 Feb. 2013, *Derhy* v. *Azuelos* [unpublished]: petition No 12-18856, dismissing a claim for review of a decision by the Court of Appeal, which, based on French rules of abuse of law, ordered a husband to compensate his ex-wife because he had refused to give her a letter of repudiation (*gueth*), in accordance with Hebrew law.

[36] On the situation in Cameroon, see B. BANAMBA, *Conflits de droits et de lois dans le système juridique camerounais (Droit des personnes et de la famille)*, doctoral dissertation directed by Y. LOUSSOUARN, University of Paris II – Panthéon-Assas, 1993.

[37] For an analysis of Senegalese inheritance law, see A. SOW SIDIBE, *Le pluralisme juridique en Afrique (L'exemple du droit successoral sénégalais)*, Paris 1991.

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Worse, evaluating inter-personal conflicts of laws negates the territorial factor, thus opening the evaluation up to criticism. In fact, the distinction between inter-local and inter-personal conflicts ignores the territorial aspect of both the existence and content of personal laws. Inter-personal conflicts of laws are necessarily linked to a territory, whether the territory changes status and inter-personal conflicts are denied legal existence or, on the contrary, accepted as a legal fact. The French overseas territories provide a particularly salient example in this regard. According to Article 75 of the French Constitution, "citizens of the Republic" may claim the benefit of their personal status only if they are natives of a French territory where the existence of such a status is officially accepted. Today that means only Mayotte, New Caledonia, and Wallis and Futuna. But for how long?

Algeria's history shows that in a French territory where a particular status is recognised, acceding to independence confers a "foreignness" on this status that theoretically precludes it from being maintained in France by those who chose to keep French nationality.[38] The same would no doubt be true for the Kanak status if New Caledonia were to accede to independence tomorrow. At the same time, modifying the status of a French territory is likely to throw the existence of the various personal statuses recognized in that territory into doubt. It therefore seems to me that Mayotte's becoming a department in March 2011 tolled the bell for personal status there, and the government has in fact already taken steps in this direction.[39] As a corollary, personal status does not exist legally outside the territories affected by Article 75 of the Constitution. There is, therefore, no personal status in French Polynesia, despite the existence of several strong customs, particularly in the area of adoption. Similarly, the communities in French Guiana, which are *de facto* governed by their customary laws, are not protected under the French Constitution because these laws have not been officially recognised. Such recognition of the specific situation of these communities and the personal status of their members requires a legal text and, most likely, statutory amendments.

Moreover, not only is the existence of inter-personal laws linked to a territory, the content is as well. The influence of territory is felt in the common law[40] civil status as well as in the area of personal status in the strict sense. The content of French civil status varies depending on territory. This variation was originally based on the principle of legislative particularity, but the recent transfer of civil law to the New Caledonian authorities has given it a new foundation. Differences in the contents of personal status, strictly speaking, may be explained by the fact that each society interprets and modulates the specific rights it recognises according to

[38] This is not the only reason Algerian colonial law is useful for understanding conflicts of laws: see V. PARISOT, L'apport du droit colonial algérien à la science des conflits de lois, in J.-Ph. BRAS (ed.), *Faire l'histoire du droit colonial, cinquante ans après l'indépendance de l'Algérie*, Paris [forthcoming, 2014].

[39] Ordinance No 2010-590 of 3 June 2010 concerning civil status under the local law applicable in Mayotte and the courts competent to hear claims related thereto: *JORF* No 127, 4 June 2010, p. 10 256-10 259 [Text No 59].

[40] Translator's Note: French "common law" (*droit commun*) is "common" in the sense that it comprises the positive law that applies to all situations not governed by specific rules.

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its own aspirations. Within the meaning of Article 75 of the French Constitution, "local-law" status must therefore be understood to mean status that is governed by local rules established in relation to conceptions specific to a given territory. This observation applies to all inter-personal conflicts of laws. Personal rights, even essentially religious ones, do not have a universal definition: they are always understood through the prism of a territory. We must therefore admit that there are as many different bodies of Muslim law as there are Muslim States and as many different bodies of customary law as there are territories where such law evolves. In any event, the application of common-law civil status, local-law civil status, and, more broadly, religious laws, is not limited to a particular State's geographical boundaries. Individuals take their personal status with them wherever they go, which further weakens the distinction between strictly territorial conflicts and personal conflicts.

2. *Inter-Federal and Inter-Regional Conflicts*

The further distinction between inter-federal and inter-regional conflicts suffers from two main weaknesses. Firstly, this distinction is limited to territorial conflicts and based on the structure of the State in which these conflicts arise or, more precisely, on whether or not there is legislative autonomy:[41] inter-federal conflicts arise in federal States such as the United States, whereas inter-provincial or inter-regional conflicts are generally experienced in politically unified States such as France and Spain. This factor is obviously too formalistic. Emphasising the unity of the legislative body, strictly speaking, makes it difficult to understand legal pluralism as it results from a plurality of normative sources, such as in the relationship between Great Britain and Scotland both before and after 1997.[42] Customary law and/or judge-made law should be taken into account just as legislation is. Secondly, the suggested factor should not lead to excluding, from the category of "real" conflicts of laws, internal conflicts that arise in federal States that have adopted centralised regulations, such as in the former Soviet Union and, perhaps, Mexico since the reforms conducted in 2000.

The overly formalistic distinction between inter-federal and inter-regional conflicts also seems to me to be outdated due to the emergence of an intermediate category of States that public-law specialists call "autonomic" States (*États* "autonomiques"). Such States, such as Spain and, I believe, France in its relationship with New Caledonia, resist all attempts to be categorised as unitary or federal States. While the political and legislative autonomy of their territorial subdivisions

[41] This categorisation was first suggested by E. ZITELMANN, *Internationales Privatrecht*, vol. 1, Leipzig 1897, esp. No 1, p. 395-397. It has since been adopted by a large number of authors. See, *e.g.*, P. MAYER/ V. HEUZÉ (note 25), No 92, esp. p. 79, for the French doctrine, and E. EILERS, *Systeme des interlokalen Privatrechts – Rechtsvergleichung und Versuch einer Typisierung*, doctoral dissertation in law, Göttingen 1954, esp. p. 5-6, for the German doctrine.

[42] Restoring the Scottish Parliament in 1997 does not seem to have eliminated the unitary nature of Great Britain's legislative power since the Scottish Parliament functions on the basis of attributed legislative powers.

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clearly separates them from unitary States, these elements alone are insufficient to place them in the category of federal States: the autonomous regions do not have a genuine power of self-organisation, they do not participate in the central government, and there is only one judicial system for the entire country. It therefore seems risky to base a typology of inter-local conflicts of law solely on the structure – unitary or federal – of the State in which they arise.

Various arrangements may be suggested to remedy the two types of problems encountered by the above categorisation. Firstly, the overly formalistic nature of the distinction may be overcome by taking into account the diversity of normative sources that may cause internal conflicts of laws. Anglo-Scottish conflicts may thus be included in the category of inter-federal conflicts of laws despite the unitary nature of the State. Even better, such an approach would incorporate inter-personal conflicts into this category. The concept of "personal federalism", which requires broadening the definition of federalism by detaching it from the principle of territoriality on which it is usually based, would make it possible to take into account the normative autonomy that a community may have. If both the existence and the contents of the norms that such a community produces are legally recognised and autonomous, an inter-federal conflict of laws might arise.

Clearly, the adaptation I am suggesting is no more able than the classic distinction to make room for unofficial inter-personal conflicts of laws, such as those that arise in French Polynesia or Guiana. Characterised by the *de facto* coexistence of a State legal system – the only recognised system – and customary laws that are not legally recognised, such conflicts are not currently considered to be internal conflicts of laws in the strict sense. In fact, there is no real choice to be made between the legal systems involved in the conflict because only State law is applied. However, the criterion of autonomy I am suggesting as a replacement for the nature – unitary or federal – of the "plurilegislative" State does make it possible to qualify Lebanese intercommunity conflicts as "inter-federal conflicts" of laws, even though they involve inter-personal conflicts arising in a unitary, centralised State. In fact, close scrutiny of the jurisdiction conferred on the religious communities reveals that these communities enjoy real legislative and judicial autonomy.

Secondly, drawing on the language used with regard to conflicts arising in unitary States and demonstrations made in the context of conflicts arising in federal States, the (outdated) distinction between inter-federal and inter-regional conflicts can be updated by including conflicts arising within autonomic States. It must first be determined whether the competing norms were produced by a competent authority (setting aside norms produced *ultra vires* would eliminate conflicts immediately). If so, or if one of the norms was produced by an authority that exceeded its jurisdiction but the norm can no longer be invalidated, there is a federal-type internal conflict of laws. Like national laws, norms produced by local authorities are potentially universal in scope: the traditional doctrine, which was developed with regard to inter-regional conflicts of laws and limits the effects of "local" law to the territory of the authority that produced it,[43] must therefore be

[43] On New Caledonia, see *e.g.*, Cl. MARLIAC-NEGRIER, Du particularisme législatif. À propos de la nouvelle catégorie juridique des lois du pays en Nouvelle-Calédonie, *Revue juridique et politique des États francophones* 2003, p. 173-211, esp. p. 185 and p. 197.

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rejected. I believe great progress can be made by taking the analogy between conflicts in autonomic States and those that arise in federal States further, as the local authorities are authorised to set down their own choice-of-law rules. In New Caledonia for example, the local law of 13 February 2008 providing the territory with a new Labour Code stipulates that when an employee whose employer is established on the mainland is temporarily deployed to New Caledonia, her employment contract is subject to the Labour Code of the host country, New Caledonia. This rule is the exact opposite of the one set out in Article 8(2) of the European Regulation of 17 June 2008 on the law applicable to contractual obligations, which the mainland courts must apply.

The above analysis of the features of internal conflicts of law reveals that all such conflicts have a similar nature and are, in the end, merely a particular subset of international conflicts of laws. This comprehensive conception of internal conflicts of laws makes it possible to suggest ways to resolve them. As I show below, there is no impediment to resolving internal conflicts using the methods well known to internationalists.

II. Resolving Internal Conflicts of Laws

The similar nature of these conflicts is reflected in how they are resolved, whether the conflict is purely internal or involves a foreign element. For the first type of conflict, I suggest ways in which the "plurilegislative" State directly involved may resolve the conflict; for the second I discuss mainly, but not exclusively, solutions that may be implemented by a foreign court.

A. Resolving Purely Internal Conflicts of Laws

Traditional scholarship in this area generally insists on the particularities of the methods for resolving internal conflicts in general, and inter-personal conflicts in particular. I have shown, however, that these particularities can in fact be simplified: they are not evidence that different conflicts of laws have different natures. A new key for understanding conflicts of laws lies in the relationship of equality or inequality established between the systems in conflict. When the laws involved are unequal, particular methods are used to ensure the primacy of one law over the others despite the fact that there are usually no real technical obstacles to using the choice-of-law method (2.). Conversely, when the laws in conflict are equal, the choice-of-law method is favoured. The law applicable to the situation may be determined by using a "connecting factor" that, without favouring the laws involved, takes the sociological context of the situation into account (3.). Before elaborating on how to resolve internal conflicts using this new key, I must say a few words about the effect of a judicial system's structure on resolving such conflicts (1.).

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1. *The Effect of a Judicial System's Structure on Resolving Internal Conflicts*

We are traditionally taught that courts do not necessarily apply their own law when resolving conflicts; this cornerstone of modern private international law is also the rule in territorial internal conflicts. Conversely, we are traditionally taught that due to the exclusivity of personal systems, courts must systematically and necessarily apply their own law in inter-faith conflicts. But, the nature (personal) of the conflict is not the only reason for this. In fact, the main instances of such parallelism between the law of the forum and the applicable law are also encountered in private international law. The first such instance is the basis for the court's jurisdiction over the applicable law due to the technical nature of the matter to be resolved. The second derives the applicable law from the court's jurisdiction as indicated in a forum-selection clause. In addition, when personal conflicts of laws are being resolved, there is always a possibility that the court will apply another law instead of its own. This is the case in religious States such as Egypt and Morocco, as well as several Sub-Saharan States, which have eliminated their religious or customary courts but have not necessarily unified their law. It also exists in States that have secularised their law, as Lebanon has with respect to the non-Muslim paternity regime, but which have not put an end to judicial pluralism.

2. *Unequal Internal Laws and Application of a Primacy Rule*

When competing internal laws are unequal (as established by the central government), private international law's methods for resolving conflicts, and more particularly the method involving choice-of-law rules, are set aside in favour of a primacy rule. Four main techniques are used so that the law considered to be dominant will prevail.

One of these techniques is very widely used in territories formerly under French rule, such as certain African States that have continued to use this technique after independence, as well as certain overseas territories that are part of France today. This technique is to systematically (or almost systematically) apply the law of the former colonial power in conflicts involving mixed legal relationships. For example, the primacy of French civil status has played a very large role in the area of personal status. In particular, it not only imposes the exclusive jurisdiction of French law on the formation of a mixed marriage (that is, a marriage in which one spouse has French civil status and the other has local-law personal status), but also on the effects of that marriage. But it is entirely possible to apply private international law rules in such a case. For example, former article 170 of the Civil Code[44] could be applied by analogy to recognise the validity of mixed marriages performed in the former colonies in accordance with one of the local laws in force.

[44] This text, which has since become Civil Code Article 171-1, provides: "marriages entered into in a foreign country between French citizens, or between a French citizen and a foreigner, are valid if they are entered into in the usual way in the country where they take place and provided the French citizen(s) did not violate the provisions of Chapter 1 of this title."

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In fact, the solutions found in some cases reflect a classical conflicts approach: as under private international law, the substantive requirements for marriage are held to be governed by the spouses' respective personal laws. In addition, problems raised by prohibiting polygamy have been solved in a similar manner under both the law of internal conflicts and private international law. It therefore seems to me that the application of French civil status – or modern law – is not based on any real justification other than the desire to ensure the pre-eminence of one law over the others. To a certain extent, the technique involved here can be compared to the privilege of religion in the Muslim States in the Maghreb and Middle East, which consists in applying Muslim law in every relationship involving either one Muslim or two non-Muslims of different rites, whether the conflict is internal or international.[45]

The desire to ensure the broadest application possible of a dominant law is also apparent in the role given to the parties' wishes. For example, people living in French colonies were allowed, under certain conditions, to waive their local or community (personal) status definitively and irrevocably to become French citizens subject to French civil law and policies. This possibility became an unconditional right in 1946, when French citizenship was generalized. However, citizens have always been prohibited from waiving their common-law civil status in exchange for a personal status. Here again, no technical difficulty required such a prohibition; it stemmed directly from the supposed inequality of the statuses, and was only recently abandoned with regard to New Caledonia.[46] Moreover, the resolution of the resulting *conflit mobile* follows the resolution of conflicts with foreign laws over time. Waiver of personal status is sometimes compared to religious conversion. In France, which is a secular State, converting to Islam has no effect on personal status, whereas abjuring Islam might alter the convert's personal status. The different results are not contradictory: they both give precedence to French civil status over Muslim status. In religious States, converting to Islam – the only conceivable option – has categorical consequences: it retroactively modifies the law applicable to the convert in both the internal and the international order.

In addition to the possibility of waiving their personal status, individuals could make their desires in this regard known by exercising a legislative option in a special legal operation. The one-way nature of the option – that is, from personal law to dominant law – together with the very broad interpretation given the

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[45] For a comparison in this light between secular and religious systems, see V. PARISOT, La prise en compte de la religion par le droit international privé (interne et externe), in *Des ordres et du Droit* [forthcoming proceedings of a study day organized by the Centre de Théorie et d'Analyse du Droit, Université de Paris Ouest-Nanterre and held on 14 November 2013].

[46] See, in particular, Cass. 1st civ., 26 June 2013, *Proc. Rép.* v. *Karl Poadey*: *Bull. civ.* 2013, I, No 139, p. 138-139; *La Semaine juridique*, Ed. G, 2013, 986, note É. CORNUT, L'accession au statut civil coutumier kanak par voie de possession d'état coutumier; *Dalloz* 2013, p. 2092-2095, note I. DAURIAC, La différenciation des personnes par l'état civil: expérience calédonienne. The court interpreted Article 15 of the organic law of 19 March 1999 as establishing a cause of action to enable anyone who has common-law civil status to acquire customary status when the latter reflects their lifestyle.

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requirements to exercise it, similarly contributes to increasing the cases in which the dominant law applies. The case law developed during the colonial era, as well as that following it since independence, indicates that the courts did and continue to frequently hold that the appearance of the spouses before the French officer of civil status constitutes submission of both the personal and property-related effects of the marriage to French law. Arguably, the scope of the option was sometimes extended beyond the act for which it was exercised.

The exception for public order is another technique for enforcing the dominant law over local or personal laws. Classical theory contrasts federal States, which seem to allow the exception, with unitary States, in which it is necessarily precluded. But such a stark division does not take positive law into account. On the one hand, federal States do not necessarily bring public order into the equation: in the United States, courts invoke the Full Faith and Credit Clause[47] to allow the exception, whereas in Australia they invoke the Clause to preclude it. In fact, assuming the exception is recognised, this supposed particularity of federal States should be extended to pluri-community or religious States, such as Egypt, that follow personal federalist thinking. In fact, Egyptian lawmakers have expressly instituted rules of public order that do not cover exactly the same ground as the principles of Islamic law.

On the other hand, and above all, in unitary States, neither the national laws at issue nor the constitutional requirement to protect personal status justifies a general exclusion based on public order. Furthermore, numerous judicial decisions allowed the exception in French colonial territories. Ultimately, the classical theory must be overcome by accepting a plurality of concepts of public order within a single sovereign territory.[48] Public order may, as in private international law, provide a framework for local or personal entities to exercise whatever power they may have to modify the contents of the competing norms, or even set aside or abrogate them. Public order may also be invoked for more constructive purposes, such as to eliminate, from the central State's legal ranking, the local or personal entity's norms that do not seem consistent with the fundamental principles of such a State, or, as in Cameroon after independence, to move the norms produced by such entities in a direction that complies with the values protected by the dominant law. I believe that these last two meanings of public order – public order that abrogates, and public order that assimilates or develops – fit within the general theory of private international law.

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[47] This clause applies mainly, and undeniably, to the interstate recognition of judgments: the courts of each constituent State must give "full faith and credit" to, *inter alia*, all judicial decisions rendered by the courts of the other States. The issue of whether, and to what extent, the clause also requires courts to recognise and apply the laws of other States is less clear.

[48] On plurality of concepts of public order, see, in particular H. SOLUS (note 19), esp. Nos 270-394, p. 302-419; M. ELIESCO (note 4), esp. Chap. XI, p. 298-371; P. LAMPUE, comment on Trib. civ. Seine, 26 March 1956, *Hamache*, *Rev. crit. dr. int. pr.* 1958, esp. Nos 4-5, p. 337-338; D. BODEN, *L'ordre public: limite et condition de la tolérance. Recherches sur le pluralisme juridique*, doctoral dissertation directed by H. MUIR WATT, University of Paris 1 – Panthéon-Sorbonne, 2002, esp. note 326, p. 159-160.

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The technique of subsidiary application of the dominant law due to the silence or inadequacy of the usually applicable law is the last manifestation of the inequality of competing systems. This technique, which was used very frequently during the colonial period and is still used today in African States, consists in applying French (or modern) law instead of customary law whenever the latter does not explicitly resolve the issue raised. The apparent gap is filled by turning to an element external to the indigenous law instead of by interpreting that law's fundamental principles. The technique of subsidiary application is also well known in religious States, including in countries that have modern codes, such as Morocco: Muslim law governs all issues that are not covered by written law.

Neither the nature – territorial or personal – of the internal conflict itself nor, more broadly, any particularity whatsoever of internal conflicts as opposed to international conflicts, can explain the use of any of these four methods. Only the relationship of inequality between the systems in conflict can explain these solutions. When the central authority considers the systems in conflict to be equal, however, the traditional choice-of-law method regains favour.

3. *Equality of Internal Laws and Use of Traditional Choice-of-Law Rules*

Use of the choice-of-law method, whether to resolve inter-local or inter-personal conflicts of laws, can hardly be cause for complaint. In the former type of conflict, positive law indicates that the principles of private international law have often been extended, with a few changes, to the internal order. This may be verified when States openly adopt a single body of rules for both internal and international conflicts, as is the case in the United States and Germany. Similarly, the rules set out in international conventions and European Union regulations may (such a solution can never be imposed) govern the relationships among a country's internal legal systems. This is also true when States provide two distinct bodies of rules to govern internal and international conflicts of laws, as was the case in the former Soviet Union and Poland, and as is still the case in Alsace-Moselle (the specific rules for conflicts between inter-provincial laws set out in the law of 24 July 1921 do not in any way render the principles of private international law irrelevant in this area). With regard to inter-personal conflicts of laws, the decrees on organising the judicial system in the francophone colonial territories institute a choice-of-law approach drawn directly from private international law to resolve conflicts of customary law. At independence, African communities kept these rules in force, with a few modifications based much more on changes within these communities rather than on the nature of the conflicts to be resolved.

Moreover, genuine choice-of-law rules have been proven to be used to resolve internal conflicts. Developing a rule for internal conflicts is not really any different from developing a rule for international conflicts. First of all, with regard to the legal categories, scholars generally assert that the specificity of a rule for internal conflicts lies in the fact that personal status is construed much more broadly when resolving internal conflicts of laws than when resolving international conflicts. Even so, personal status seems to raise border issues similar to those raised in international issues. For example, when an individuals' legal status, and

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more particularly his marital status, is included in the category of "personal status", the rules relating to marriage must be clearly defined. In this regard, the obligation to return the dowry or wedding trousseau creates a problem that is both classic and common to the laws of both internal and international conflicts of laws. In addition, the precise content of the category of personal status becomes particularly difficult to determine when the areas it covers are not clearly set out in a text. In New Caledonia, personal status, which now governs all civil matters – including those aspects not expressly governed by customary status[49] – may well include customary criminal law in the future.[50]

Furthermore, a broad definition of personal status does not systematically and necessarily constitute a criterion for distinguishing internal conflicts from international conflicts. On the one hand, with regard to internal conflicts, the personal status category is not necessarily extensive. In Senegal, the "reserved civil status" (*statut civil réservé*) resulting from the decree of 20 May 1857 was interpreted very restrictively: it did not include setting up guardianships for minors or a cause of action for restitution of a dowry. In colonial Algeria, the personal status of Jews was limited, as it was in French private international law, to their civil status and legal capacity in the strict sense. On the other hand, the vast majority of States define personal status very broadly in their private international law. It is therefore impossible to believe that this expansive conception gives internal conflicts of laws "specificity"; it appears, rather, to be the simple extension, into the international order, of what has already been recognised in the internal order.

With regard to the connecting factors used to resolve conflicts of laws, I have concluded that, contrary to what is commonly asserted, there are real similarities between the laws of internal and international conflicts. The territorial factor does not automatically make inter-local conflicts similar to international conflicts because specific solutions are sometimes found for the former. In Canada for example, determining the law applicable to inter-provincial torts is governed by the Supreme Court's constitutionalisation of inter-provincial legal rules. The *lex loci delicti* must therefore be applied without exception, whereas exceptions are allowed in cases of international conflicts of laws.[51] The solution to inter-provincial conflicts provided by the French law of 1921 cited above also differs from the international conflicts rule: the inheritance of both movable and real property are subject to the law of the decedent.

However, the territorial factor does not necessarily distinguish territorial conflicts (internal or international) from inter-personal conflicts of laws because it

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[49] *Cour de cassation* advisory opinion No 005 0011, 16 Dec. 2005: *Revue trimestrielle de droit civil* 2006, p. 516-521, comment P. DEUMIER, La coutume kanake, le pluralisme des sources et le pluralisme des ordres juridiques; *RJPENC* 2006, No 7, Jur. p. 42-49, note L. SERMET, Statut civil coutumier kanak: entre politique jurisprudentielle et incertitude juridique; *Droit et Cultures* 2006, p. 229-232, note P. FREZET, Justice française en Nouvelle-Calédonie: la fin du rêve tropical.

[50] For a global approach to this issue, see V. PARISOT, Justice pénale républicaine et droit coutumier kanak, in S. PESSINA DASSONVILLE (ed.), *Le statut des peuples autochtones. À la croisée des savoirs*, Paris 2012, p. 183-208.

[51] See J.-G. CASTEL, Back to the future! Is the "new" rigid choice of law rule for interprovincial torts constitutionally mandated?, *Osgoode Hall Law Journal* 1995, p. 35-77.

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may be used to resolve all internal conflicts of any kind. In the area of inheritance, for example, French colonial courts relied explicitly on the rules of private international law to apply the law of the *situs* to buildings in disputes involving a conflict between Muslim and Kabyle law, and several recent decisions by the *Cour de cassation* follow this line of reasoning. The primary residence was thus used as the connecting factor to determine the marital regime applicable to a French couple who were married before the Cadi in Algeria before independence and thus had local-law status,[52] and domicile was used as the connecting factor to give effect to a divorce pronounced by the Muslim judge in Mayotte.[53] In short, when the territorial connecting factor is set aside in favour of a personal connecting factor, it is not necessarily because of the nature of the conflict. In New Caledonia, for example, the organic law of 19 March 1999 attributes jurisdiction over cases involving real property to the personal law of the landowner rather than to the law of the *situs.* The primary reason for this rule is the Kanaks' personal ties to the land: in this territory, land is not an alienable "thing". Like the human body and human beings, it cannot be traded lawfully and is therefore an integral part of a Kanaks' identity. Clearly then, the territorial connecting factor does not make it possible to systematically liken international conflicts to inter-local conflicts or to distinguish inter-personal conflicts of laws from either of these two types of conflicts.

With regard to the personal connecting factor, it is often claimed that nationality, while useful for resolving international conflicts of laws, would on the contrary be of no use in inter-local or inter-personal conflicts of laws because it is, by definition, the same for all citizens of a State's territorial units and human or religious communities. It seems to me, however, that this does not constitute a particularity of internal conflicts relative to international conflicts. There are two reasons for this. Firstly, in the domestic order, the factors connecting individuals to a status or a region are in fact fairly close to the factor of nationality, which links individuals to a State. Of course, a certain number of pluri-legislative States use a different connecting factor within their domestic order than they do in the international order: Germany, Poland, Romania, and the former Yugoslavia use a person's habitual residence or domicile instead of nationality. But I do not believe this difference reflects any particularity of internal conflicts as compared to international conflicts. Both factors, domicile and nationality, refer to an individual's personal law. In addition, the choice between these factors is usually governed by the same legislative policy considerations in both types of conflicts. In fact, other States employ a similar, personal-type connecting factor in both internal and international conflicts of laws: in some cases nationality serves to extend the connection to an internal ethnic or religious community into the international order; in others the connection to a community or a status extends nationality into the domestic order. The latter situation may be illustrated by the Spanish concept of "civil neighbourhood" (*vecindad civil*), called a "sub-nationality" or "little nationality within na-

[52] Cass. 1st civ., 31 Jan. 2006: *Bull. civ.* 2006, I, No 41, p. 41; *Clunet* 2006, p. 970-985, note I. BARRIÈRE BROUSSE (2d esp.). This solution was confirmed again by Cass. 1st civ., 26 October 2011 [unpublished]: petition No 10-23298.

[53] Cass. 1st civ., 5 Apr. 2005, *Mme. Y.* v. *Proc. Rép.*: *Bull. civ.* 2005, I, No 170, p. 144.

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tionality"[54], and the notion of "community origin" in Alsace-Moselle. Territorial and personal factors may even no doubt be combined by taking into account the concept of "regional origin". Secondly, when a court uses a rule that implements a personal factor, it is following the same reasoning as when using the choice-of-law method in private international law. In this regard, the issue of the law applicable to a mixed marriage in Indonesia provides an excellent example of the similar treatment of conflicts of laws whether they are inter-local, inter-faith, or international.

The similarities between the law of internal conflicts and the law of international conflicts are even clearer with respect to the role given to autonomy. The first way for parties to express their free will is to exercise a legislative option. Notably, pluri-legislative States that have adopted a dualist system for determining the law applicable to international contracts have generally opted for the same method for domestic contracts. But the will of the parties also plays a role in areas other than contracts, such as in domestic and international family relationships. In Spain it plays a subsidiary role, with private international law having been extended to govern domestic family relationships, whereas in Lebanon it plays the primary role and inter-community law seems to have been extended into the area of international laws. The parties may also express their will directly by modifying their connection to a legal order, whether the legal order is territorial or personal and regardless of the kind of connection. But changing an individual's connection to a legal order makes it necessary to resolve the resulting *conflit mobile* and raises the issue of the exception for fraud.

Treating all internal conflicts of law alike is not limited to resolving such conflicts in disputes that are purely domestic: it is also possible when the dispute involves a foreign element.

B. Resolving Internal Conflicts in Disputes Involving a Foreign Element

To analyse solutions to internal conflicts in disputes involving a foreign element, two situations must be distinguished. Where the internal conflict results from *renvoi*, the international choice-of-law rule in a pluri-legislative State designates a foreign law as the applicable law, and that law refers back to the law of the forum (1). More frequently, the international choice-of-law rule designates the law of a pluri-legislative State as the applicable law (2).

[54] The latter two expressions are used by B. ANCEL, Review of P. Dominguez Lozano, *Las circunstancias personales determinantes de la vinculacion con el derecho local. Estudio sobre el derecho local altomedieval y el derecho local de Aragon, Navarra y Cataluna (siglos IX-XV)*, Ediciones de la Universidad Autonoma de Madrid, 1988, *Rev. crit. dr. int. pr.* 1990, p. 238-241, esp. p. 240.

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1. Resolution of Internal Conflicts Resulting from **renvoi**

The hypothesis of an internal conflict resulting from *renvoi* is perfectly illustrated by a famous case decided by a Spanish court in 1900.[55] The dispute involves the estate of a Scotsman who had lived in Barcelona for several years and died there. Spanish private international law designated Scottish law as the decedent's national law at the time of his death, whereas Scottish law referred back to the law of the decedent's domicile, Spain. The Spanish court therefore had to choose the applicable Spanish law. Did it have to accept the choice made by the foreign choice-of-law rule, or could it have resolved the internal conflict itself irrespective of the suggestion from the foreign system?

Such a situation rarely arises in practice because *renvoi* is practically non-existent in pluri-legislative States. And yet none of the doctrinal objections to *renvoi* in such States stands up to analysis. Firstly, the lack of forum law is not a technical impediment to *renvoi* when these States recognise the existence of a common law. Secondly, the claim that a lack of "legal cousins"[56] constitutes a sociological obstacle to *renvoi*, because *renvoi* sometimes imposes an Islamic law on citizens of a State having a profoundly different tradition, disregards the fact that some pluralist States prohibit *renvoi* even though the laws involved belong to the same family. Thirdly, the personalist tradition of so-called "personal status" countries should not preclude all *renvoi* since personal status is governed by State law. In any event, the argument based on this tradition is of no help when the pluri-legislation is territorial.

These observations lead to the conclusion that pluralist States need not preclude *renvoi*. It is foreseeable that internal conflicts arising from *renvoi* will be more frequent in the future than they are today. I believe the solution to internal conflicts may in such cases be found in the way courts ordinarily handle first degree *renvoi*. If they rely on the concepts specific to the foreign choice-of-law rule taken into account in the context of *renvoi*, they should consider themselves bound by the solution to the internal conflict proposed by the foreign law. If not, then they may freely resolve internal conflicts arising within their territory by adopting principles that may differ from those that would have applied to resolve the conflict directly. Thus, in the example above, nothing should stand in the way of the Spanish court's application of the law of the decedent's domicile to the estate of a Scotsman who lived and died in Barcelona, even though the Spanish internal conflict rules designate the law of the decedent's "civil neighbourhood".

The problems raised by internal conflicts that must be resolved by courts other than those of the pluri-legislative State concerned are something else entirely.

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[55] See J. de D. TRIAS I GIRO, De la théorie du renvoi devant les tribunaux espagnols, *Clunet* 1901, p. 905-911.

[56] The concept of "legal cousins" (*cousinage juridique*) was developed by J.-M. VERDIER, Décolonisation et développement en droit international privé (Essai d'une systématisation à partir de l'expérience française), *Clunet* 1962, p. 904-972, esp. p. 952. It has since been used by, in particular, P. BOUREL, Deuxième partie – Titre II – Chapitre XVII: Les conflits de droits, in P.-Fr. GONIDEC/ M.A. GLELE (eds), *Encyclopédie juridique de l'Afrique*, vol. 1: *L'État et le droit*, Abidjan/ Dakar/ Lomé 1982, p. 423-452, esp. p. 441.

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2. *Resolution of Internal Conflicts by Foreign Courts*

When the forum's international choice-of-law rule designates the law of a foreign pluri-legislative system (for example, a French court is asked to determine which U.S. law governs an American minor's capacity to marry), resolving the internal conflict requires taking a position on the role of the forum's choice-of-law rule. Some authors consider that the private international law rule serves only to designate a "legal order" and plays no further role once it has designated a foreign State (the United States as a whole). It is then up to the court to apply that State's choice-of-law rule to choose the substantive rule applicable to the dispute from among the various systems of private law in force in the designated pluri-legislative legal order. Others believe that the choice-of-law rule itself points to the "rule" applicable to the dispute, selecting the one that governs the capacity of American minors to marry from among the various U.S. laws.

The vast majority of authors adhere to the first conception of the choice-of-law rules: such rules merely indicate the foreign system of internal conflicts to be consulted.[57] In fact, this conception is enshrined in most national and European legislation and international conventions. But although this law generally suggests that courts systematically consult foreign internal conflict rules,[58] the most wide-spread doctrine suggests that they do so only selectively. One school of thought bases referral to the foreign system on elements related to the forum's choice-of-law rule, and more specifically on the nature of the connecting factor it uses,[59] or on the policies it seeks to enforce.[60] The choice-of-law rule of the court deciding the case may therefore directly designate the applicable law when the connecting factor refers to a precise geographical location, such as the location of property or the place where a legal instrument was concluded. But when their own choice-of-law rule uses nationality as the connecting factor or designates a State in which the pluri-legislation is personal, courts must consult the foreign system. Regulation EU 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

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[57] See, *e.g.*, R. DE NOVA, Historical and comparative introduction to conflict of laws, *Recueil des Cours* vol. 118 (1966), p. 435-621, esp. note 92, p. 544-545, suggesting systematic referral to the foreign internal-conflicts system regardless of the connecting factor of the forum's choice-of-law rule and the kind of internal conflict to be resolved.

[58] See, *e.g.*, Articles 36 and 37 of Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession**,** discussed by A. BONOMI, in A. BONOMI/ P. WAUTELET (eds), *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruxelles 2013, esp. p. 555-561.

[59] See, *e.g.*, O. KAHN-FREUND (note 26), esp. p. 443-444, basing the distinction on the territorial or personal nature of the connection employed by the forum's choice-of-law rule.

[60] See H. MUIR WATT (note 33), esp. Nos 407-408, p. 474-476.

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(Rome III)[61] illustrates this system. Another school takes the nature of the foreign internal conflict to be resolved directly into account. The idea is to consult the foreign rules governing internal conflicts of laws only when the conflict is not a genuine conflict of laws. Different authors present varying conceptions of "false conflicts", which raise an issue of interpreting the foreign substantive law or, more precisely, determining its scope. Some liken them to inter-personal conflicts of laws[62] while others analyse the issue more deeply, using the term "false conflict" only when a single legislator is responsible for the competing laws.[63] The major categories of internal conflicts of laws underlie this approach.

Without repeating the criticism of the distinction between true and false conflicts, I would suggest that this type of review of a foreign system's internal conflicts is hardly satisfactory. Firstly, there are two practical obstacles to such review: the method in fact assumes that a choice-of-law rule governing internal conflicts exists and makes it possible to identify the designated pluri-legislative system's applicable law. If not, the method's very foundation crumbles because the forum court must supplement its own international conflicts rule with either additional connecting factors or the rule of proximity, which provides for applying the law of the legal unit (territorial or personal) with which the dispute has the closest connection. This is not a mere hypothetical: neither in the United States nor in Canada are the choice-of-law rules the same in the various territorial entities.

In addition, assuming such an internal conflict rule did exist, referring to their law in this way would not always enable a foreign judge to determine the applicable law since the constituent units of the pluri-legislative State concerned may give the rule different interpretations. Moreover, designating a foreign internal conflicts system raises problems stemming from the internal conflict rule itself. It may be that the connecting factor manifests itself outside the legal order designated by the forum. Two famous cases illustrate this situation: *O'Keefe*,[64] which was the starting point for the clauses on internal conflicts in the Hague Conventions; and *Kenny*, which was decided by the French *Cour de cassation* in 2005 and involved the guardianship of a Canadian citizen domiciled in France.[65] Using an internal conflicts rule in this way amounts to giving it the role of an international conflicts rule, which is obviously debatable. The foreign system may then re-qualify the

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[61] For a thorough analysis of this regulation's provisions on internal conflicts, see V. PARISOT, in S. CORNELOUP (ed.), *Droit européen du divorce – European divorce law*, Paris 2013, p. 631-666.

[62] See R. AGO, Règles générales des conflits de lois, *Recueil des Cours* vol. 58 (1936); 2d ed., 1968, p. 243-469, esp. Nos 21-22, p. 368-378.

[63] See P. MAYER, Le phénomène de la coordination des ordres juridiques étatiques en droit privé – Cours général de droit international privé (2003), *Recueil des Cours* vol. 327 (2007), p. 9-377, esp. Nos 199-201, p. 214-217.

[64] In re *O'Keefe* [1940]: *Clunet* 1940-1945, p. 138-142; compare in particular with regard to this case R. DE NOVA, Il caso *in re O'Keefe* e la determinazione della *lex patriae* di un cittadino britannico domiciliato all'estero, in H.P. IPSEN (ed.), *Festschrift für Leo Raape zu seinem siebzigsten Geburtstag am 14. Juni 1948*, Hamburg 1948, p. 67-82.

[65] Cass. 1st civ., 21 Sep. 2005, *Kenny*: *Bull. civ.* 2005, I, No 336, p. 279; *Rev. crit. dr. int. pr.* 2006, p. 100-103, note H. MUIR WATT.

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conflict of laws as a conflict of jurisdiction, or even – as in Cameroon – subordinate resolution of the former to resolution of the latter. Referring to such a system leads to a dead end. For example, holding, as French courts did before the law of 11 July 1975 on divorce law reform, that the law applicable to the divorce of an American couple domiciled in France may be determined by examining the choice-of-law rules governing internal conflicts of laws in the U.S., distorts the U.S. system. In fact, this area of law does not contain rules governing conflicts *of laws* properly speaking: divorce raises issues of jurisdiction; once resolved, the court determined to have jurisdiction applies its own law.

Secondly, this method has no solid justification. On the one hand, one might be tempted to justify such referral by the need to comply with the organising principles of the foreign system designated by the forum's conflicts rule: since the pluri-legislative State has rules for resolving internal conflicts, this order should not be disturbed. But the intrusion of unilateralist thinking wishing to comply with the order established by the foreign lawmaker sometimes runs counter to the spirit underlying inter-personal systems by exporting their legislative particularities, which serve only to maintain the internal equilibrium of the relevant pluri-legislative State. This intrusion may even lead to illogical results. For example, a French court interpreted Moroccan Jewish custom, which provides that the personal status of Moroccan Jews living outside Morocco should be subject to the customs of their place of residence, to mean that it should apply Parisian Jewish custom to a Moroccan Jew living in Paris, even though that custom differs from Moroccan Jewish custom![66] Moreover, referring to foreign systems of internal conflicts without reservation can lead to disregarding the organising principles of the forum court's legal order by requiring a court in a secular State to defend a religious State's dominant religion. For example, suppose that an Egyptian Muslim husband and his French Catholic wife live in Egypt but petition a French court on the issue of the obligations of cohabitation and faithfulness during marriage. The French choice-of-law rule applicable to the effects of marriage designates the law of the shared home if the spouses do not have the same nationality. If the French judge decides to implement the Egyptian system's solution for resolving internal conflicts, it will have to apply Muslim law.

On the other hand, designating the foreign system, which commentators frequently call "domestic renvoi", may be legitimated by allowing international *renvoi*. It seems to me, however, that allowing international *renvoi* cannot justify domestic *renvoi* since the coordination techniques are different. Domestic *renvoi* is not a necessary form of international *renvoi*: the two types of *renvoi* are not made in the same place in the court's reasoning and do not play the same role. This explains why many countries' legislation and other forms of positive law take different positions on domestic and international *renvoi*.

In such circumstances, it seems to me that the solution to a foreign internal conflict may be found by interpreting the forum's international choice-of-law rule. I do not subscribe to the theory that the choice-of-law rule stops at choosing a legal order. I believe its immediate purpose is to choose a legal system and then to

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[66] Paris, 27 Oct. 1934, *Elarby*: *Clunet* 1935, p. 976-981, note J. PERROUD; *Rev. crit. dr. int. pr.* 1935, p. 507-511, anonymous note.

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designate the substantive rule that will enable the court to resolve the dispute. Moreover, whether they govern internal or international conflicts, foreign choice-of-law rules concern only the institutions of the legal order that produces them; the forum court is therefore not required to apply them. However, if the forum court deems such a solution judicious, it may agree to take them into consideration. In practice, courts faced with resolving foreign internal conflicts may refer to the foreign State's private international law rules at the beginning of their reasoning (thus avoiding the internal conflict of laws in case of *renvoi*) or at the end, once the internal conflict has been resolved. I believe two situations must be distinguished with regard to resolving the foreign internal conflict, properly speaking.

When the forum's rule directly designates the legal system governing the parties' interests, it should be applied. It does not matter whether the pluri-legislative system concerned contains a unitary rule for internal conflicts or whether the connecting factor manifests within a territorial or personal pluri-legislative system. When the choice-of-law rule uses a territorial connecting factor, this factor may be considered to link the parties' interests to a specific place and to thereby directly designate the substantive law in force. French courts have followed this approach to determine the law applicable to torts, formalities for legal instruments, and marital property regimes. This approach has also been incorporated into the law of several countries (Germany (law of 25 July 1986), Belgium (law of 16 July 2004), and Common Law countries) and international conventions, as well as European law, all of which treat pluri-legislative States' constituent territorial units as States to directly designate the applicable local law. And this reasoning is not limited to territorial conflicts: it may also be followed when the territorial connecting factor manifests itself in a personal pluri-legislative system. The forum's choice-of-law rule may be applied directly when the parties' interests lie within the sphere of one religious or community law rather than another. Thus, when a couple marries before a religious authority and establishes its first family home in a religious State, if there is no choice of law, the applicable marital property law may be that of such authority.

On the contrary, when the forum's law does not directly designate the law governing the parties' interests, that is, when the main connecting factor does not designate the applicable law precisely enough, the court must examine the subsidiary connecting factors this rule sets out, if any. Before 1975 for example, the divorce of American spouses domiciled in France should have been subject to the French law of the domicile, not because "the" U.S. choice-of-law rule refers to French law (because such a U.S. law does not exist), but through the direct application of a subsidiary factor set out in the French choice-of-law rule for divorce cases when nationality is insufficient. This method is not only simpler, but also complies better with the mechanisms at play. Connecting factors specific to resolving internal conflicts of laws become necessary only when such factors do not make it possible to resolve the conflict. If the inadequate law is the national law of a country that has a federal system, it can be replaced by the law of the place of habitual residence since people living in federal systems are usually considered "citizens" of the constituent State in which they live. If the inadequate law is the law of a personal system, French courts may directly *designate* the applicable personal law (subject to the parties' consent if this law is religious), but they are not

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required to *consult* the foreign system because doing so may disregard an individual's secular status.

The system I am suggesting does not necessarily contradict French case law in this area; it simply reinterprets it in most cases in an attempt to give it a stronger legal foundation.

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INTERNATIONAL COOPERATION IN BANKRUPTCY: IT IS TIME TO LIFT THE SWISS ISOLATION

Valentin RÉTORNAZ*

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* PhD, Assistant Professor in constitutional, civil and international law (University of Galatasaray). May I firstly thank my learned friend Prof. Dr. Gian Paolo ROMANO for the very interesting comments and for having accepted to publish the present contribution in the Yearbook of Private International Law.

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I. Introduction[1]

It is not without reason that "isolation" sounds like "island". A socially isolated individual can be compared, in an etymological way, to Robinson Crusoe sitting alone on his desert island. This metaphor is perfectly suited to Swiss law as far as international cooperation in bankruptcy matters is concerned. After the adoption of the Council Regulation (CE) No 1346/2000 of 29 May 2000,[2] creating a general framework for the whole European Union, Switzerland looks like an island emerging from wide and uniform waters.

Not being a member of the European Union, Switzerland is not primarily concerned by its legal instruments. However, this does not directly justify the insular attitude developed in a recent judgment delivered by the Federal Tribunal[3] concerning the attempt by a German *Insolvenzverwalter* to secure the cooperation of the Swiss authorities in a bankruptcy case with a criminal background. The underlined facts are easy to summarize. A company was incorporated in Switzerland, but performed its main business in Germany. It transpires from a previous court decision adopted in the same case[4] that criminal investigations were launched, certain members of the board of directors being charged with embezzlement and conspiracy to defraud.[5] At an unknown time, the public prosecutor of St. Gallen granted a request for judicial cooperation presented by the German authorities and froze some assets held by a bank on the behalf of the bankrupt company. In the meantime, two distinct bankruptcy procedures were initiated by the Swiss Court on 21 June 2011 and 5 July 2011.[6] Both were suspended, on 18 August 2011 and 19 April 2012,[7] because of the apparent lack of valuable assets.[8] On 16 August

[1] Many of the questions we are dealing with have been the object of the 25th Day of International Private Law held at the Swiss Institute of Comparative Law on 3 May 2013. Unfortunately we could not attend the discussions and the texts of the speeches have not already been printed. The title and introductory part of our article can be understood as a mirror reflection to the "heroic isolation" and the "Helvetian citadel", both mentioned by S. MARCHAND, Les règles du droit suisse de la faillite internationale à l'heure des faillites européennes, in F. BONNET/ P. WESSNER, Mélanges en l'honneur de François Knoepfler, Basel/ Geneva/ Munich 2005, p. 111 and 119.

[2] *OJ* L 160 of 30 June 2000, p. 1-18.

[3] Federal Tribunal, 28 March 2013, No 5A_665/2012. Although officially unreported, the judgment can be found on the website of the Court (<www.bger.ch>). A summary, with comments by I. SCHWANDER, has been published in: *RSDIE* 2013, p. 459-462. The judgment will hereinafter be given as "the judgment of 28 March 2013".

[4] State Court of St. Gallen, 28 August 2012, No AB.2012.12. The whole judgment can be found on the website of the Court (<www.gerichte.sg.ch>) and a summary of it has been published in: *CAN-Zeitschrift für kantonale Rechtsprechung* 2013, No 66, p. 166-171. The judgment will hereinafter be given as "the judgment of 28 August 2012".

[5] See the statement of facts of the judgment of 28 August 2012.

[6] Judgment of 28 March 2013, § A.b.

[7] Judgment of 28 March 2013, *ibid.*

[8] According to art. 230(1) of the Federal Act on Debt Enforcement and Bankruptcy Law, the Bankruptcy Court shall suspend the bankruptcy procedure if the debtor does not

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2011, the District Court of Nuremberg (Germany) opened an insolvency proceeding against the Swiss company, relying on the fact that its main business place was in Germany.[9] Relying on a treaty of 1834 between the Kingdom of Bavaria and some Swiss federated States, the appointed liquidator (*Insolvenzverwalter*) asked the Bankruptcy Office (*Konkursamt*) of St. Gallen to publish the decision of the Nuremberg District Court, to invite the creditors to announce their claims and, finally, to make sure that the frozen assets would not be given back to the company or its shareholders if the criminal charges were dropped.[10] The request was turned down by the Bankruptcy Office, whose decision was uphold by the State Court of St. Gallen as well as by the Federal Tribunal.

In a nutshell, the motives put forward by the Federal Tribunal in order to deny any obligation of the Bankruptcy Office to collaborate with its German counterpart were as follows. Firstly, the court briefly indicated that the duty of the Bankruptcy Office to cooperate with other liquidators, mentioned in Article 4(1) of the Swiss Federal Act on Debt Enforcement and Bankruptcy Law (hereinafter: DEBLA),[11] did not extend to international cooperation.[12] Then it held that the above-mentioned treaty of 1834 was not applicable because a bankruptcy

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have sufficient assets to cover the cost of the liquidation, even if it is performed in a summary way.

[9] Judgment of 28 March 2013, § A.a. According to § 3(1) of the German Bankruptcy Code (*Insolvenzordnung*, hereinafter "InsO") the court of the place where the debtor has his main business interests (*Mittelpunkt einer selbständigen wirtschaftlichen Tätigkeit*) is competent to open the bankruptcy proceeding.

[10] See the statement of facts of the judgment of 28 August 2012. The Federal Court decision of 28 March 2013 (§ A.d) mentions that the liquidator asked "in substance, the freezing and restitution of assets, respectively of the bank account of the Z. AG with the Bank Y., to the [German] insolvency patrimony, especially in case of lifting of the criminal [freezing order]" (*…im Wesentlichen die Sicherung und Weiterleitung von Vermögen bzw. Guthaben der Z. AG bei der Bank Y. an die Insolvenzmasse, insbesondere für den Fall der strafrechtlichen Deblockierung*). However, the publication of the German Court's decision and the call to the creditors is mentioned in the summary of the pleading before the Federal Tribunal (§ C). Since new pretentions are forbidden in the appeal procedure before the Federal Tribunal (see art. 99 of the Federal Act on the Federal Tribunal), there is no doubt that the liquidator hat already petitioned for the publication of the German Court decision and the call to the creditors before the courts of St. Gallen.

[11] The translation and abbreviation of the Swiss piece of legislation is taken from an English judgment: *Enasarco v Lehman Brothers Finance SA & Anor* [2014] EWHC 34 (Ch) at [35].

[12] The matter is dealt with in an implicit way, since it does not seem to have been subject to contestation before the Federal Tribunal. See Judgment of 28 March 2013, § 3.1: "The Baillif and Bankruptcy offices shall perform official acts at the request of other offices, private administration of bankruptcies, receivers and liquidators of other – Swiss – districts […] It is rightly not contested that international treaties and dispositions of the Federal Act on Private International Law are reserved (Die Betreibungs- und die Konkursämter nehmen auf Verlangen von Ämtern, ausseramtlichen Konkursverwaltungen, Sachwaltern und Liquidatoren eines anderen - schweizerischen – Kreises Amtshandlungen vor […] Zu Recht ist unbestritten, dass die völkerrechtlichen Verträge und die Bestimmungen des IPRG vorbehalten sind...)."

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proceeding had already been opened by the Swiss Court before the German decision.[13] Finally, the Federal Tribunal considered that the Swiss bankruptcy proceeding could be reopened to deal with the bank assets if the freezing order were to be lifted.[14]

Even if the motives put forward by the Federal Tribunal are not manifestly arbitrary, we do not think that the resulting ban on international cooperation between Swiss and foreign liquidators is justified.[15] The general trend in Europe, and even globally,[16] is to facilitate the smooth cooperation between courts or administrative authorities of various countries. The fact that Switzerland does not totally belong to the political union of Europe[17] is not a sufficient reason to make this jurisdiction a legal island.[18] The above-mentioned trend is a general one and political membership of an international organization does not play a very significant role in its overriding nature.

The Swiss legal system cannot afford itself the privilege of staying out of this general movement. A way to grant cross-border cooperation should be found somehow in Swiss law.[19] In the present article, we will therefore follow a broader approach of the problem, going beyond the strict limit of the case adjudicated by

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[13] Judgment of 28 March 2013, § 3.3. Even if the Treaty were applicable, it would not directly imply that mutual assistance should be granted. A delivered by the Federal Tribunal before the adoption of the PILA (ATF 109 III 83, § 6, whose French translation is published in: JdT 1986 II 36) considered that the application of the Treaty of 1834 and of an agreement on bankruptcy with Baden-Württemberg, similiar to the Treaty of 1834, does not allow the German liquidator to directly accomplish any official act in Switzerland, but only leads to the opening of an ancillary bankruptcy. This has been widely criticized by many scholars (see among them: M.A. GEHRI/ G.H. KOSTKIEWICZ, Annerkennung ausländischer Insolvenzentscheide in der Schweiz – Ein neuer Réduit National, *RSDIE* 2009, p. 198-199)

[14] Judgment of 28 March 2013, § 3.4.

[15] Nor does SCHWANDER in his comment (note 4), at 461, stating that "the denial of any cross-border cooperation is contrary to the interests of both bankruptcy estates, to the interests of creditors, being they in Switzerland or abroad, and, finally, to the interests of the bankrupt company (Die Verweigerung jeglicher Rechts und Amtshilfe für das ausländische Konkursverfahren in der Schweiz widerspricht den Interessen beider Konkursmassen und den Interessen von Gläubigern im In- und Ausland, zuweilen auch dem Interesse der Gemeinschuldnerin)."

[16] See for instance A.M. SLAUGHTER, *A New World Order*, Princeton 2004, p. 85. In the field of bankruptcy law, see J. ISRAËL, *European Cross-Border Insolvency Regulation*, Antwerpen/ Oxford 2005, p. 39.

[17] The Swiss membership of the Council of Europe should not be forgotten. The European Court of Human Rights is playing an increasing role concerning mutual assistance in private international law relations.

[18] In the same way (also with reference to the "island metapher"), see M.A. GEHRI/ G.H. KOSTKIEWICZ (note 13), at 221-222. For a proposal to align Swiss law on EU law concerning the powers of the foreign liquidator with a change in the case law, see F. NAEF/ E. NEURONI NAEF, Droit suisse de la faillite internationale: la faillite d'un système?, *AJP/PJA* 2008, p. 1396 *et seq.*, especially p. 1411-1412.

[19] See also, but in very general terms, the following call for a modification of art. 166-175 PILA: R. KUHN, Enden die Befugnisse eines ausländischen Konkursverwalter an der schweizerischen Staatsgrenze?, *TREX* 2010, p. 41-42.

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the Federal Tribunal. Firstly, we will define more precisely the concept of "cross-border cooperation" under Swiss law. We will afterwards question the general assertion that the only conceivable form of mutual assistance resides in the opening of an ancillary bankruptcy (II.). Then, the restrictive approach of cross-border cooperation will be confronted, firstly, with the wider possibilities afforded by Swiss law in the field of criminal and banking law (III.) and, secondly, with European law, including the case law of the European Court of Human Rights (IV.). Finally, we will try to present different solution, essentially based on the positive law in order to remedy the defects of the present situation (V.).

II. The Concept of Cross-Border Cooperation in Bankruptcy Matters under Swiss Law

A. The State of the Legislation

When addressing the issue of cross-border cooperation, the first reflex is to consult all the relevant national legislation. As far as Swiss law is concerned, two main instruments encompass all the field, namely the Federal Act on Private International Law (1.) and the Federal Act on Debt Enforcement and Bankruptcy Law (2.).

1. Federal Act on Private International Law

Cross-border cooperation is modestly mentioned in the first chapter of the Federal Act on Private International Law (hereinafter: PILA). Articles 11 and 11*a* provide for some general principles. However, the scope of cross-border cooperation is not defined in a clear manner. Article 11 modestly states that "request for judicial cooperation coming from Switzerland or addressed to it are dealt by the Federal Office of Justice". Article 11*a* determines the law and procedure applied by administrative and judicial authorities when dealing with such requests, but it does not give more precision about the scope and extent of cross-border cooperation. Before the adoption of the Federal Code of Civil Procedure,[20] cross-border cooperation was only regulated by Article 11 PILA, whose wording was different without being more specific. The preparatory works of the PILA does not provide more information, merely stressing the necessity to respect the federated states' sovereignty in civil procedural matters which existed at that time.[21]

[20] The Code (published in: *RO* 2010 1739) came into force as of 1 January 2011.

[21] See *FF* 1983 I 255, 296: "The present draft does not deal with the question whether, or under what conditions, cooperation should be granted. In absence of any treaty, this falls under the states' competence (Le présent projet ne dit pas si, ni à quelles conditions, l'entraide doit être assurée. Cela ressort de la compétence cantonale, en l'absence de tout traité)".

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Recognition of foreign bankruptcy decisions is dealt in Chapter 11 of the PILA. Articles 166 seq. follow the pattern of the ancillary bankruptcy proceeding. This means that recognition is linked with the opening of a separated bankruptcy upon assets located in Switzerland.[22] The bankruptcy estate is liquidated in an abridged way,[23] with the goal to transfer the biggest part of the monetized asset to the foreign liquidator after the verification of the foreign creditors' list.[24] Only privileged and securitized creditors[25] will normally be paid with the assets located in Switzerland. There is no provision that allows the Swiss liquidator to directly transfer any assets abroad; the wording of Article 170(1) PILA even seems to exclude it. Since the recognition of a foreign bankruptcy shall have the same effects as a Swiss bankruptcy decision, this implies that all the assets of the debtor are included in the bankruptcy estate and are subject to the liquidation of it.[26] Such an interpretation is confirmed by the preparatory works. They present the ancillary proceeding as a clear improvement on the principle of the territoriality which was previously applied, as this is the only way of securing cross-border cooperation in bankruptcy matters.[27]

2. Federal Act on Debt Enforcement and Bankruptcy

The Federal Act on Debt Enforcement and Bankruptcy is one of the most ancient pieces of federal legislation that is still in force. Enacted in April 1889, it has only been slightly modified subsequently. Even if cross-border insolvency was already a known issue at the time,[28] the legislator did not consider it necessary to address it.

[22] Art. 170(1) PILA: "Regarding the assets of the debtor located in Switzerland, the recognition of the foreign bankruptcy decision has, in the absence of any other provision of this Act, the same effects as a bankruptcy decision under Swiss law (Pour le patrimoine du débiteur sis en Suisse, la reconnaissance de la décision de faillite rendue à l'étranger a, sauf dispositions contraires de la présente loi, les effets de la faillite tels que les prévoit le droit suisse)".

[23] See art. 170(3) PILA, which states that neither a creditors' assembly nor a supervision comity will be appointed.

[24] Art. 173(1) and (2) PILA. This verification provides the Swiss Bankruptcy Court with the opportunity to make sure that Swiss creditors are not unduly excluded from the foreign bankruptcy proceeding (art. 173(3) PILA).

[25] Art. 172(1) PILA.

[26] See art. 197(1) DEBLA: "All the seizable assets of the debtor at the time of the opening of the bankruptcy proceeding shall be included in the same estate, independantly of their location, and shall be used to pay the creditors (Tous les biens saisissables du failli au moment de l'ouverture de la faillite forment une seule masse, quel que soit le lieu où ils se trouvent, et sont affectés au paiement des créancier)".

[27] *FF* 1983 I 255, 436-437.

[28] It was already an issue in the Middle Ages, namely in January 1302, with the bankruptcy of a large Italian banking company, the Ammanati di Pistoia. The company was described by Boniface VIII as "the merchants of the company Ammanati de Pistoia, established in diverse parts of the world, province and kingdoms (mercatores de societate Ammanatorum de Pistorio, per diversa mundi climata, provintias et regna dispersi)" (see the

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For this reason, it is not a surprise that no special provision enables the liquidator, whether a public authority (the *Office of Bankruptcy*)[29] or a private person (the *special administrator*),[30] to cooperate with foreign liquidators. Even if Article 4 of the Act only provides for mutual assistance between liquidators appointed by the Swiss courts,[31] nothing directly prohibits its extension to cross-border situations.

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reproduction of a letter of 29 January 1302, in A. FLINIAUX, La faillite des Ammanati de Pistoie et le Saint-Siège (début du XIVe siècle), *Revue historique de droit français et étranger* 1924, p. 438-439), which suggests a highly globalized business. Indeed, the company was active across the whole of Europe (A. FLINIAUX, *ibidem*, at 449-450), including England and Portugal (D. GRAHAM, The Insolvent Italian Banks of Medieval London, *International Insolvency Review* 2000) and used refined legal tools, like the floating charge, long before they became common practice (see D. GRAHAM, *ibidem*, at 215 *seq.*). The Church played an active role in the bankruptcy proceeding (A. FLINIAUX, La faillite des Ammanati […], at 456 *et seq.*), mainly because the Holy Seat had deep business relations with the company (on these, see A. FLINIAUX, *ibidem*, at 449-451). The first measures adopted by Boniface VIII were to make sure that the assets could not be diverted: no debtor of the company was allowed to pay its debt to the company or its partner without a papal agreement (A. FLINIAUX, *ibidem*, at 457) and the latter were also prohibited from disposing of any of their personal belongings (A. FLINIAUX, *ibidem*, at 458). Then the Pope granted them a safe conduct for two months in order to allow them to negotiate an agreement with their creditors, especially with the Church (A. FLINIAUX, *ibidem*, at 463-465). However, this was to no avail, since the partners of the bankrupt company were apparently excommunicated (A. FLINIAUX, *ibidem*, at 467-468; *contra:* D. GRAHAM, The Insolvent Italian Banks […], at 219). In March 1304, a letter of the successor of Boniface VIII, Benedict IX, mentioned that the partners of the company were now cooperating with the Church (A. FLINIAUX, La faillite des Ammanati […], at 468-469), which gradually took part in the liquidation of the bankruptcy estate. Firstly, clerics were appointed as local liquidators in Italy, France, Spain, England and Portugal, the local debtors of the company being summoned to pay to them their debt under penalty being made subject to sanctions by the Church itself (A. FLINIAUX, *ibidem*, at 469-470). The Pope himself reserved the right to distribute the recovered money among the creditors of the company (A. FLINIAUX, *ibidem*, at 470-471). However, it is not clear from the Vatican archives if Benedict IX, or his successor, Clement V, were able to put an end to the liquidation of the company (A. FLINIAUX, *ibidem*, at 471-472). This very particular use of Church authority enhanced the development of a more effective national bankruptcy law, so that English courts were in a better position when faced, in August 1326, with the collapse of the Scali Bank of Florence (see D. GRAHAM, The Insolvent Italian Banks […], at 221 *et seq.*).

[29] The liquidation of the bankruptcy estate by a public authority (see art. 2 DEBLA) is a Swiss peculiarity of big practical importance.

[30] Art. 237(2) DEBLA provides for the possibility (scarcely used) of appointing one or more private individuals as liquidators of the bankruptcy estate.

[31] See the wording of art. 4(1) DEBLA: "Offices for execution or bankrutpcy shall accomplish all the acts in their competence at the request of offices, special administrators of bankruptcy, receivers and liquidators of other districts (Les offices des poursuites et les offices des faillites procèdent aux actes de leur compétence à la requête des offices, des administrations spéciales de la faillite, ainsi que des commissaires et liquidateurs d'un autre arrondissement)".

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B. The Restrictive Approach Followed by the Swiss Courts and Scholars

Courts and academic scholars tend to strictly follow the pattern implicitly suggested by the Private International Law Act of 1983. There is thus a wide consensus that the opening of an ancillary bankruptcy is the only way to secure cross-border cooperation.[32] This consensus is reflected in the accessible case law.[33] Only a few authors contemplate the possibility of relaxing the strict practice followed by the Federal Tribunal or amending the Private International Law Act.[34] The

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[32] I. AMBAUEN/ D. GISBERGER, Entwicklungen im schweizerischen internationalen Privatrecht – Le point sur le droit international privé, *RSJ/SJZ* 2012, p. 88 ("Das im 11. Kapital des IPRG vorgesehene System ist abschliessend"); Y. JEANNERET/ S. LEMBO, La reconnaissance d'une faillite étrangère (art. 166 *et seq*. LDIP): état des lieux et considérations pratiques, *SJ* 2002 II 247, p. 248-249; J. KREN KOSTKIEWICZ/ R. RODRIGUEZ, *Internationales Insolvenzrecht*, Berne 2013, p. 105-106; F. LORANDI, Handelsspielraum ausländischer Insolvenzmassen in der Schweiz, *AJP/PJA* 2008, p. 563; R. RODRIGUEZ, Ausgewählte Neuerungen im internationalen Zivilprozessrecht, in A. DOLGE (ed.), *Zivilprozess – aktuell*, Zürich 2013, p. 138 ("Die Rechtsnachfolgerin [...] kann jedoch aus schweizerischer Sicht die Prozessfähigkeit der konkursiten Gesellschaft erst «wiederaufgreifen», wenn eine Anerkennung nach Art. 166 ff. erfolgt ist"); K. SPÜHLER/ R. RODRIGUEZ, *Internationales Zivilprozessrecht* (2nd ed.), Zürich 2013, p. 148-149. Implicitly, see A.K. SCHNYDER/ M. LIATOWITSCH, *Internationales Privat- und Zivilverfahrensrecht* (3rd ed.), Zürich 2011, p. 160-161; D. SCHRAMM/ A. BUHR, in A. FURRER/ D. GIRSBERGER/ M. MÜLLER-CHEN, *Handkommentar zum Schweizer Privatrecht – Internationales Privatrecht* (2nd ed.), Zürich 2012, Art. 11 No. 22; K. SIEHR, Grundfragen des internationalen Konkursrecht, *RSJ/SJZ* 1999, p. 86; K. Spühler/ R. Rodriguez, Internationales Zivilprozessrecht (2nd ed.), Zürich 2013, p. 145-146 and 198; D. STAEHELIN, *Die Anerkennung ausländischer Konkurse und Nachlassverträge in der Schweiz (Art. 166 ff. IPRG)*, Basel/ Frankfurt-am-Main 1989, p. 14-15; A. TRUNK, Grenzüberschreitende Insolvenz von Gesellschaften im Verhältnis EG-Schweiz: Folgerungen aus Centros, Überseering und Inspire Art, *RSDIE* 2004, p. 547; P. VOLKEN, in D. GIRSBERGER/ A. HEINI/ M. KELLER/ J. KREN KOSTKIEWICZ/ K. SIEHR/ F. VISCHER/ P. VOLKEN, *Zürcher Kommentar zum IPRG* (2nd ed.), Zürich 2004, Art. 11 No. 97 and Art. 166 No. 21. For a general presentation of the different approaches: I. MEIER *Internationales Zivilprozessrecht und Zwangsvollstreckungsrecht mit Gerichtsstandsgesetz* (2nd ed. with the collaboration of Miguel SOGO), Zürich 2005, p. 203-204.

[33] See the recent case: ATF 137 III 631, § 2.3.3: "The foreign liquidator is in Switzerland only authorized to file a motion for the recognition of the foreign bankruptcy decree and for interim measures (Der ausländische Konkursverwalter ist in der Schweiz einzig berechtigt, die Anerkennung des ausländischen Konkursdekretes und sichernde Massnahmen zu beantragen)". This principle is also valid for administrative procedures concerning the tortious liability of the State: Federal Tribunal, 24 October 2011, No 2C_303/2010 (unreported); a summary is published in J. KREN KOSTKIEWICZ/ A. MARKUS, *Internationales Zivilprozess – Entwicklungen 2011*, Berne 2012, p. 43-44. The case concerned the liability of the Swiss Federal State (Confederation) for an air crash caused by the negligence of the air traffic controllers at Zürich Airport (the infamous *Disaster of Überlingen*). A Russian bankrupt company sued the Confederation, but its claim was turned down for lack of *locus standi.* For a previous decision with a similar issue: ATF 134 III 366.

[34] See M.A. GEHRI/ G.H. KOSTKIEWICZ (note 13), at 221; R. KUHN (note 19), at 42 (who also suggests a revision of the PILA); S. MARCHAND, Exécution de décisions

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necessity to develop the shortlist of exceptions to the exclusivity of the ancillary bankruptcy admitted by the case law is also mentioned.[35]

III. The Other Meanings of Cross-Border Cooperation under Swiss Law

The quiet *unisono* between courts and scholars about the exclusivity of ancillary bankruptcy proceeding under Swiss law should not cause us to overlook the fact that cross-border cooperation dealing with insolvent entities can have a broader meaning as soon as we leave the field of bankruptcy law. Both banking law (A.) and criminal procedure (B.) can also be used to secure the cooperation of the Swiss authorities. It is even more important to examine them, because both branches of the legislation either were, or could have been, applied in our case. A comparison is therefore not a mere speculation on potential similarities.

A. Mutual Assistance in Winding-Up Insolvent Banks

The winding-up of an insolvent bank is subject both to the Federal Act on Debt Enforcement and Bankruptcy Law and to distinct rules incorporated in the Federal Banking Act of 1934 (hereinafter: BA).[36] Some of its dispositions deal with the cooperation afforded by Swiss authorities to their foreign counterparts.[37]

Unlike general bankruptcy law, the banking legislation is entirely based on the principle of mutual assistance. According to Article 37*f*(1) of the BA, the supervisory authority for financial markets (colloquially called *FINMA*) should do its best to coordinate Swiss and foreign winding-up proceedings when they are jointly conducted. The available commentaries on this disposition indicates that this should be applied when a bank which has its seat in Switzerland is also doing business abroad, through a branch, and is therefore subject to insolvency proceedings both in Switzerland and in a foreign country.[38] The cooperation should mainly

étrangères en matière de faillite, in C. LEUENBERGER/ J.-A. GUY, *Entraide judiciaire et exécution forcée: affaires civiles, enlèvements d'enfants et faillites*, Berne 2004, p. 184-185; I. MEIER (note 32), at 204-206; F. NAEF/ E. NEURONI NAEF (note 18), at 1411-1412.

[35] See I. SCHWANDER (note 3), at 464 concerning the exception admitted by the Federal Tribunal to the lack of *locus standi* of the foreign liquidators before the Swiss courts as long as the dispute does not concern assets located in Switzerland. See also: C. KÖLZ, Internationales Konkursrecht – Prozessführungsbefugnis einer ausländischen Konkursverwaltung – internationale Zuständigkeit für die Beurteilung einer Widerklage, *RJB/ZBJV* 2013, p. 744 *et seq.*, especially p. 747-748.

[36] See art. 33 *et seq*. (chapter XII) of the BA.

[37] Art. 37*f* and 37*g* of the BA.

[38] See R. SCHWOB, in D. BODMER/ B. KLEINER/ B. LUTZ (eds), *Kommentar zum Bundesgesetz über die Banken und Sparkassen*, Zürich 2004, No. 1 ad art. 37*f* BA; D. STAEHELIN, in R. WATTER/ N.P. VOGT/ T. BAUER/ C. WINZELER (eds) *Basler Kommentar*

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consist of recognition of measures taken by a foreign liquidator, without the possibility of delivering to him any asset located in Switzerland.[39]

The second paragraph of Article 37*g* of the BA allows the supervisory authority to directly deliver to a foreign liquidator any asset located in Switzerland, without conducting a separate ancillary proceeding, if the foreign winding-up proceedings "treat the privileged or securized creditors domiciliated in Switzerland in a similar way" and if it "takes duly into account other creditors domiciliated in Switzerland". It lifts the restriction mentioned by the doctrine with regard to Article 37*f*. The possibility to deliver to a foreign liquidator assets belonging to the bankruptcy estate has been recently introduced into Swiss banking law. This newly created possibility aims at avoiding the burdensomeness of the ancillary proceeding.[40]

Our brief presentation of the wide possibilities of cross-border cooperation in banking matters sheds new light on the very restrictive approach followed in bankruptcy law. The preparatory work reveals that "this flexibility also makes it easier to ensure a better coordination for the banks active in several countries and thus to enable a faster and more effective completion of the various national insolvency proceedings, in terms of protecting investors".[41] These persuasive arguments are not only valid for the winding-up of an insolvent bank, but also in every situation where creditors are confronted with an international situation. Hence, the wording used in the preparatory works sounds rather like a veiled confession of the lack of efficiency of the general principles enshrined in the PILA. This is particularly striking in the case that we are discussing now, because the bankrupt company was mainly dealing with assets provided by German investors.[42] Had the BA been applied, the cooperation of the Swiss authorities would have been possible. Such an application was, however, not totally excluded in the present case. Articles 37*f* and *g* of the BA are also applicable to the liquidation of the bankruptcy estate of other financial markets actors. This is, for instance, the case with the Federal Act on Collective Investment of Assets[43] (hereinafter: CIA), which

– *Bankengesetz* (2nd ed.), Basel 2013, No. 9 ad art. 37*f* BA; J. Essebier/ M. Guggenbühl, Das Schweizerische Internationale Bankenkonkursrecht – Praxis und Revisionsbedarf, *RSDA/SZW* 2010, p. 125 *et seq*., especially p. 131.

[39] R. Schwob (note 38), No. 7 ad art. 37*f* BA; D. Staehelin (note 38), No. 9 ad art. 37*f* BA.

[40] J. Essebier/ M. Guggenbühl (note 38), at 132; D. Staehelin (note 38), No. 8b ad art. 37*g* BA.

[41] *FF* 2010 3661: "Cette flexibilité plus grande permet également plus facilement d'assurer pour les banques actives dans plusieurs pays une meilleure coordination et donc une exécution plus rapide et plus efficace des diverses procédures nationales d'insolvabilité, dans le sens de la protection des investisseurs."

[42] See the statement of facts of the judgment of 28 August 2012.

[43] Published in the Swiss Systematic Collection of Legal Instruments (<http://www.admin.ch/opc/fr/classified-compilation/national.html>; *RS* 951.31).

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expressly refers to the above-mentioned dispositions of the BA.[44] Under Swiss Law, the concept of "Collective Investment of Assets" is a very broad one.[45] It encompasses all "contributions made by investors in order to be managed collectively for the benefit of them".[46] In the absence of any factual information about the activities of the Swiss company, it is almost impossible to determine if those activities could be considered as a "Collective Investment of Assets". But, *prima facie*, this possibility should not be excluded. For this reason, the denial of any mutual assistance is more disturbing because if everything had been done within the boundaries of what is legal, it is conceivable that the liquidation of the bankrupt company would have followed a pattern that made cooperation possible. Even an *ex post* intervention by the FINMA, that is, after the opening of the bankruptcy in Germany and Switzerland, cannot be excluded, since the absence of valid authorization is not in itself a sufficient ground for excluding the dispositions of the Federal Act on Collective Investment of Assets.[47]

B. Mutual Assistance in International Criminal Law

Without going back to an out-dated approach that every bankruptcy is necessarily fraudulent, or at least likely to be suspected as such, the parallel progress of civil and criminal proceedings is not a rare configuration. The necessity of a smooth collaboration between the bankruptcy administration and the prosecution services has already been exposed, but only in a national context.[48] Specific problems raised by the internationalization of both criminal and bankruptcy proceedings have not drawn the attention of Swiss academics. However, this does not mean that they should be considered as being unworthy of any reflection.

In the case we are examining, the German authorities had asked for the collaboration of their Swiss counterparts in both the civil and criminal contexts. If mutual assistance was denied as far as bankruptcy was concerned, this had not been the case in the criminal context. It transpires from the various decisions delivered that some assets were frozen by the District Attorney of St. Gallen. This immediately raises the question of a possible transfer of them to the German prosecution authorities, who could then use them to pay off the creditors who had

[44] See art. 138 CIA. At the time of the opening of the bankruptcy by the Swiss court, a slightly different version of the Act was in force, but with a similar provision (see the former art. 137(3) CIA).

[45] For more information on this, see C. LOMBARDINI, *La protection de l'investisseur sur le marché financier*, Paris-Zurich 2012, p. 276 *et seq*.

[46] Art. 7(1) CIA.

[47] For instance: Federal Tribunal, 12 January 2012, No 2C_30/2011 and 2C_543/2011. The application of art. 37f and g of the BA has already been contemplated for banks and securities brokers operating in Switzerland without valid licence: D. STAEHELIN (note 38), No. 1 ad art. 37*f* BA.

[48] See M.J. JEKER, *Die Konkurs- und strafrechtliche Aufarbeitung der Kriminalinsolvenz*, Zürich 2009, p. 260 *et seq*., especially p. 269 *et seq*.

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announced their claim to the German liquidator.[49] Criminal law may contribute to solve a problem that bankruptcy law is unable to address properly. For this reason, it is important to take it into account, even if, from a purely academic point of view, criminal and bankruptcy law cannot be considered as being closely related. Our reflection will be organized in the following way. Firstly, we will examine the general rules concerning mutual assistance in Swiss-German criminal cases, especially as far as the transfer of assets for the purposes of victim compensation is concerned (1.). Secondly, we will turn to the factual peculiarities of our present case in order to investigate if the existence of a suspended bankruptcy proceeding in Switzerland constitutes an irremediable obstacle to the transfer of assets to Germany (2.). Finally, we will present a brief conclusion on the matter (3.).

1. Mutual Assistance in Criminal Cases and Victim Compensation

Cross-border cooperation in criminal matters between the German and Swiss authorities is regulated by the *European Convention on Mutual Assistance in Criminal Matters* of 20 April 1959.[50] Article 5 of the Convention enables the contracting States to make some precise reservation concerning the execution of letters rogatory aiming at search and seizure. However, it is generally considered that the Convention only deals with search and seizure for evidentiary purposes, and is not applicable when confiscation is envisaged.[51] A *Swiss-German Bilateral Agreement* of 13 November 1969,[52] aiming at a better implementation of the

[49] The German Criminal Code and Criminal Procedural Code allow the Court to use the product or the instruments of a crime to indemnify the victims of a criminal act instead of confiscating them and transferring them to the State (see §§ 73(1) and 73*d*(1) of the German Criminal Code and § 111*i*(2) of the German Criminal Code). At the end of the criminal proceeding, the Court orders the freezing of those assets for three more years (§ 111*i*(3) of the German Criminal Code). When this deadline is reached, the Court lifts the freezing order if the victim has already been indemnified, if the assets have been transferred to him or if a civil court has ordered the seizure or the freezing of the assets (§ 111*i*(5) of the German Criminal Code). A similar mechanism exists under Swiss law, but works in a slightly different way. Criminal assets are formally confiscated by a court decision (art. 70 of the Swiss Criminal Code), but the court orders in the same decision that those assets should be transferred to the victim (art. 73(1)(b) and (c) of the Swiss Criminal Code) under the condition that he assigns to the State his claim against the offender (art. 73(2) of the Swiss Criminal Code). For further details about Swiss law, see G. PAVLIDIS, *Confiscation internationale : instruments internationaux, droit de l'Union européenne, droit suisse*, Zurich 2012, p. 236-241.

[50] The text of the Convention (CETS NO 030) can be found on the website of the Council of Europe (<http://conventions.coe.int>). The Second Additional Protocol of 8 November 2001 has not yet been ratified by Germany. The Council of Europe Convention on Laudering, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005 has not been signed by either Germany or Switzerland.

[51] G. PAVLIDIS (note 49), at 48.

[52] Published in the Swiss Systematic Collection of Legal Instruments (<http://www.admin.ch/opc/fr/classified-compilation/international.html>; *RS* 0.351.913.61).

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Convention, explicitly allows the transfer of frozen assets.[53] This is also possible under the *Convention*[54] *on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* of 8 November 1990.[55] The *Schengen Agreement* and its *Implementing Convention* of 19 June 1990[56] do not go further than the above-mentioned agreements.[57]

At the national level, the Swiss Federal Act on Mutual Assistance in Criminal Matters (hereinafter: MACM) is applicable, even in presence of international instruments.[58] This Act allows the Swiss authorities to grant mutual assistance to their foreign counterparts by freezing assets located in Switzerland and transferring them abroad.[59] The transfer mechanism can also be used in order to make assets available for the compensation of victims.[60] A brief examination of the case law of the Federal Criminal Court reveals that freezing and transfer from assets at the request of foreign authorities is a routine job under Swiss law.[61] As a matter of principle, mutual assistance could thus be an adequate way to secure the transfer of assets to Germany.

2. *Impact of the Suspended Bankruptcy Procedure in Switzerland*

In the preceding paragraph, we reached the conclusion that Swiss law concerning mutual assistance in criminal matters is amenable to the transfer abroad of frozen assets. For this reason, it is highly probable that if such a request would be made by the German authorities, their Swiss counterparts would do everything in return to treat it favourably. In doing so, they will have to face the question of the existence of a suspended bankruptcy proceeding in Switzerland and a pending one in

[53] Art. II of the Bilateral Agreement of 20 April 1959.

[54] CETS No 141.

[55] See art. 13(1)(a) and (b) of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; G. PAVLIDIS (note 49), at 54.

[56] Published in *OJ* L 239 of 22 September 2000, p. 19-62.

[57] For a short presentation of them, see G. PAVLIDIS (note 49), at 119-121.

[58] G. PAVLIDIS, (note 49), at 264. See already the wording of art. 1 MACM.

[59] Art. 63(2)(b) and (d) MACM, further concretized by art. 74*a* MACM.

[60] As a matter of principle, the Federal Tribunal considers that mutual assistance in criminal matters can be used to secure the compensation of victims as long as it is not with the purpose of circumventing a prohibition made by the pertinent rules concerning mutual assistance in civil matters. See the following *leading case* concerning transmission of information: ATF 128 II 305, § 3 confirmed in the Federal Tribunal, 20 June 2003, n° 1A_38/2003, § 7.1. We could not find a case where mutual assistance in criminal matters was used in order to transfer assets; however, it is highly probable that the same dispositions will be applied. Academics are of the same advice; see, among many others, M. HARARI, Remise international d'objets et valeurs: réflexions à l'occasion de la modification de l'EIMP, in C. NILS-ROBERT/ B. STRÄULI, *Procédure pénale-droit pénal international-entraide pénale – Etudes en l'honneur de Dominique Poncet*, Geneva 1997, p. 176.

[61] See for instance: Federal Criminal Court, 13 November 2013, No RR.2013.148; Federal Criminal Court, 4 October 2013, No RR.2013.129.

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Germany. Does this create an obstacle to the transfer of frozen assets to Germany? This question can only be properly answered in two steps. Firstly, we should know if the suspended bankruptcy in Switzerland is a legitimate ground to reject a request for transfer of assets to Germany (a). Then, we will investigate the probable consequences of the opening of a bankruptcy proceeding in Germany on the criminal freezing order made by the German authorities and executed in Switzerland (b).

a) Consequences of the Existence of a Suspended Bankruptcy in Switzerland

The Federal Act on Mutual Assistance in Criminal Matters provides for some exceptions to the transfer of frozen assets. Two of them seem to us to be likely to be applied in a configuration similar to the facts mentioned by the Federal Tribunal in its decision of 28 March 2013. Firstly, Article 74(4)(a) MACM prohibits the transfer of assets when they should be assigned to a victim whose habitual residence is in Switzerland. In the present case, it seems highly probable that all the victims of the embezzlement live in Germany, since the main activities of the company took place in the environs of Nuremberg. Even if some of the victims are located in Switzerland, we do not think that they could rely on the above-mentioned provision. The compensation, if necessary by the way of the transfer of confiscated assets,[62] is not comparable with restitution. Claims raised by the victims are mere pretention *in personam* and thus are without any link to any property interests on the assets. The transfer operated by the decision at the end of the criminal proceeding is only a special form of setting-off.[63] It does not involve the recognition of any immediate right of the victims on the assets. For this reason, the hypothetical victims residing in Switzerland cannot object to the transfer of frozen assets to Germany.[64] With regard to the second objection, we observe that Article 74(4)(b) MACM prohibits the transfer abroad of frozen assets if claims are raised by the public authorities. Does such a claim exist when bankruptcy has been opened, like in our case, since the Bankruptcy Office in charge with the administration of the estate is a public authority? Without examining the question whether the divestment of the debtor through the opening of the bankruptcy proceeding[65] gives rise to a claim under Article 74(4)(b) MACM, we note that the proceedings have been suspended because of the lack of available assets.[66] Under

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[62] For a short presentation of Swiss law, see note 49 above.

[63] More corectly a special form of *dation en paiement.*

[64] G. PAVLIDIS, (note 49), at 284 and footnote No 1249 with a reference to the following precedent: Federal Tribunal, 3 July 2009, 1C_166/2009, § 2.3.4. See also M. BOILLAT, *Trafic illicite de biens culturels et cooperation judiciaire internationale en matière pénale*, Zurich 2012, p. 207, footnotes 929 and 931 with the same reference. The leading case is in reality much more ancient and dealt with the confiscation and restitution of assets belonging to the family of the former dictator Ferdinand Marcos: Federal Tribunal, 10 december 1997, ATF 123 II 595, § 6)b)aa).

[65] See art. 204 and 205 DEBLA.

[66] Judgment of 28 March 2013, § A.b.

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Swiss bankruptcy law, the suspension of the proceedings automatically puts an end to the power of administration of the liquidator and therefore lifts the divestment imposed on the debtor.[67] Accordingly, no claim whatsoever can be raised by the Bankruptcy Office.[68]

b) *Consequences of the Opening of a Bankruptcy Proceeding in Germany*

In the course of our research we found two very interesting decisions delivered by the Court of Appeal of Nuremberg concerning criminal freezing orders in relation to Switzerland.[69] The factual situation displayed in one of them[70] is so similar to the case that we are examining here that a link should not be excluded. It reveals how it is difficult to coordinate criminal and bankruptcy procedure at an international level because of fundamental divergences between countries in terms of national legislation. Before going into further detail, we feel it necessary to give some more explanation on the differences between German and Swiss law concerning the forfeiture of assets and the use of them to compensate the victims of criminal acts (i). Then we will envisage how those differences impact on the consequences of the opening of a bankruptcy proceeding (ii), before trying to forecast how criminal freezing orders are likely to be treated in the light of the existing precedents and of the above-mentioned precedents (iii). Lastly, we will address the question whether the reopening of the bankruptcy in Switzerland is possible (iv).

i) *Swiss and German Approach as to the Compensation of Victims*

Under Swiss law, there is no difference between forfeiture with transfer to the State and forfeiture with transfer to the victim. At the end of the procedure, the court orders the confiscation in both cases.[71] An additional ruling is delivered if the court deems it fit to transfer the confiscated assets to the victim as compensation,[72] under the condition that all claims for compensation are assigned to the State in exchange.[73] As it is virtually impossible to know until the end of the procedure

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[67] See below at note 118.

[68] A different answer may be given if the bankruptcy proceeding in Switzerland was still ongoing; see the whole discussion on the effect of a civil freezing order: M. HARARI (note 60), at 189-190.

[69] Court of Appeal Nuremberg, decision (*Beschluss*) from 8 November 2013 - 2 Ws 508/13 (<http://openjur.de/u/659269.html>); Court of Appeal Nuremberg, decision from 15 March 2013, - 2 Ws 561/12 and 2Ws 590/12 (<http://openjur.de/u/618178.html>).

[70] See decision of 15 March 2013, §§ 6, 8, 9 and 11-13.

[71] Article 70 of the Swiss Criminal Code.

[72] Art. 73(1)(a) and (b) of the Swiss Criminal Code.

[73] Art. 73(2) of the Swiss Criminal Code. This is to avoid the situation where the victim sues the convict for damages after having been indemnified by the State. Since the latter acquires the *locus standi* of the victim, it makes sure that the culprit will not escape paying damages.

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whether the assets to be confiscated will be transferred to the victim, the freezing orders *pendente lite* are applied in the same way in both eventualities. The Swiss Criminal Procedure Code does not make any distinction between a freezing order with the purpose of subsequently transferring the assets to the victim and a freezing order in a more common situation where the State will be the only beneficiary of the forfeited assets.[74]

German law works in a very different way. The forfeiture automatically transfers the property of confiscated assets to the State exclusively.[75] If the court envisages compensating the victim with frozen assets, it refrains from ordering their confiscation with the final court decision[76] and extends the freezing order for three more years in order to give to the victim sufficient time to use the seizure proceedings established by the German Criminal Procedure Code.[77]

In short, if Swiss law prefers formally confiscating assets subject to forfeiture before transferring them to the victim, German law simply allows the latter to use those assets for the purposes of compensation without forfeiting them. German law assigns a more subsidiary role to criminal law in the compensation process.[78] In view of these differences between the German and Swiss conceptions of confiscation for the benefit of the victim, it should not be a surprise that the effects of a bankruptcy decree on frozen assets are different in both countries.

ii) Consequences of the Opening of a Bankruptcy Proceeding on the Freezing of Assets for the Purpose of Criminal Investigations

Under Swiss law, the opening of a bankruptcy proceeding has no impact on the assets that are subject to a criminal freezing order, since bankruptcy law is of a subsidiary nature in relation to criminal procedure.[79] Such assets are incorporated

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[74] See art. 263(1) of the Swiss Code of Criminal Procedure.

[75] See § 73*e*(1) *first limb* of the German Criminal Code: "If the forfeiture of an asset is ordered, the property thereof, or the confiscated right, is transferred to the State when the decision is final, as long as the individual concerned by the measure is entitled to them at this moment (Wird der Verfall eines Gegenstandes angeordnet, so geht das Eigentum an der Sache oder das verfallene Recht mit der Rechtskraft der Entscheidung auf den Staat über, wenn es dem von der Anordnung Betroffenen zu dieser Zeit zusteht)".

[76] § 73(1) *second limb* of the German Criminal Code.

[77] § 111*i*(2) of the German Criminal Procedure Code.

[78] For this reason, German law does not have to face the same problem as Swiss law when the frozen assets are used to compensate a victim who, in a normal bankrutpcy proceeding, should only be indemnified after the other creditors. On this last problem, see M. SCHUBARTH, Privilegierung des Deliktsgläubigers durch strafrechtliche Einziehung, in J.-B. ACKERMANN/ A. DONATSCH/ J. REHBERG, *Wirtschaft und Strafrecht – Festschrift für Niklaus Schmid zum 65. Geburtstag*, Zürich 2001, p. 161 *et seq*.

[79] See art. 44 DEBLA: "The liquidation of assets confiscated in application of Federal or State criminal or tax statutes […] is done in conformity with those statutes. (La réalisation d'objets confisqués en vertu des lois fédérales ou cantonales en matière pénale ou fiscale […] s'opère en conformité avec ces lois)". For more information on this, see M.J. JEKER (note 48), at 77 and 263.

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into the bankruptcy estate only when they are totally free of any restriction to disposal.[80]

The situation is different under German law. Frozen assets pending criminal investigations are included in the bankruptcy estates as a matter of principle, the only exception being when a lien with effect *in rem* has been created upon them before the opening of the bankruptcy procedure.[81] Since this is not the case for criminal freezing orders adopted under the German Criminal Procedure Code, frozen assets are incorporated into the bankruptcy estate and are subject to its administration and liquidation under the German Insolvency Code.[82]

iii) Consequences in Swiss-German Transnational Cases

Since frozen assets are, under German law, incorporated into the bankruptcy estate and are subject to the divestment imposed to the debtor, it is no surprise that a freezing order is lifted in Germany when an insolvency proceeding is opened. That is what happened in one of the cases we have already mentioned. The *ratio decidendi* is very interesting, since the underlying facts are so similar to those of our case that a material link cannot be excluded. A freezing order had been imposed on the assets of a Swiss company involved in a fraud on German territory.[83] This order encompassed an account opened with a Swiss bank, so the Swiss prosecuting authorities granted mutual assistance, treating the case as a purely criminal one.[84] A Swiss court declared the company bankrupt[85] and subsequently a German court opened an insolvency proceeding upon its assets.[86] Subsequently, the Nuremberg Regional Court lifted the freezing order since the assets were now under the receivership of a German liquidator and could not be fraudulently disposed of by the managers of the company.[87] The liquidator and the public prosecutor (*Staatsanwalt*) attempted to have this decision reversed by the Court of Appeal on the ground that the freezing order should be maintained as long as the money deposited in the Swiss bank had not been delivered back.[88] The Nuremberg

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[80] But it is also sometimes suggested that a criminal freezing order should not be ordered when a bankruptcy has been opened with the divestment of the debtor/culprit as a consequence: B. LIPS, Möglichkeiten und Grenzen einer Zusammenarbeit von Konkursverwaltung, Staatsanwaltschaft und Gericht, in J.-B. ACKERMANN/ W. WOHLERS, *Konkurs und Strafrecht: Strafrechtliche Risiken vor, in and nach der Generalexekution – 5. Zürcher Tagung zum Wirtschaftsstrafrecht*, Zürich 2011, p. 173-174.

[81] See § 80(2) of the German Insolvency Code.

[82] Bundesgerichtshof, 24 May 2007, Akz. IX ZR 41/05, *NJW* 2007, p. 3350.

[83] Decision of 15 March 2013, § 7. *In casu*, the State was considered as a victim with civil claims, but without any further motivation in this respect.

[84] Decision of 15 March 2013, § 8.

[85] Decision of 15 March 2013, § 9. The liquidation of the bankruptcy estate was subsequently suspended for lack of valuable assets (§ 12).

[86] Decision of 15 March 2013, § 10.

[87] Decision of 15 March 2013, § 32.

[88] Decision of 15 March 2013, §§ 22, 23 and 30.

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Court of Appeal considered that a freezing order under the Criminal Procedure Code should not be maintained with the sole purpose of assisting the liquidator of a bankruptcy estate in recovering assets abroad.[89] The freezing of the bank account in Switzerland had been executed before the opening of the insolvency proceeding; therefore, it could not create a right *in rem* under German law,[90] since the applicable Swiss law does not recognize such an effect for a freezing order.[91] This very point led the Nuremberg Court of Appeal to dismiss the appeal as ill-founded.

Turning back to our case, it is clear that the freezing order made by the German courts, and executed by a Swiss prosecutor, is very likely to be lifted because of the opening of the bankruptcy proceeding in Germany. Does this imply that the freezing of assets should also be lifted in Switzerland? It is very difficult to formulate definitive answer to this question. We believe there is *prima facie* no compelling reason for the Swiss public prosecutor not to lift a freezing order imposed at the request of its German counterpart if a German court has decided accordingly. Since no further steps will be taken in the context of a criminal investigation, Swiss authorities have no reason to wait indefinitely. However, the 1969 Bilateral Agreement between Germany and Switzerland allows for the transfer of assets even in the absence of any confiscation order if a court decision confirms that the assets should be subject to a "freezing order".[92] It is not inconceivable that the concept can be interpreted in such a broad way that it encompasses the divestment imposed on the debtor in bankruptcy proceedings. In 2003 the Federal Tribunal deemed that documents transferred to the German prosecution authorities as evidence in a criminal case could be used in a subsequent compensation proceeding on frozen assets.[93] Thus, it is not impossible to claim for an analogical application to the situation where frozen and transferred assets are incorporated in a bankruptcy proceeding.

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[89] Decision of 15 March 2013, § 74.

[90] Decision of 15 March 2013, §§ 63 and 64.

[91] Decision of 15 March 2013, §§ 65-71.

[92] Art. II(1) *first limb* of the 1969 Bilateral Agreement: "Gegenstände können auch ohne Vorlage eines Beschlagnahmebeschlusses der zuständigen Behörde des ersuchenden Staates herausgegeben werden, wenn sich aus dem Ersuchen eines Richters dieses Staates ergibt, dass die für eine Beschlagnahme nach dessen Recht erforderlichen Voraussetzungen vorliegen würden". However, a recent case decided by the Federal Tribunal seems to restrain the pertinency of art. II(1) of the 1969 Bilateral Agreement to cases where the prosecution authorities are not in a position to produce a formal criminal freezing order, but may give a clear assurance that the assets are potentially subject to it (Federal Tribunal, 28 May 2013, 1C_326/2013, § 3.2).

[93] Federal Tribunal, 20 June 2003, 1A.38/2003. For further information, see M. HARARI, L'évolution récente de l'entraide en matière pénale: des interrogations demeurent, in R. GANI (ed.), *Récents développements en matière d'entraide civile, pénale et administrative*, Lausanne 2004, p. 130-131.

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iv) Will the Swiss Bankruptcy Proceeding Be Reopened?

If the criminal freezing order is lifted, should this enable a reopening of the bankruptcy proceeding in Switzerland? Normally, a suspended bankruptcy can be reopened only if *new* assets are discovered.[94] In our case, the competent authorities are clearly aware of the existence of the banking account. An orthodox point of view would be that newly liberated assets cannot be considered as truly new.[95] In our case, however, the Federal Tribunal indicated, as an *obiter dictum*, that the lifting of the freezing order could lead to the reopening of the bankruptcy proceeding.[96] The highest Swiss jurisdiction confirmed in this way the approach followed by the State Court of St. Gallen.[97] If the reopening of the bankruptcy and the liberation of the assets are well coordinated, this should make sure that the money is not given back to the company or, even worse, to its partners. The defrauded German investors could also have a slight hope that they would be compensated in the course of the liquidation of the Swiss bankruptcy estate.

Nevertheless, such an issue is far from being an adequate solution. The creditors will have to announce their claim to the Swiss Bankruptcy Office and they may have to defend them before the Swiss courts in a separate set of proceedings,[98] even if they were not contested in Germany.[99] Even if the whole set of proceedings ends with success, there is still a risk that some creditors are over- or under-compensated because of the uncoordinated liquidation of both German and Swiss bankruptcy estates.[100] So the twofold set of independent proceedings in two different countries is not suitable to adequately protect the interests of German

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[94] On this possibility, which is not contested, see among many others F. VOUILLOZ, La suspension de la faillite faute d'actif, *PJA/AJP* 2001, p. 82.

[95] The question has not attracted much attention until now. M.J. JEKER (note 48), at 77 considers, without going into many details, that creditors should pay the necessary costs of liquidation of the bankruptcy estate in order to avoid the suspension of the liquidation because of the lack of apparent valuable assets (see art. 230(2) DEBLA). In our view, this assertion implicitly excludes without any valid reason a reopening after the liberation of frozen assets.

[96] Judgment of 28 March 2013, § 3.4.3.

[97] Judgment of 28 August 2012, § 8c.

[98] The Swiss courts have exclusive jurisdiction for any contestation concerning the existence or the amount of a claim announced in a bankruptcy proceeding: A. BRACONI, *La collocation des créances en droit international suisse de la faillite – Contribution à l'étude des articles 172-174 LDIP*, Zurich 2006, p. 124-125.

[99] It is difficult to say if the creditors could rely on a potential German court decision concerning their claim. Under Swiss law, decisions on the existence or the amount of a claim do not benefit from the full *res judicata,* but only have effect in the course of the bankruptcy proceeding in which they were delivered (A. BRACONI, note 98, at 137-138). For this reason, Swiss court would be likely to consider that a similar German decision (see §§ 179, 183 and 184 InsO) cannot be recognized in Switzerland.

[100] Art. 172(3) PILA would not be applicable, for the Swiss bankruptcy proceeding is not ancillary to its German equivalent. Since bankruptcy law is a public order matter under Swiss law, it is unlikely that such a disposition could be applied by way of analogy.

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creditors who were defrauded by the directors of the Swiss company. For this reason, we think that transferring the case to Germany is a better option.

3. As a Provisional Conclusion

As a matter of a general conclusion as to the criminal aspects of our case, we now understand that the intricate links between criminal procedure and bankruptcy law raise the possibility of the utilisation of the more elaborated rules of mutual assistance in criminal matters as a remedy for the lack of similar principles in bankruptcy matters. In spite of a "general trend toward harmonization and modernization of mutual assistance procedures",[101] the resolution of practical issues is always bumping into the "impression of a lack of general layout of norms following a methodical plan".[102] With some pragmatism, we could consider positively the fact that, in some situations, mutual assistance in criminal matters can help to by-pass the too restrictive rules of bankruptcy law.

IV. The European Approach of Cross-Border Cooperation

The necessity of extensive cross-border cooperation and coordination is one of the preoccupations which led to the development of European law in the field of international insolvency law. It is therefore natural that we look firstly at the Council Regulation No 1346/2000 of 29 May 2000, which codifies the European Private International Law in this respect (A.). However, a more recent trend is in our view at least as important as a European Union law. It seems that the case law of the European Court of Human Rights is about to recognize a "right to cross-border cooperation" as a subsidiary category of the "right to a fair trial" enshrined in Article 6 § 1 of the European Convention on Human Rights (B.).

A. The Council Regulation (CE) No 1346/2000 of 29 May 2000

The European legislator has addressed the matter of cross-border cooperation within Europe through the Council Regulation (CE) No 1346/2000 of 29 May 2000. Although based on the universality of bankruptcy decree,[103] the regulative framework nevertheless allows the opening of secondary proceedings at some conditions.[104] The parallel liquidation of two bankruptcy estates of the same debtor is thus not an anomaly under European law. In order to make the whole process

[101] G. PAVLIDIS, (note 49), at 100.

[102] G. PAVLIDIS, (note 49), at 100-101.

[103] See art. 16(1) of Regulation No 1346/2000.

[104] Art. 27 of Regulation No 1346/2000.

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evolve more smoothly, the Regulation No 1346/2000 provides for some duty of mutual assistance for both administrators of the principal and secondary proceedings.[105] It is therefore worth figuring out how the European Regulation could be applied if Switzerland were a Member State of the European Union. Firstly, we will try to answer the question whether the German administrator could, as he seems to wish, have direct access to the banking account held by the Swiss bank (1.). Since a bankruptcy proceeding has been opened and then suspended, in Switzerland we will then examine how far the Swiss Bankruptcy Office could be compelled to grant mutual assistance to the German administrator of the bankruptcy estate (2.).

1. Direct Access to Assets Located in Switzerland

According to Article 18(1) of Regulation No 1346/2000, the liquidator appointed in the course of a proceeding opened at the centre of the main interests[106] of the debtor is entitled to "remove the debtor's assets from the territory of the Member State in which they are subject". It is highly probable that if the European Regulation were applicable, the German administrator would *a priori* be allowed to claim the deliverance of the deposit made with a Swiss bank. However, two important objections could then be raised to any concrete step that the administrator could undertake in our case.

Firstly, the bank, and even more certainly the Swiss authorities, could claim that the bank account has been frozen in the course of the criminal proceedings and is therefore not a part of the bankruptcy estate.[107] This raises the question of the applicable law in relation to the issue. According to Article 4(2)(b) of the European Regulation, the *lex fori concursus* determines "the assets which form part of the estate". The administrator could rely on the provision to claim the immediate delivery of the deposit, since German law does not recognize any priority to a criminal freezing order over the bankruptcy divestment. In answer, the Swiss party could again object that the German regulation is contrary to public order and is therefore not binding in accordance with Article 26 of the European Regulation.[108] We could not find any pertinent case law, either European or national, on this subject. This issue is nevertheless not peculiar to Swiss-German transnational relations, since criminal freezing orders can be found in every European country.

Even if this first objection as to the consequences of the criminal freezing order could be dismissed, there would still be a second one. The powers conferred on the liquidator by the European Regulation to claim for the delivery of assets do

[105] Art. 31 of Regulation No 1346/2000.

[106] See the reference made to art. 3(1) of Regulation No 1346/2000.

[107] They could rely on art. 44 DEBLA.

[108] But the applicability of art. 26 to the outcome of the conflict rule of art. 4 of Regulation No 1346/2000 could be questioned, since the provision is evidently designed for the recognition of judgments. See, with a positive opinion, S. REINHART, in H.-P. KIRCHOF/ H. EIDENMÜLLER/ R. STÜRNER (eds), *Münchner Kommentar Insolvenzordnung* (3rd ed.), Munich 2008, Art. 26 EuInsVO No. 15.

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not apply when a secondary bankruptcy proceeding is opened or is about to be opened.[109] In our case, the bankruptcy of the Swiss company had been ordered[110] by a Swiss court with a subsequent suspension for lack of valuable assets. Would this deprive the German liquidator from any power on Swiss territory? Again, the question is difficult to answer. Even if the possibility of putting a premature end to a proceeding for lack of valuable assets is not an uncommon scenario in Europe,[111] we cannot identify a clear precedent on the topic. General principles are also difficult to apply, since the nature of the decision of suspension is not totally clear.[112] If under Swiss law the bankruptcy proceeding is only "suspended"[113] because of the lack of valuable assets, creditors are not obliged to wait indefinitely. They can start individual enforcement proceedings after the publication of the decision of suspension,[114] and these proceedings, which had been initiated before the opening of the bankruptcy and were therefore stopped,[115] are started again.[116] Thus, the so-called "suspension" is vested with all the effects of a closure of the bankruptcy proceeding. As we have already explained, a "suspended proceeding" can be reopened if new assets are found.[117] For this reason, the "suspension" is not definitive and the real status of the assets during the "period of uncertainty" between both decisions to "suspend" and to "reopen" is not very clear.[118] This is not to speak of the peculiarities of the present case, where the assets were not unknown at the time of

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[109] See the wording of art. 18(1) of Regulation No 1346/2000: "The liquidator […] may exercise all the powers […] as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State".

[110] In order to simplify matters, we will consider that the bankruptcy proceeding, technically a liquidation by way of bankruptcy ordered pursuant to art. 731b of the Swiss Code of Obligations, can be considered as a bankruptcy proceeding to which Regulation No 1346/2000 is applicable.

[111] See for instance in the neigbouring countries: § 107 InsO (Germany); § 123a Insolvenzordnung (Austria); art. 90 Konkursordnung (Liechtenstein); art. L 643-9 to L 643-13 Code de commerce (France); art. 118 of the Legge Fallimentare (Italy).

[112] This question is exclusively dealt with by national legislation; in a recent case, the Court of Justice of the European Union refused to adopt an European-wide concept of closure of the proceedings: Judgment of 22 November 2012, *Bank Handlowy w Warszawie SA and PPHU* "ADAX"*/Ryszard Adamiak v. Christianapol sp. z o.o.*, C-116/11, *OJ* C 26 of 26 January 2013.

[113] The wording of the provision (art. 230 DEBLA) is very clear in the three pertinent languages (*Einstellung des Konkursverfahrens mangels Aktiven/suspension de la faillite faute d'actifs/Sospensione della procedura di fallimento per mancanza di attivi*).

[114] Art. 230(3) DEBLA.

[115] Art. 206 DEBLA.

[116] Art. 203(4) DEBLA.

[117] See above at note 94.

[118] The only clear point is that the divestment is lifted with the suspension decision: F. LORANDI, Einstellung des Konkurses über juristische Personen mangels Aktiven (Art. 230a SchKG), *PJA/AJP* 1999, p. 41; C.R. STOCKER, *Entscheidungsgrundlagen für die Wahl des Verfahrens im Konkurs – insbesondere des Konkursverfahrens bis zur Einstellung mangels Aktiven mit seinen unmittelbaren Nachwirkungen*, Zürich 1985, p. 183.

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the suspension, but were merely inaccessible because of the criminal freezing order.

In the view of all these unresolved questions, it is very likely that the application of the European Regulation could not easily grant the German liquidator with the powers he is deprived of by the unilateral application of Swiss legislation. We doubt that he could have direct access to the deposit with the Swiss bank, either because of the criminal freezing order or as a consequence of an existing, albeit suspended, bankruptcy proceeding.

2. *Cross-Border Assistance*

We have previously noted that the existence of an open bankruptcy proceeding in Switzerland could deprive the German administrator of any direct access to the deposit, even if the European law had been applicable. This does not imply that no other remedy would be available. The European Regulation provides for some coordination tools when the same estate is subject to two different bankruptcy proceedings.

A secondary bankruptcy proceeding can be opened outside of the centre of the debtor's main interests only if he has an establishment in an another Member State than the centre of his main interests, the effect of such a parallel proceeding being limited to the liquidation of the assets related to the establishment.[119] If a proceeding is opened before the beginning of the main proceeding, the liquidator is entitled to ask for its conversion into a secondary proceeding.[120] Accordingly, if the Swiss proceeding could be considered as being still open, the German administrator could ask for its conversion into a secondary proceeding. The liquidation process could then encompass the bank deposit as soon as it is available.[121]

In accordance with Article 31(2) of the European Regulation, "the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other". Could the German administrator rely on this provision in order to have the deposit transferred to Germany so as to avoid a costly bankruptcy proceeding in Switzerland? European law (again) gives no precise answer to this question and the academic literature has not proposed any comprehensive model of cooperation involving such a possibility;[122] even in the

[119] Art. 3(2) of Regulation No 1346/2000.

[120] Art. 37 of Regulation No 1346/2000.

[121] On this question, see above.

[122] It sometimes satisfies itself with indicating that the liquidator in the secondary proceeding should be prevented from taking a decision that could be detrimental to the main proceeding: J. ISRAËL (note 16), at 303-304; G. MÄSCH, in T. RAUSCHER (ed.), *Europäisches Zivilprozessrecht – Kommentar* (2nd ed.), Vol. 2, München 2006, Art. 31 EC Regulation No 8; G. MOSS/ I. FLETCHER/ S. ISAACS, *The EC Regulation on Insolvency Proceedings – A Commentary and annotated Guide* (2nd ed.), Oxford 2009, Art. 31 EC Regulation No 5.122. For some other general approach, E. FABRIES-LECEA, *Le règlement "insolvabilité" – Apport à la construction de l'ordre juridique de l'Union européenne*, Brussels 2012, p. 411 *et seq*. Concerning the economic utility of a secondary proceeding, see G.C. GIORGINI,

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very detailed propositions made by WESSELS and VIRGÓS, such a situation is not mentioned.[123] We cannot find any clear court decision on the extent of the duty to cooperate.[124] It transpires from an Austrian case that the duty to collaborate does not allow the liquidator in the main proceedings to claim for further possibilities of intervention; in particular, it cannot be understood as creating a relationship of subordination even if the liquidator in the main proceedings shall assume some leadership.[125] Such an approach can lead to difficulties when the assets in the main proceeding are of lesser value than those in the secondary proceeding, namely

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Méthodes conflictuelles et règles matérielles dans l'application des "nouveaux instruments" de règlement de la faillite internationale, Paris 2006, p. 317-318.

[123] See *European Communication and Cooperation Guidelines For Cross-Border Insolvency,* July 2007, can be consulted at <www.insol.org>. Guidelines 13.1 and 13.2 concerning cross-border sales do not give any right to the transfer of assets from the secondary to the main proceeding. For a similar opinion, see R. DAMMANN/ G. PODEUR, La coordination des procédures d'insolvabilité "principale(s)" et "secondaire(s)" au sens du Règlement européen n° 1346/2000, in SOCIÉTÉ DE LÉGISLATION COMPARÉE (ed.*), Les faillites internationales – Colloque du 30 novembre 2007*, Paris 2008, p. 49-50 (*the liquidator of the main proceeding cannot directly sell the assets belonging to the secondary proceeding*). More in favour of a right of the liquidator in the main proceeding to intervene in the secondary proceeding is J. GARAŠIĆ, *Anerkennung ausländischer Insolvenzverfahren: Teil 2*, Frankfurt-am-Main (etc.) 2005, p. 526.

[124] See on this lack of precision P. NABET, *La coordination des procédures d'insolvabilité en droit de la faillite internationale et communautaire*, Paris 2010, p. 261.

[125] Oberlandesgericht Graz, Decision (*Beschluß*) of 20 October 2005 – 3 R 149/05, *NZI* 2006, p. 660 *et seq*., especially p. 662: "Different approaches as to the strategy of liquidation are something foreseeable when a principal and a secondary insolvency proceeding are open. In case of conflict the Regulation provides, as a matter of principle, for the right of the liquidator in the main proceeding to make some proposal concerning realization of the assets [...] in the same way as the Regulation acknowledges the leadership of the liquidator in the main proceeding without contemplating the relationship between the liquidator in the main and secondary proceeding as being a merely subordinate one (Unterschiedliche Auffassungen über die Abwicklungsstrategien sind daher bei Eröffnung eines Haupt- und eines Sekundärinsolvenzverfahrens vorsehbar. Im Konfliktfall entscheidet sich die Verordnung aber grundsätzlich für ein Verwertungsvorschlagsrecht des Hauptinsolvenzverwalters […], wie überhaupt die Verordnung das Verhältnis von Haupt- zum Sekundärinsolvenzverwalter zwar keineswegs als hierarchische Über- und Unterordnung begreift, wohl aber dem Hauptinsolvenzverwalter eine leitende Funktion zuordnet)". This decision confirmed a previous one, which as also been published: Landesgericht Leoben, Decision of 31 August 2005 – *NZI* 2005, p. 646 *et seq*. with a commentary by Ch.G. PAULUS. Some scholars are also going in the same direction; see for instance: F. MÉLIN, *Le Règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilités*, Paris/ Brussels 2008, p. 382-383; K. PANNEN/ S. RIEDEMANN, in K. PANNEN (ed.), *European Insolvency Regulation*, Berlin 2007, Art. 31 EC Regulation No 40. In favour of a more firm leadership: K.S. STAAK, *Der deutsche Insolvenzverwalter im europäischen Insolvenzrecht – Eine Analyse der EG-Verordnung Nr. 1346/2000 des Rates vom 29. Mai über Insolvenzverfahren unter besonderer Berücksichtigung der Person des deutschen Insolvenzverwalters*, Frankfurt-am-Main (etc.) 2004, p. 177.

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because the centre of the main interest has been mistakenly assessed.[126] The secondary proceeding cannot be closed at the request of the liquidator of the main proceeding,[127] and he is then left without any enforceable remedy against his colleague, who is leading a "factual" main proceeding.[128] This cannot but push courts into retaliating by denying any mutual assistance; however, "even if this reaction [...] is understandable, it is hardly the right way to arrive at a functioning European insolvency law".[129]

In our case, a similar configuration is transpiring from the facts analysed by the Federal Tribunal. Since the activities on German territory had an obvious fraudulent purpose, the opening of a criminal investigation being the best evidence of this, it is very likely that the bank deposit in Switzerland constitutes both the proceeds of the crime and the only hope for all the creditors. This can also explain why the German administrator took the financial risk of bringing the case before the highest jurisdiction. Assuming that the European Regulation would be applicable, and the Swiss bankruptcy proceeding could be considered as being still open,[130] the German administrator would have no remedy against the unwillingness of his Swiss counterpart, who could, like the Austrian courts in the above-mentioned example, use his power in order to retaliate against the opening of a main proceeding in a non-adequate venue. The application of European law would therefore not be very helpful in spite of all the promises of collaboration and mutual assistance upon which it is based.[131]

B. The "Right to Cross-Border Cooperation" in the Recent Case Law of the European Court of Human Rights

Since the European Regulation provides us with little assistance in solving the problem, even if it had been applicable, we need to knock on another door, which is actually not far away from Luxembourg. In its vivid case law, the European Court of Human Rights has drawn a wide range of procedural guarantees from the right to a fair trial enshrined in Article 6 § 1 of the European Convention on

[126] In the Austrian case, this was the consequence of both the trend of English judges to attract some multinational cases and the cost of the appeal proceedings that deterred any creditors: C.G. PAULUS, Commentary on the judgment delivered by Landgericht Leoben on 31 August 2005, *NZI* 2005, p. 647, § I. As of 2007, this seemed to be a general tendency within the Chancery Division of the High Court, except in one case where fraud was demonstrated: R. DAMMANN/ G. PODEUR (note 123), at 43-45.

[127] C.G. PAULUS (note 126), at 647, § II.1.

[128] C.G. PAULUS (note 126), at 648, § II.3.

[129] C.G. PAULUS (note 126), p. 647, § II *in initio*: "Zwar ist eine derartige Reaktion […] durchaus verständlich, es ist aber schwerlich der geeignete Pfad, zu einem funktionierenden europäischen Insolvenzrecht zu kommen".

[130] And therefore could be converted in a secondary proceeding.

[131] It is unfortunately a frequent issue: F. MÉLIN (note 125), at 375-376; A. TRUNK, *Internationales Insolvenzrecht – Systematische Darstellung des deutschen Rechts mit rechtsvergleichenden Bezügen*, Tübingen 1992, p. 434.

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Human Rights. One of them is the right to the execution of any civil judgment.[132] Much of the relevant case law only deals with national issues, but the application of the same standards in international cases is not excluded, even if this point is far from being uncontested.[133] For instance, the execution of a foreign decision concerning a case of child abduction,[134] or the recognition in Romania of a Portuguese judgment declaring that a certain individual is a member of the former Romanian royal family,[135] are both covered by the right to a fair trial. In the *McDonald* case, the Strasbourg Court explicitly stated that "the refusal to declare an American judgement enforceable in France has been an interference in the right of the applicant to a fair trial",[136] even if the application was finally dismissed on the ground that the applicant himself is responsible for his tricky situation.[137] Two

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[132] See the leading case: *Hornsby v. Greece,* application No 18357/91, judgment (Chamber) of 19 March 1997, §§ 40-41, concerning the execution by administrative officials of a judgment delivered by the Greek Supreme Administrative Court (Συμβούλιο της Επικρατείας) concerning the opening of a private school by foreign nationals. The civil nature of the issue was not at stake before the European Court. Subsequent judgments deal with clear civil cases where the execution of a court decision is made impossible by the lack of effective way to compel a reluctant individual to fulfill his obligations: *Immobiliare Saffi v. Italy,* application No 22774/93, judgment (Grand Chamber) of 28 July 1999 (prohibition of the use of public force against a former lessee); *Fuklev v. Ukraine,* application No 71186/01, judgment (Chamber) of 7 June 2005 (disregarding of a court decision by the liquidation committee of a joint stock company); *Bačić v. Croatia*, application No 43595/06, judgment (Chamber) of 19 June 2008 (refusal to consider the applicant as a creditor in a bankruptcy because of the lack of filing of a proof of claim according to the relevant legislation). Scholars generally follow the same pattern: F. De Santis di Nicola, *Ragionevole durata del processo e rimedio effetivo*, Napoli 2013, p. 135-137; O. Doğru/ A. Nalbant, *İnsan Hakları Avrupa Sözleşmesi – Açıklanma ve Önemli Kararlar*, Ankara 2012, p. 632; L. Marino, *Le droit à un tribunal au sens de la Convention européenne des droits de l'Homme*, Paris 2006, p. 565 *et seq*.; Y. Iqbal, *SchKG und Verfassung – untersteht auch die Zwangsvollstreckung dem Grundrechtsschutz?*, Zürich 2005, p. 31.

[133] D. Spielmann, Recognition and enforcement of foreign judicial decisions, *Cyprus Human Rights Law Review* 1 (2012), p. 14 therefore mentions the "embryonic case-law concerning the obligation of recognition and enforcement". For a more general point of view, see F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'Homme*, Brussels 2007, p. 364 *et seq*.

[134] See among many others: *Ancel v. Turkey*, application No 28514/04, judgment (Chamber) of 17 February 2009 where in the end no violation of art. 6 § 1 of the Convention was established.

[135] *De Hohenzollern (of Roumania) v. Romania,* application No 18811/02, judgment (Chamber) of 27 May 2010.

[136] *McDonald v. France*, application No 18648/04, inadmissibility decision of 29 April 2008. This is the first case dealing directly with this matter: D. Spielmann (note 133), p. 15. A previous decision (*Hussin v. Belgium,* application No 70807/01, inadmissibility decision of 6 May 2004) had refused to adopt a clear opinion on this point (for a critical point of view F. Marchadier (note 133), at 368-370).

[137] The applicant had firstly proposed a divorce petition before the Marseilles Court of General Jurisdiction (*tribunal de grande instance*), which had been actually rejected for want of a precise and substantiated cause of action. Instead of lodging an appeal, the

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subsequent cases[138] have firmly reaffirmed this approach, which could be considered as a firm legal doctrine if the Strasbourg Court had not also adopted an unfortunate inadmissibility decision.[139] In spite of this, scholars also tend to acknowledge the existence of a "right to the international enforcement of judgments", not only on the basis of Article 6 § 1 of the Convention,[140] but also with reference to other articles.[141]

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applicant introduced a second divorce proceeding before the County Court of Brevard (Florida), the enforcement of whose favourable judgment he sought in France.

[138] *Shlokhov v. Armenia and Molodova*, application No 49358/05, judgment (Chamber) of 31 July 2012; *Vrbica v. Croatia,* application No 32540/05, judgment (Chamber) of 1st April 2010; *Selin Aslı Öztürk v. Turkey*, application No 39523/03, judgment (Chamber) of 13 October 2009. See also, in a slightly different way: *Ateş Mimarlik Mühendislik A.Ş. v. Turkey*, application No 33275/05, judgment (Chamber) of 25 September 2012 concerning the effect of the recognition of a German judgment on the time limit to lodge a claim with a Turkish court.

[139] *Constantinou and others v. Cyprus*, application No 3888/06, inadmissibility and strike-out decision of 17 September 2009. This decision, already analysed by D. SPIELMANN (note 133), at page 16 in footnote 49, rejects the whole complaint concerning the denial of international enforcement in Cyprus of an English judgment, under the pretence that "it is not [its] function to deal with errors of fact or law allegedly committed by national court", in view of the fact that "the applicants are in essence requesting [it] to review the findings of the domestics courts, and in particular of the Supreme Court, concerning the enforcement of the judgment of the High Court in Cyprus". This motivation is almost literally identical to that of the above-mentioned *Hussin* case, which had been overruled by the *McDonald* decision. Unfortunately, it was not the first time in the history of the Strasbourg Court that an inadmissibility decision was delivered without taking into account a clear precedent. A similar configuration in tax matters has led to a Grand Chamber case in order to clear the situation: *Jussila v. Finland*, application No 73053/01, judgment (Grand Chamber), of 23 November 2006, especially §§ 33-35.

[140] For instance, see D. SPIELMANN (note 133), at 24. For this author, it is, however, difficult to say if the right to the international enforcement is covered by the right to access a court or by the right to the enforcement as a sub-category of the right to a fair trial (see D. SPIELMANN (note 133), at 17-18). In our view, this distinction is purely theoretical, since in both cases the link between the right to the international enforcement and the right to a fair trial is accepted.

[141] This approach was also proposed before the *McDonald* decision (F. MARCHADIER (note 133), at 372 *et seq.*) and has been sometimes followed by the European Court when the refusal to execute a foreign court decision had an impact on the family life of the parties: *Wagner et J.M.W.L. v. Luxembourg,* application No 76240/01, judgment (Chamber) of 28 June 2007 (recognition in Luxembourg of a Peruvian judgment granting the adoption of the second applicant by the first one); *Ignaccolo-Zenide v. Romania,* application No 31679/96, judgment (Chamber) of 25 January 2000 (execution in Romania of a French judgment granting to the applicant the exclusive guardianship over her two daughters). After *McDonald,* the case law is still considering some aspects of international execution under art. 8 of the Convention. Either the Court examines the complaints under both art. 6 and art. 8 separately (for instance, the above-mentioned *Ancel* case; *Negrepontis-Giannisis v. Greece,* application No 56749/08, judgment (Chamber) of 3 May 2011) or it considers that the complaints under art. 8 encompass all matters so that no separate adjudication under art. 6 is necessary (*Raw v. France*, application No 10131/11, judgment (Chamber) of 7 March 2013). In addition, some other cases examine the denial of international enforcement under

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However, it should be noted that in our case, the enforcement of the German bankruptcy decree was not directly at stake. The administrator was requesting the mutual assistance of the Swiss authorities in recovering assets, not for the recognition (or extension) of its direct effects in Switzerland. This small difference is crucial, since the recognition of a foreign bankruptcy decree is an available remedy under Swiss private international law. The German administrator was actually asking the Swiss authorities to grant him mutual assistance in the same way as is foreseen by Article 31 of Regulation No 1346/2000. In other words, does the right to international enforcement encompass the right to cross-border mutual assistance? This question is difficult to answer. The European Court of Human Rights considered in the *Dumitrascu* case in 2005[142] that a victim of a car accident caused in Romania by a Turkish driver should formally ask for the recognition and enforcement of a Romanian judgment granting him compensation before lodging an application with the Court against Turkey for lack of effective enforcement. Even if the question was only raised on the occasion of a procedural incident, the Strasbourg Court proceeds implicitly from the point of view that there is no right to spontaneous collaboration enshrined in the Convention. On the other hand, more recent cases admitted the application of Article 6 § 1 of the Convention to mutual assistance proceedings enshrined in some international conventions.[143] Even if the Court does not raise the question of the existence of a potential right to mutual assistance, it nevertheless applies the standards of efficiency that are normally used in "basic" enforcement cases. In the *Romańczyk* and *Matrakas* cases, it held France and Greece to be liable for the lack of collaboration in the execution of a Polish judgment granting alimonies. The French Government attempted to defend itself by relying on the inapplicability of Article 6 § 1 of the Convention to enforcement proceedings conducted in the absence of any court proceeding initiated by the applicants,[144] pleading, by way of consequence, the inadmissibility

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art. 1 of the additional Protocol No 1 to the Convention (see the above-mentionned *Vrbica* case, analysed by D. Spielmann (note 133), at 21-22 and the *Shlokhov* case).

[142] *Dumitrascu v. Romania and Turkey*, application No 43007/02, inadmissibility decision of 9 June 2005.

[143] Concerning the New York Convention on the Recovery Abroad of Maintenance of 20 June 1956, see *Matrakas and others v. Poland and Greece*, application No 47268/06, judgment (Chamber) of 7 November 2013; *Romańczyk v. France,* application No 7618/05, judgment (Chamber) of 18 November 2010; *Huc v. Romania and Germany,* application No 7269/05, inadmissibility decision of 1 December 2009; *Dinu v. France and Romania*, application No 6152/02, judgment (Chamber) of 4 November 2008; *Zabawska v. Germany*, application No 49935/99, inadmissibility decision of 2 March 2006; *K. v. Italy,* application No 38805/97, judgment (Chamber) of 20 July 2004.

[144] *Romańczyk* (note 143), § 43. Enforcement proceedings had been initiated by the public prosecutor following an official demand presented by the competent French administrative body (§§ 14, 15, 31, 36). After the lodging of the application with the European Court, the applicants seem to have undertaken some steps in order to bring the matter before a French court (implicitly: § 37). In the above-mentioned *Dinu* case, enforcement proceedings had been undertaken before the French courts. In *Zabawska,* the German Government did not contest the applicability of art. 6 § 1 of the Convention. And, finally, in *K.* the exception was belatedly raised by the Italian Government and was therefore dismissed without examination on its merits.

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of the application.[145] The Greek Government claimed that in the absence of any exequatur proceedings before the national courts, the domestic remedies had not been exhausted.[146] The Court rejected both objections, considering that "the obligation to act does not rest exclusively on the claimant, but equally on the State of the respondent which is under a positive obligation to assist the claimant in the proceedings under the New York Convention".[147] Such a prudential statement is far from looking like an acceptance of any general duty to collaborate extra-judicially in the enforcement of civil judgment. Furthermore, in the *Huc* case, the German Government explicitly contended that "article 6 [of the Convention] does not grant any general right either to judicial assistance or to judicial cooperation".[148] The Court answered soberly that existing case law held this provision applicable to cases where the fulfilment of obligations under the New York Convention was at stake.[149]

In our view, the motivation of the above-mentioned judgments makes it clear that the Court is not ready to adopt a clear policy on the existence of an independent right to cross-border cooperation in civil matters, that is, a right which can be vindicated even in the absence of any applicable international instrument other than the European Convention on Human Rights. However, it seems that a general trend exists and we firmly believe that in the near future, the case law may evolve in this direction. For this very reason also, the approach followed by the Swiss Federal Tribunal is far from being accurate. Unlike Regulation No 1346/2000, which binds only Member States of the European Union, the European Convention on Human Rights is directly applicable to Switzerland.

V. Some Concrete Proposals

After having examined different approaches of our matters, we will now address the question of modifications that the Swiss approach should eventually undergo in order to achieve better cross-border cooperation as far as bankruptcy is concerned. First of all, we will question the opportunity of such modifications and the general orientations that should be taken in this respect (A.). Based on this, we will then propose some modifications *de lege ferenda* (B.) and *de lege lata* (C.).

A. What Shall We Do?

Before making any proposition as to the amendment that the law of bankruptcy and mutual assistance in criminal matters should undergo, the first point is to question

[145] *Romańczyk* (note 143), § 42.

[146] *Matrakas* (note 143).

[147] *Matrakas* (note 143), § 148; *Romańczyk* (note 143), § 58.

[148] *Huc* (note 143), *passim.*

[149] *Ibid.*

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the necessity of them (1.). Assuming that change is necessary, we will present what should be its main characteristics (2.).

1. Necessity of a Fundamental Change

To put it in diplomatic terms, the situation of the parties after the judgment of the Federal Tribunal is far from being ideal. The denial of any cross-border cooperation between the Swiss Bankruptcy Office and the German administrator causes a total block, with the risk that in the end, the proceeding will be reopened in Switzerland, leading to a cumbersome procedure only to liquidate the amount of the bank deposit. Moreover, the difficult interactions between criminal and bankruptcy proceedings, mainly because of the lack of mutual attention, add to the already-existing uncertainties.

In our view, the need for fundamental change in international bankruptcy law is even more desirable since the underlying facts are free from any peculiarity. The incorporation of a company under Swiss law followed by fraudulent undertakings in Germany and two bankruptcy proceedings in each country is far from being a rare occurrence. This is clearly evidenced by the other criminal cases in which the Nuremberg Court of Appeal had to adjudicate.[150] For this very reason, a rearrangement of the pertinent rules is necessary, at least in order to be sure that shortcomings in the coordination of both bankruptcy and criminal proceedings are not unwillingly providing a safe haven for individuals who certainly do not deserve it.[151]

Finally, we also observe a general tendency in private international law to enhance cross-border cooperation, especially in matters relating to bankruptcy. The adoption of the UNICITRAL Model Law on Cross-border Insolvency by many non-European states[152] reveals that mutual assistance, and mutual trust, is not limited to the close relationship of European Union Member States. The evolution is especially noticeable in American bankruptcy law, which has evolved from a strict territorial approach in the Bankruptcy Code of 1898 to a reception of the UNCITRAL Model Law in 2005.[153] This constitutes, in our eyes, the best incentive for a more favourable approach to be taken by Swiss law.

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[150] See above at note 69.

[151] The problem of asset tracing in international investment fraud is a worldwide one; for an another example, see M. STEINER, Is an Ostrich in Belgium Worth Two in the Bush? Asset Tracing in International Insolvency, 8 *Int. Insolv. Rev.* 171 (1999). The fact that Swiss private international law may be used in order to create a safe haven in bankruptcy has already been mentioned: R. KUHN (note 19), at 42; S. MARCHAND (note 34), at 184.

[152] As of 2009, the list already encompassed Australia, the British Virgin Islands, Canada, Colombia, Mexico, Montenegro, New Zealand, South Africa and the United States: B. WESSELS/ B.A. MARKELL/ J.J. KILBORN, *International cooperation in Bankruptcy and Insolvency matters*, Oxford 2009, p. 222 *et seq.*

[153] For a general presentation of the different steps followed, see J. SMITH, Approaching Universality: the role of Comity in international bankruptcy proceedings litigated in America, 17 *B.U. Int'l L. J.* 370 (1999).

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2. Main Characteristics

A better determination of the main characteristics of the future regulatory work can only be made if we try to extract ourselves, insofar as it is possible, from the peculiarities of the case dealt with by the Federal Tribunal.

We have seen that the interactions between criminal and international bankruptcy law have a very negative impact, making the situation more difficult to manage. This situation should be resolved somehow, but within a general framework. The real matter is not the coordination of Swiss and German criminal procedure with international bankruptcy law, it is the interaction of some public law institutions related to "asset management" with bankruptcy law. Similar issues can be observed in taxation matters.[154]

The openness towards public law should thus be one of the leading principles of any reform of the Swiss regulatory framework concerning international bankruptcy law. Conversely, the institution of mutual assistance in criminal law should be framed in such a way that it totally jeopardizes the international liquidation of bankruptcy estates. As we have seen, the foreseeable result of the difficult interactions between the opposed conceptions of the effect of a criminal freezing order in Switzerland and Germany is likely to result in a separate fully-fledged bankruptcy being reopened only for the liquidation of a single bank deposit. This result is clearly unsound and should be avoided.

Aside from the relationship between public law and bankruptcy, the new framework should better address the issue of cross-border collaboration. The Debt Enforcement and Bankruptcy Law Act is interpreted in such a way by the Federal Tribunal that it only allows for mutual assistance in internal affairs. This clearly has to be changed. The necessity of a smooth cross-border collaboration has already been underlined, namely because of the fact that two different bankruptcy estates concerning the same debtor are to be considered as being both part of a same patrimony whose administration should rely on the same principles.[155] Such an objective cannot be reached without coordination between the different entities in charge with the management of assets belonging to the debtor.[156] In the light of the evolution of the case law of the European Court of Human Rights, it is not impossible that a clear duty to collaborate in bankruptcy matters will soon be imposed on the Member States of the Council of Europe. The enshrinement of this in the positive law is therefore more than a luxury tool that a benevolent legislator could envisage for the quietness of its conscience.

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[154] For a case concerning a seizure for tax purposes followed by a bankruptcy in an international context, see: European Court of Human Rights, *Gasus Dosier- und Fördertechnik GmbH v. The Netherlands*, application No 15375/89, judgment (Chamber) of 23 February 1995, Series A No 306-B.

[155] S. CHALAS-KUDELKO, *La coopération en droit international privé – Originalité d'une méthode*, PhD thesis, University of Paris Ouest-Nanterre La Défense, 2014, p. 71 (unprinted manuscript available at <www.theses.fr>); M. RAIMON, *Le principe de l'unité du patrimoine en droit international privé – Etude des nationalisations, des faillites et des successions internationales*, Paris 2002, p. 36.

[156] M. RAIMON (note 155), at 97-98.

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B. De lege ferenda

The best way to make sure that the principles we have already mentioned are duly implemented is to envisage a modification of both the Swiss legislation on bankruptcy and international private law. Should a precise model be followed or is an *ad hoc* solution a better option? Scholars have already advocated the reception in Switzerland of the European Regulation.[157] However, we have seen that European law does not answer all the questions that are raised in our case. In particular, it does not address the consequences of mutual assistance in criminal law and is not detailed enough in relation to the extent of the duty to cooperate.

In spite of the above-mentioned foreseeable difficulties, the possibility of a bilateral agreement with the European Union, following the pattern of the Lugano Convention, constitutes the best argument in favor of the reception of the European Regulation,[158] turning it into the more pragmatic option. Hopefully, the Court of Justice of the European Union and the ongoing revision of the European Regulation will contribute to set aside a number of difficulties.[159] For the remaining differences, the few solutions we propose in the following paragraphs (*de lege lata*) could be of help.[160]

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[157] See the radical reforms proposed by S. MARCHAND, *Poursuite pour dettes et faillite – Du palais de justice à la salle des ventes*, Zurich 2008, p. 167-168; S. MARCHAND (note 1), at 127-128. In a more smooth way, M. GÜNTER, *Internationale Schiedsgerichtsbarkeit und Insolvenz - Zur Berücksichtigung von Insolvenzverfahren und ihren Auswirkungen vor internationalen Schiedsgerichten mit Sitz in der Schweiz*, Zürich 2011, p. 78; Y. JEANNERET/ S. LEMBO (note 32), at 272-273; D. STAEHELIN, Konkurs im Ausland – Drittschuldner in der Schweiz, in *Schweizerisches und Internationales Zwangsvollstreckungsrecht - Festschrift für Karl Spühler*, Zürich 2005, p. 417-418. For a somehow prophetical view of the question, at a time when the solution enacted in the PILA had not yet been the subject of criticism, see H. HANISCH, Universality versus Secondary Bankruptcy: A European Debate, 2 *Int. Insolv. Rev.* 151 (1993), p. 160 and W. NUSSBAUM, *Das schweizerische internationale Insolvenzrecht gemäss dem Bundesgesetz vom 18. Dezember über das internationale Privatrecht und sein Umfeld in Europa*, Zürich 1989, p. 9-10.

[158] See already S. MARCHAND (note 1), at 117; A. TRUNK (note 32), at 548; W. NUSSBAUM (note 157), at 55-56 and 59. In favour of a Bilateral Agreement with single Member States, see F. WALTHER, Grundlagen des Internationalen Insolvenzrechts der Schweiz, in *Grenzüberschreitendes Insolvenzrecht – 29. Tagung der DACH in Bad Ragaz/Vaduz vom 25. bis 27. September 2003*, Zürich/ Köln 2004, p. 76.

[159] In relation to the latter, the current Proposal of an amending regulation is contemplating an extension of the duty to cooperate: COM(2012) 744 final, p. 8 (available at <http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf>). A new recital 20 of Regulation No 1346/2000 will be introduced in order to oblige the liquidators and the courts, in main and secondary proceedings, to "take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law" (see the above-mentioned proposal, p. 17). This opens the door to large-scale transnational cooperation.

[160] Maybe a quick look at the theory of *cooperative territoriality* developed by some American scholars could also be helpful: L.M. LOPUCKI, Cooperation in International Bankruptcy: A post Universalist Approach, 84 *Cornell L. Rev.* 696 (1999), especially at

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In any case, a wide effect should be given to foreign bankruptcy decision, without any fear of the consequences. Even the application of the principle of universality could be envisaged, as it had been under the now-defunct Swiss-French Convention of 1869.[161] Furthermore, a future Swiss regulation could take advantage of the practice followed within the Commonwealth, where cooperation reaches such an extent that it makes it possible to achieve a result that was not possible within the initial jurisdiction.[162] In the same way, the existence of an opened bankruptcy proceeding in the United Kingdom does not *per se* prohibit the transfer of assets abroad, even if some conditions are nevertheless met.[163]

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p. 742 *et seq.*; A.M. KIPNIS, Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency, 36 *Denv. J. Int'l L. & Pol'y* 155 (2007-2008), especially at p. 184-188.

[161] Also in favour of universality, see M.A. GEHRI/ G.H. KOSTKIEWICZ (note 13), at 221. For a presentation of the former French-Swiss relationship in the area of bankruptcy, see A. HIRSCH, L'universalité de la faillite entre la France et la Suisse, Commentary under Federal Tribunal, 10 September 1968, *JdT* 1970 II 2.

[162] It was therefore possible for an Australian court to ask an English court to open an administration proceeding as a matter of mutual assistance only because such a rescue and reorganization vehicle did not exist under Australian law: P.J. OMAR, UK-Cross-Border cooperation: Extending Rescue to Jersey Debtors on a "Passporting" Basis, 22 *Int. Insolv. Rev* 119 (2012), especially at p. 121 *et seq*. Such a mutual assistance is based on sect. 426(4) of the Insolvency Act of 1986. Except for the Channel Islands and the Isle of Man, only courts of countries deemed to be *relevant* by a decision of the Secretary of State can lay claim to such extended cross-border cooperation (see sec 426(11) of the Insolvency Act). For a general presentation, see I. FLETCHER, *Insolvency in Private International Law – National and International Approaches* (2nd ed.), Oxford 2005, p. 227 *et seq*.

[163] Concerning an ancillary proceeding opened in England on the estate of a company based in Luxembourg before the enactment of the EU Regulation No 1346/2000, see: *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, where the restrictions concerned the rules governing set-off in bankruptcy (rule 4.90 of the 1986 Insolvency Rules in the version then in force). The *Privy Council,* relying on general common law principles, had a smoother approach, considering that mutual assistance should be denied only if there is a "suggestion of prejudice to any creditor […] or local law which may be infringed" (*Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors (of Navigator Holdings PLC and others,* [2006] 3 WLR 689, [2006] UKPC 26 at [21] concerning the mutual assistance granted by Manx courts to a reorganization scheme decided by a New York Court under Chapter 11 of the US Bankruptcy Code). More recent decisions seem to follow the way of the *Privy Council: HIH Casualty & General Insurance Ltd & Ors v McMahon & Ors* [2006], EWCA Civ 732, at [41], which was reversed and then extended by *McGrath & Ors v Riddell & Ors (Conjoined Appeals)* [2008] UKHL 21, the House of Lords accepting the application of Australian law by English courts in a much more extended way. The debate on the scope of each precedent has been been exported to Singapore: H. TIJO/ M.S. WEE, Cross-border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy, 20 *S. Ac. L. J.* 35 (2008), especially at p. 47.

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C. De lege lata

A long period of time may elapse before a multilateral agreement on bankruptcies is adopted by the European Union and Switzerland, so we think it necessary to examine if there is some space left for immediate improvements.[164] A change in the interpretation of existing rules may provide for some relief. In our view this is perfectly conceivable as an interim solution. Let us now see how Swiss law can be reinterpreted in this way.

The pertinent disposition of the Debt Enforcement and Bankruptcy Law Act concerning the duties of the Bankruptcy Offices[165] does not directly prohibit the cross-border cooperation with a foreign liquidator when a bankruptcy has already been opened in Switzerland. More than the wording of the disposition, it is only its interpretation that raises an obstacle to mutual assistance.[166] This can therefore be changed by a modification of the case law, even if it is a well-established one. A similar path can be followed for the pertinent passages of the PILA. The piece of legislation only regulates the recognition and enforcement in Switzerland of a foreign bankruptcy decree.[167] Nothing is said about the requests for mutual assistance, which are only governed by two general provisions of the above-mentioned Act.[168] As far as the impact of international criminal law is concerned, we again see that Article 44 of the Debt Enforcement and Bankruptcy Act only reserves the application of the pertinent dispositions of the Criminal Procedure Code in relation to "the liquidation assets confiscated on the basis of the pertinent federal and cantonal legislation in criminal or tax matters, as well as on the basis of the Federal Act of 1 October 2010 on the restitution of illegal assets". Neither the Criminal Procedure Code, nor the Federal Act on Mutual Assistance in Criminal Matters, forbids the transfer of assets to German authorities instead of the reopening of the bankruptcy proceeding in Switzerland.[169]

In a decision delivered in 2011 concerning the famous Lehman Brothers company, the Federal Tribunal refused in a demonstrative way to examine if the so-called "closed system" is still adequate, particularly in view of the regulatory framework applicable in international banking matters. The Swiss Supreme Court considered that a modification of the present situation is only possible through an amendment of the PILA.[170] This sounds like a strange precaution,[171] especially

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[164] Same opinion: F. Walther (note 158), at 76.

[165] Art. 4(1) DEBLA.

[166] In the same way, see F. Naef/ E. Naef Neuroni (note 18), at 1411, where both authors consider that a change of case law could be suffisant to grant suffisant power to the foreign administrator. In a more descriptive way, see: A.K. Schnyder/ M. Liatowitsch (note 32), at 160-161.

[167] See art. 166 *et seq*. PILA.

[168] Art. 11 and 11*a* PILA.

[169] The principle that a criminal freezing order should prevail over bankruptcy divestment is a consequence of the generalization of the rule enshrined in art. 44 DEBLA: D. Acocella, in A. Staehlin/ T. Bauer/ D. Staehelin (eds), *Basler Kommentar – Schuldbetreibung- und Konkursgesetz* (2nd ed.), Vol. 1, Basel 2010, Art. 44 DEBLA No. 3.

[170] ATF 137 III 570, § 3.

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considering that in the past it did not hesitate to interpret a legal provision contrary to its plain meaning in order to bring its interpretation into conformity with its scope of application.[172] Such a judicial self-restraint also constitutes an indirect confession in favour of a change. The message may have been received by inferior courts. One year later, the Supreme Court of Thurgovia ruled that the foreign liquidator can lodge a criminal complaint and exercise all the rights acknowledged to the victims of criminal offences, except to claim for compensation, on behalf of the bankruptcy estates and without asking for the recognition of the foreign decision, and thus without commencing an ancillary bankruptcy in Switzerland.[173]

For all these reasons, we strongly advise Swiss courts and Bankruptcy Offices not to wait the potential conclusion of a Bilateral Agreement on bankruptcy with the European Union in order to change the current practice in this area. The more pragmatic way of reaching a satisfactory level of cross-border cooperation without spending too much time on abstract considerations could be the conclusion of *ad hoc* conventions between the Swiss Bankruptcy office and the foreign administrator in order to regulate the modality of cooperation in a single case.[174] This friendly approach has a long history in common law jurisdictions.[175] It began with an isolated precedent concerning a debtor whose assets were located both in England and India, which was then a British colony.[176] Afterwards, it became a firm practice with the necessity to settle-down a transatlantic conflict of law and culture concerning the reorganisation of companies owned by a deceased businessman.[177] Now, a standard version of such agreement has been elaborated[178] and the UNCITRAL Model Law mentions the conclusions of such agreements in the non-exhaustive list of tools that the national legislators should put at the disposition of the interested parties in transnational cases.[179] There is nothing to prevent Switzerland from following the same path.[180]

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[171] It is even stranger to see that British courts have also adopted a very literal approach as to the recognition in the UK of a US Chapter 11 reorganization scheme concerning the same company: C.N. NANA, In re Lehman Brothers International (Europe): Positivism or the Rigour of Pedantry, 21 *Int. Insolv. Rev*. 1 (2011). It is not impossible that the peculiar background of the case had an influence on the issue in both countries.

[172] See the so-called *teleogical reduction* case (*UBS v. BK Vision*): ATF 121 III 219 (French translation published in JdT 1996 I 162).

[173] Superior Court Thurgovia, 28 June 2012, *RBOG* 2012, No 25, p. 234 *et seq*.

[174] Same opinion: F. WALTHER (note 158), at 76.

[175] For a complete presentation: B. WESSELS/ B.A. MARKELL/ J.J. KILBORN (note 152), at 176 *et seq*.

[176] See the *McFadyen* case resumed in B. WESSELS/ B.A. MARKELL/ J.J. KILBORN (note 152), at 176-177.

[177] The *Maxwell* case: B. WESSELS/ B.A. MARKELL/ J.J. KILBORN (note 152), p. 177-180.

[178] The *Loewen Model*, presented in B. WESSELS/ B.A. MARKELL/ J.J. KILBORN (note 152), at 187-189.

[179] Art. 27(d) of the UNCITRAL Model law.

[180] Except maybe the fact that civil law jurisdiction is more reluctant (see B. WESSELS/ B.A. MARKELL/ J.J. KILBORN (note 152), at 189). However, the matter has

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VI. Conclusion

Arriving at the end of our critical review of the consequences of the judgment adopted by the Federal Tribunal on 28 March 2013, we will stress once again the necessity of developing a more collaborative international bankruptcy law in Switzerland. The lack of flexibility of the solutions provided by the case law is clearly generating economic cost as a consequence of related externalities.[181] As already explained, the best way to get rid of the problem is to completely modify the legislative framework in order to make the duty of cooperation clear to all interested parties. In the meantime, some improvement can already be envisaged with a change of mentality on the basis of existing provisions.

already been raised among German scholars, being subject of a PhD thesis in 2003 (M. WITTINGHOFER, *Der Nationale und Internationale Insolvenzverwaltungsvertrag: Koordination Paralleler Insolvenzverfahren durch Ad Hoc Vereinbarungen*, Bielefeld 2004). The conclusion of such an agreement is generally supported: MÄSCH (note 122), Art. 31 EC Regulation No. 2. It seems that in 2006 a French court authorized the signature of such a protocol in an Anglo-French case: F. MÉLIN (note 125), at 377-378. See for more exemples: R. DAMMANN/ G. PODEUR (note 123), at 49 *et seq.*; P. NABET (note 124), at 245-250.

[181] See Lucian Arye BEBCHUK/ Andrew T. GUZMAN, An Economic Analysis of Transnational Bankruptcies, 42 *J.L. & Econ.* 775 (1999).

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