A COMPARISON OF GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT: THE 2019 HAGUE JUDGMENT CONVENTION AND THE BRUSSELS IBIS REGULATION

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Abstract. The aim of this article is to analyze the scope of grounds for refusal of recognition and enforcement of judgements in civil and commercial matters in contemporary private international law. The article focuses mainly on the analysis of the grounds for non-recognition of judgments under the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters and Regulation No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The article provides a thorough analysis of the practical problems of the application of these grounds, such as public policy, irreconcilable judgments, fraud, the effectiveness of the notification of the defendant, and review of jurisdiction. The author argues that the material scope of grounds for refusal under both instruments is different, which might cause inconsistencies in their application by national courts.

Keywords: the 2019 Hague Judgement Convention; the Brussels Ibis Regulation; grounds for non-recognition of judgment in civil cases; irreconcilable judgment; public policy.

Introduction

The 2019 Hague Judgement Convention (hereinafter – the Convention) is a multilateral instrument that facilitates the recognition and enforcement of foreign judgements rendered in cross-border civil and commercial matters. The application of the Convention is based upon the test of "jurisdictional filters" in Article 5(1) of the Convention. If one of the thirteen criteria is satisfied, recognition and enforcement are possible in a State.[1] However, recognition is conditioned upon the grounds for refusal of recognition and enforcement, an exhaustive list of which is established in Article 7 of the Convention. The court addressed has the discretion to refuse recognition and enforcement if even one of the grounds is satisfied.

The Convention creates an autonomous framework for the recognition and enforcement of judgments. Nevertheless, the plurality of international instruments and their application might create problems for their application by national courts. For example, the application of the Convention and 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 (hereinafter – the Brussels Ibis Regulation or Regulation) is possible by the same national courts of the European Union Member States but in different circumstances depending on territorial and temporal criteria. This implies that the court concerned should perceive the rules on the recognition and enforcement of judgments in the Regulation and the Convention in order to reduce the chances of further disputes when a judgment is recognized and enforced abroad.

Both legal instruments aim to provide a smooth procedure for the recognition

1 Ronald A. Brand, "The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?", *University of Pittsburgh Law Review* 82, no. 4 (2021): 875. https://doi.org/10.5195/lawreview.2021.803.

and enforcement of foreign judgments based on the principle of the free circulation of judgments. At the same time, however, they also establish certain grounds for the non-recognition of judgments, limiting the full effectiveness of this principle. The Convention establishes seven grounds for the refusal of recognition and enforcement, while the Regulation establishes only five. This means that possible inconsistencies may arise in application since the preliminary scope of both instruments with regard to the grounds for refusal of recognition and enforcement is different. However, the development of private international law must be consistent, as evidenced by Articles 26–27 of the Convention, which provide due regard to regional economic integration organizations. Thus, the following questions arise: What is the relationship between the scope and application of these acts? Do they mean that the grounds for the non-recognition and enforcement of judgments should be interpreted in the same manner? Should the courts, when applying the Convention or the Regulation, take into account the provisions of another law?

Some scholars – for instance, Niklas Meier, Junhyok Jang, and Catherine Kessedjian – have analyzed separate grounds to refuse recognition and enforcement under the Convention.[2] Questions have also been raised on the self-insufficiency of the Convention and the balance of interests established, which implies the need for a systematic interpretation with other instruments in order to ensure the coordinated development of private international law.

The aim of this research is to analyze and compare the grounds for the refusal of recognition and enforcement of foreign judgements in cross-border civil and commercial matters under the Convention and the Regulation, and to form

2 Niklas Meier, "Notification as a Ground for Refusal", *Netherlands International Law Review* 67 (2020): 87. https://doi.org/10.1007/s40802-020-00158-3; Junhyok Jang, "The Public Policy Exception Under the New 2019 HCCH Judgments Convention", *Netherlands International Law Review* 67, no. 1 (2020): 101. https://doi.org/10.1007/s40802-020-00157-4; Catherine Kessedjian, "Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters", *Nederlands Internationaal Privaatrecht* 1 (2020): 22. https://www.nipr-online.eu/pdf/2020-131.pdf

conclusions on their compatibility. To achieve this, the first part of the paper analyzes the grounds for refusal under the Regulation. Part two is devoted to the grounds for refusal of recognition and enforcement under the Convention. Part three compares the material scope of grounds under both instruments. The following methods were used: description, analysis, and comparison. The novelty of this paper lies in the substantive and structural comparison of the grounds for refusal of recognition under two instruments.

1. Grounds for Refusal of Recognition and Enforcement Under the Brussels Ibis Regulation

The Brussels Ibis Regulation is based on the principal idea that judgments given in a Member State should be recognized in all Member States without the need for any special procedures.[3] However, the recognition of a judgment should be refused only if one or more of the grounds for refusal provided for in this Regulation are present.[4] Article 45(1) of the Regulation establishes an exhaustive list of the grounds for the non-recognition of judgments. The application of these grounds limits the full effectiveness of the principle of free circulation of judgments, which is one of the fundamental concepts under the Regulation and thus should be interpreted in light of this principle.

Public policy. As a preliminary matter, it should be noted that the application of all grounds, including public policy, by the court is mandatory where recognition is sought. However, Article 45 of the Regulation limits the discretion of courts in the *ex officio* application of these grounds, meaning that these grounds

3 Recital 26 of the Regulation (EU) 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) [2012] OJ L 351.

4 Recital 30 of the Regulation (EU) 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) [2012] OJ L 351.

may be invoked only by the interested party.[5]

Article 45(1)(a) of the Regulation establishes that recognition shall be refused if a judgement is manifestly contrary to public policy in the Member State addressed. The formation and interpretation of public policy are left to each Member State.[6] However, the Court of Justice of the European Union (hereinafter – CJEU) has the right to review the limits within which the courts of Member States may have recourse to this concept for the purpose of refusing recognition and enforcement.[7] Moreover, national legislation shall not infringe on EU law, including the aims and goals of the Regulation.[8] Due to this influence, the concept of public policy will not have significant divergences among Member States and will be based on the cornerstones established by the CJEU.[9]

Another essential aspect to consider is the relationship between public policy and other grounds to refuse recognition and enforcement. When discussing this matter, some scholars rely on the principle of *lex specialis derogat generalis*, meaning that public policy is the rule of last resort, which is applicable if the other grounds are not met.[10] The result of this approach is that grounds for refusal of recognition and enforcement under the Regulation do not overlap and are applicable to the defined limits. However, Member States have the discretion within separate grounds to refuse recognition.[11] As the CJEU determined in the *Trade Agency Ltd v. Seramico Investment Ltd* case, a court "may refuse to enforce

5 David Althoff, Lisette Frohn, and Fieke Van Overbeeke, R*egulation Brussels Ia: A Standard for Free Circulation of Judgments and Mutual Trust in the European Union (JUDGTRUST)* (Asser Instutite, 2020). https://www.asser.nl/media/795650/consolidated-report.pdf

6 "Case C-38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, [2000]", par. 32.

7 "Case C-7/98, *Dieter Krombach v André Bamberski*, [2000], ECLI:EU:C:2000:164", par. 27.

8 "Case C-292/10, *G v Cornelius de Visser*, [2012], ECLI:EU:C:2012:142", par. 46.

9 Bram Akkermans, "Public Policy (Orde Public): A Comparative Analysis of National, Private International Law, and EU Public Policy", *European Property Law Journal* 8, no. 3 (2020): 270. https://doi.org/10.1515/eplj-2019-0015.

10 Peter Mankowski and Ulrich Magnus, eds., *European Commentaries on Private International Law ECPIL: Commentary*, vol. I, Brussels Ibis Regulation (Köln: Verlag Dr. Otto Schmidt KG, 2016), pag. 884.

11 Adrian Briggs, *Civil Jurisdiction and Judgments* (Taylor & Francis Group, 2009), 578.

the judgement given in default of appearance [...] only if it appears to the court that the judgements are a manifest and disproportionate breach of the defendant's right to a fair trial."[12] However, the right to a fair trial, as well as the European Convention for the Protection of Human Rights in general, traditionally belongs to a "constitutional tradition common to the Member State."[13] Since the infringement of public policy constitutes a "manifest breach of the rule of law regarded as essential in the legal order of the State,"[14] there is no doubt that the right to a fair trial relates to public policy. Hence, it is not possible to conclude that grounds for refusal of recognition and enforcement under the Regulation do not overlap.

Despite the fact that a common definition of public policy is hardly possible due to the constant development of law, the Regulation and the practice of the CJEU provide limits for interpretation. In particular, Article 52 of the Regulation narrows the competence of the court which is seized of the recognition request by prohibiting the review of the judgement on the merits. This might be the reason why procedural public policy is more often invoked.[15] The second situation occurs when the interpretation or misapplication of EU law by a court does not necessarily lead to the possibility of claiming the protection of public policy since EU law only harmonizes national law.[16] Therefore, the national court of the Member State will have the right to determine the concept of public policy for the purpose of recognition and enforcement within the limits established by the law of the European Union.

Judgement in default of appearance against a defendant precluding the arrangement of the defense. The problematic aspect of differentiation between the grounds under Articles 45(1)(a) and 45(1)(b) lies in the fact that both aim to

12 "Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd*, [2012], ECLI:EU:C:2012:531", par. 63.

13 "Case C-7/98, *Dieter Krombach v André Bamberski*, [2000], ECLI:EU:C:2000:164", par. 27.

14 "Case C-420/07, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams,* [2009], ECLI:EU:C:2009:271", par. 59.

15 "Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd*, [2012], ECLI:EU:C:2012:531", par. 63.

16 "Case C-681/13, *Diageo Brands BV v Simiramida-04 EOOD*, [2015], ECLI:EU:C:2015:471", par. 50.

protect the right to a fair trial. However, as a matter of differentiation, the scope of the latter ground is significantly narrower than the protection of the right to a fair trial (Schramm, 2013). Hence, the public policy defense can only be applicable if the criteria under Article 45(1)(b) are not met.

The first condition for the application of this ground is the default of the defendant. This criterion is linked with the inability of the defendant to present the case. Moreover, this provision is also applicable in the case of *negotiorum gestio*.[17] A person shall be regarded as a defendant in default where the proceedings were initiated against a person without their knowledge, but a lawyer appeared before the court seized.[18] Moreover, the documents instituting the proceedings or equivalent documents shall be interpreted broadly and cover any documents which enable the plaintiff, under the law of the court in which the judgement was given, to obtain, in default of appropriate action taken by the defendant, a decision capable of being recognized.[19] Examples of such documents include an order for payment service.

The service of documents shall satisfy two requirements, namely being served in sufficient time and enabling the preparation of the defense.[20] Therefore, this ground for refusal will be satisfied if the documents are served and the defendant is aware of the proceeding, but they are not able to present the defense due to insufficient time. However, the temporal criterion for the service of documents cannot be formulated precisely since it depends on the circumstances of the case.[21]

This ground is also conditional upon the subjective intention of the defendant.

17 Dorothee Schramm, "Enforcement and the Abolition of Exequatur under the 2012 Brussels I Regulation", in *Yearbook of Private International Law*, ed. Petar Sarcevic et al. (De Gruyter, 2014), 154. https://doi.org/10.1515/9783866536081.143.

18 "Case C-78/95, *Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH*, [1996], ECLI:EU:C:1996:380:, par. 21.

19 "Case C-166/80, *Peter Klomps v Karl Michel*, [1981], ECLI:EU:C:1981:137", par. 10.

20 Peter Mankowski and Ulrich Magnus, eds., *European Commentaries on Private International Law ECPIL: Commentary*, vol. I, Brussels Ibis Regulation (Köln: Verlag Dr. Otto Schmidt KG, 2016), par. 908.

21 Marie Linton, "Recognition and Enforcement of Foreign Judgments under the Brussels I Regulation and the Regulation on a European Enforcement Order for Uncontested Claims", *Upsala Universitet* (2013): 14.

If the documents were served in a timely manner, ensuring the possibility to challenge the judgement in the state of origin, but the defendant failed to appear or challenge the decision, the defense of default cannot be claimed in the State where recognition is sought.

Irreconcilable judgements. Article 45(1) of the Regulation divides irreconcilability as grounds for refusal based on the nationality of the judgements involved. While Article 45(1)(c) deals with the domestic judgement from the State where recognition is sought, Article 45(1)(d) addresses the situation that involves two foreign judgements. Firstly, it shall be noted that two provisions are applicable to these judgements, and no arbitration is covered due to their contractual nature.[22]

These judgements are irreconcilable if they entail legal consequences that are mutually exclusive.[23] Therefore, Articles 45(1)(c–d) are applicable if, for example, one judgment declares that a contract is null and void, while the second awards damages based on the violation of the contract.[24]

Article 45(1)(c) of the Regulation gives priority to domestic judgements over foreign judgements if they involve the same parties to the dispute. However, both judgements must have been given at a reasonably similar time in order to create a conflict of judgements. Therefore, if the domestic judgement is given later than the foreign judgement, no application of Article 45(1)(c) of the Regulation shall be sought.

On the other hand, Article 45(1)(d) of the Regulation employs the temporal criterion irrespective of the territorial criterion. Preference will be given to earlier judgements. However, to apply this provision, the later judgement shall involve not only the same parties, but also the same cause of action, which encompasses the subject matter of a dispute. Interestingly, this Article does not establish any

22 "Case C-414/92, *Solo Kleinmotoren GmbH v Emilio Boch*, [1994], ECLI:EU:C:1994:221", par. 18.

23 "Case C-145/86, *Horst Ludwig Martin Hoffmann v Adelheid Krieg*, [1988], ECLI:EU:C:1988:61", par. 34.

24 Yuhan Ji, *Recognition of Foreign Judgments with a Special Focus on Maritime Judgments* (Rotterdam, Erasmus University, 2022), pag. 63.

difference between the judgements delivered in the EU and in third States, but the preference of domestic judgements over foreign might potentially be assessed as discrimination based on the origin of the court.

Review of jurisdiction. Articles 45(1)(e)(i) and (ii) establish grounds for refusal of recognition and enforcement with regard to the jurisdiction of the court that delivered the judgment. Despite the fact that the jurisdiction of the court that delivered the judgement cannot be revised, this Article establishes an exception with a view to protecting the weaker party.[25] In light of this, recognition and enforcement will be refused if the court does not comply with the rules for jurisdiction in matters relating to insurance (Articles 10–16), consumer contracts (Articles 17–19), or contracts of employment (Articles 20–23). However, the issue is not clear when a decision is delivered between parties domiciled outside of the EU and recognition is sought in the EU. Without the application of certain exceptions under Sections 3, 4, or 5 of Chapter II of the Brussels Ibis Regulation – for example, if a claim was brought by an employee where their employer has an establishment within the EU – there are two possible options. Firstly, if the court in the EU applies the relevant provisions to refuse recognition, this would constitute the application of EU law over the law of third States. Moreover, in this case, EU law might worsen the position of the relevant categories of persons if the law of the third State establishes a higher level of protection. Nevertheless, if the provisions of the Regulation are not applicable, recognition will be regulated by the national law of a State where recognition is sought in the absence of bilateral or multilateral agreements.[26]

In the same light, recognition will be refused if the court which delivered the

25 Peter Mankowski and Ulrich Magnus, eds., *European Commentaries on Private International Law ECPIL: Commentary*, vol. I, Brussels Ibis Regulation (Köln: Verlag Dr. Otto Schmidt KG, 2016), pag. 829.

26 Paul Beaumont and Lara Walker, "Recognition and Enforcement of Judgments in Civil and Commercial Matters in the Brussels I Recast and Some Lessons from It and the Recent Hague Conventions for the Hague Judgments Project", *Journal of Private International Law* 11, no. 1 (2015): 45. https://doi.org/10.1080/17536235.2015.1033197.

judgement has failed to apply the rules of exclusive jurisdiction under Article 24 of the Regulation, which provides for: exclusive jurisdiction with regard to *rights in rem*, the nullity and validity of the constitution of legal persons or the validity of the decisions taken by its organs, the validity of entries in the public register, the registration and validity of industrial property rights, and the jurisdiction of the court of the Member State in which recognition is sought.

Therefore, the Brussels Ibis Regulation establishes such grounds for refusal for recognition and enforcement as public policy, the default of the defendant or if they were not served with the appropriate documents, irreconcilable judgements, and the violation of Sections 3–6 of Chapter II of the Regulation.

2. Grounds to Refuse Recognition and Enforcement Under the 2019 Hague Convention

The Convention establishes grounds to refuse recognition and enforcement in Article 7. The primary difference between this Article and Article 45 of the Regulation is that the Convention uses the word "may" when granting the right to the requested court to refuse recognition and enforcement. The consequence of this formulation is that even if the requested court finds that the ground for refusal is met, it is still at the discretion of that court to decide whether to refuse recognition. This implies a lower level of predictability for litigants, as if the interested party is sure that there was a violation of procedural or material guarantees, recognition would not be possible under the Regulation.[27]

The Convention establishes seven grounds for the refusal of recognition, with an additional division of the service of documents to the defendant. However, the grounds for refusal overlap with public policy, which may negatively impact the consistency of the practice of application of the Convention since the same cause

27 Matthias Weller et al., eds., *The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook* (Oxford: HART PUBLISHING, 2023), 72.

of action may satisfy multiple grounds for refusal.[28] Therefore, to ensure consistency of application, the addressed court shall take into account the experience of the application of Article 7 of the Convention from States with similar systems of law.

Service of documents to the defendant. Article 7(1)(a) of the Convention establishes that the court addressed may refuse recognition if the defendant (i) was not notified of the institution of the proceeding, unless the defendant entered the proceeding and did not challenge the notification if the law of the state of the court of origin provides this possibility; or (ii) was notified of the proceeding in a manner that is incompatible with the fundamental principles of the service of documents in the state addressed.[29]

Essentially, both grounds aim to ensure the possibility for a defendant to present their case.[30] While the first ground is coupled with the right to a fair trial in a state of origin by establishing that even if the defendant was served with documents they shall contain a statement of the essential elements of the claim, the second ground is very limited in application and concerns only recognition and enforcement proceedings in the State addressed. The problematic aspect here is that the criterion of "fundamental principles concerning the service of documents" is not an autonomous concept,[31] and the application of this ground might significantly differ between the State Parties. Therefore, the timely nature, context, and effectiveness of the notification of the documents will be assessed by the court addressed without the obligation of taking into account the international

28 Francisco Garcimartín and Geneviève Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: HCCH 2019 Judgments Convention* (The Hague: HCCH, 2020), 120.

29 Marko Jovanovic, "Thou Shall (Not) Pass – Grounds for Refusal of Recognition and Enforcement under the 2019 Hague Judgments Convention", in *Yearbook of Private International Law Vol. XXI - 2019/2020*, ed. Andrea Bonomi and Gian Paolo Romano (Verlag Dr. Otto Schmidt, 2020), p. 315, https://doi.org/10.9785/9783504386962-015.

30 Garcimartín and Saumier, *supra note,* 28: 116.

31 *Ibid*.

practice of serving documents.[32]

A judgement obtained by fraud. Article 7(1)(b) of the Convention establishes that recognition may be refused if a judgement in a State of origin is obtained by fraud. The rationale for defining fraud as a separate ground is the adaptation of the instrument to different approaches in national legislation. For example, fraud, as a stand-alone ground, is more generally present in common law states.[33] Moreover, the reason for the open definition of this scope is to cover both procedural and material misconduct.[34] Although the Convention does not define fraud, the Explanatory Report provides that "fraud refers to behaviour that deliberately seeks to deceive in order to secure an unfair or unlawful gain or to deprive another of a right."[35] When analyzing the definition offered, it is clear that it does not bring clarity or limits to the application of the ground. This results in uncertainty for States that do not define fraud as a separate ground for refusal, as the concept might overlap with public policy.

Public policy. Article 7(1)(c) of the Convention establishes a classical and necessary ground for refusal of recognition and enforcement in the state addressed.[36] The threshold to reach the violation of public policy under the Convention is high, which is consistent with other international instruments governing the sphere of recognition and enforcement.[37] The phrase "manifestly incompatible" indicates that mere inconsistency with the law of the State addressed is not enough to trigger the protection of public policy.[38] Incompatibility shall concern the questions of the "vital interests" of the State requested, such as infringements

32 Meier, *supra note*, 2: 88.

33 Garcimartín and Saumier, *supra note,* 28: 118.

34 Kessedjian, *supra note,* 2: 22.

35 Garcimartín and Saumier, *supra note,* 28: 118.

36 Weller, *supra note,* 27: 80.

37 *Ibid*., 81.

38 Ronald A. Brand et al., *The 2019 Hague Judgments Convention*, Oxford Private International Law Series (Oxford, New York: Oxford University Press, 2023), p. 300.

of security or sovereignty or violations of procedural fairness.

The application of the public policy ground raises the question of its relationship with other grounds for refusal, in particular with Article 7(1)(a) and Article 7(1)(b) of the Convention. The Convention does not establish the relationship between separate grounds for the non-recognition of judgments. However, it is generally accepted that public policy is applicable as a rule of last resort,[39] giving preference to more specific rules. This is also evidenced by the high threshold of application of public policy, which limits its application to an "intolerable result."[40] Thus, public policy may be regarded as *lex generalis*, which can be claimed only if no *lex specialis* rules can be invoked.

Procedural fairness is designed to capture the same interest, and might have multiple forms in different legal systems – such as due process, natural justice, or the right to a fair trial. Moreover, the Convention gives due regard to exemplary or punitive damages in Article 10, enabling the court addressed to refuse requests for the recognition of the judgement delivered, which includes damages which do not compensate a party or actual loss.[41]

Disregarding the choice of court agreement or a designation in a trust instrument. Article 7(1)(d) of the Convention establishes the only ground for refusal of recognition, which allows the review of the jurisdiction of the court of origin. It provides that the court seized has the right to refuse recognition and enforcement if the court of origin disregarded the choice of the parties on jurisdiction and institution. However, the scope of the competence of the court addressed is unclear. This provision does not provide the answer to whether it is applicable only after the choice of court or designation in a trust instrument defense was raised in the court of origin. Some clarity was provided in the Explanatory

39 Weller, *supra note,* 27: 81.

40 Garcimartín and Saumier, *supra note,* 28: 119.

41 *Ibid*., 120.

Report, which indicated that the intention of the drafters included the possibility for the requested court to review the jurisdiction of the court of origin. For this, the requested court has the right to review the validity and effectiveness of the agreement or the designation, applying the law of the requested State, including private international law rules.[42] The possibility to review the jurisdiction is also indirectly evidenced by Article 4(1) of the Convention, which prohibits only a review on the merits. Thus, the court addressed has the right to the jurisdiction of the court of origin if the cause of actions involved the choice of court agreement or designation on trust instruments without a preliminary choice of party defense in the court of origin.

Irreconcilable judgements. Article 7 of the Convention divides the regulation of irreconcilable judgements depending on the location of the court that delivered the judgements. Pursuant to Article 7(1)(e) of the Convention, a request for recognition may be refused if the judgement is inconsistent with a judgement given by a court of the requested State in a dispute between the same parties. To apply this provision, two requirements shall be satisfied. Firstly, there shall be a judgement in a State addressed between the same parties; secondly, the judgement for which recognition is sought shall be irreconcilable with one in the State addressed.[43] This provision is applicable irrespective of the temporal criterion of the adoption of the domestic judgements, which might lead to forum shopping, especially when the law of the requested State provides the possibility for a fast-tracked judicial procedure. The Convention also fails to define "inconsistency" for the purpose of applying the provision. However, the Explanatory Report upheld the concept of mutual exclusivity, defining that "the two judgements will be 'inconsistent' when it is not possible to act in accordance with one without violating the other one in whole or in part."

42 Garcimartín and Saumier, *supra note,* 28: 122.

43 Brand, *supra note,* 38: 311.

Nevertheless, Article 7(1)(f) of the Convention establishes a stricter approach. It provides that the recognition request may be refused if the judgement is inconsistent with an earlier judgement given by a court of another State between the same parties on the same subject matter, provided that the earlier judgement fulfils the conditions necessary for its recognition in the requested State. To apply the provisions, there are four requirements to fulfil. First, the foreign judgement shall be given prior to the judgement from the State of origin. Second, both judgements should concern the same parties and the same subject matter. Thirdly, both judgements shall be inconsistent, and the foreign judgement shall fulfil the conditions necessary for its recognition in the requested State. The priority given to an earlier judgement does not depend on whether another State is a contracting party or not, minimizing the abuse of rights based on the jurisdictional criterion.

Therefore, the Convention establishes such grounds for refusal for recognition and enforcement as public policy, the service of documents to a defendant, a judgement obtained by fraud, irreconcilable judgments, and disregard for the choice of court agreements or designation in a trust instrument.

3. Comparison of the Grounds to Refuse Recognition and Enforcement Under the Brussels Ibis Regulation and the Convention

Given the outline of the grounds for the refusal of recognition and enforcement, this part of the paper will compare the substantive scope of their application under the Convention and the Regulation.

Service of documents. Article 45(1)(b) of the Regulation and Article 7(1)(a) of the Convention protect the possibility for a defendant to present the case and enjoy the rights of a fair trial. Both articles recognize the subjective element of the failure to present before the court. While the Regulation provides an exception where the defendant failed to commence the proceeding to challenge ineffective notification, meaning that the defendant loses the right to invoke this ground

where the subsequent procedural conduct does not demonstrate the intention to do so, the Convention levies the notification ground, when the defendant entered the proceeding without challenging the notification in the same proceeding. The notification standard granted by both instruments in a State of origin does not indicate a significant difference in scope. However, the Convention establishes additional protection in a State addressed by Article 7(1)(a)(ii), granting the right to the court addressed to refuse recognition if the service of documents is incompatible with the standards established in that State.[44] Therefore, the scope of the services of documents as grounds for the refusal of recognition and enforcement is broader under the Convention. However, in such cases, the Regulation may provide better effectiveness in the protection of a defendant's right to a fair trial since it operates on autonomous concepts, the interpretation of which does not depend on national legislation.

Irreconcilable judgements. Both the Convention and the Regulation grant protection from irreconcilable judgements rendered in different States. The scope of this ground to refuse recognition and enforcement under both instruments is almost identical. The recognition will be refused if a judgment is irreconcilable with another judgment given between the same parties in the State requested, providing preference to the domestic judgment. Priority is granted to the judgement delivered earlier in another State if the subsequent judgement is given between the same parties and concerns the same cause of action. However, the question may arise on the compatibility of the "same cause of action" under the Regulation and the "same subject matter" under the Convention. This aspect was addressed by the Preparatory Report to the Convention, which found that the "same subject matter" is considered to exclude the requirement that the two judgements involve exactly the "same cause of action." The difference here is more evident when comparing the French version of the Regulation and the Convention, which operate

44 Meier, *supra note*, 2.

"le même objet et la même cause" and "le même objet," respectively. Therefore, while the scope of protection is identical under the Convention and the Brussels Ibis Regulation, the latter provides a higher threshold for the irreconcilability of judgements rendered in other States.

Public Policy. Both instruments establish public policy as a ground for the refusal of recognition and enforcement. Judgements shall be manifestly contrary (the Regulation) or incompatible (the Convention) with the public policy of a State addressed. Neither instrument employs the concept of international or regional public policy, leaving the full discretion to the State to define this concept. Both instruments establish the highest threshold of "manifestly" to refuse recognition and enforcement.

Nevertheless, there is a notable difference in the scope of public policy in the Regulation. While the Convention establishes fraud as a separate ground for refusal, the Regulation includes it in the concept of public policy.[45] This might raise the question of whether Article 7(1)(c) of the Convention is applicable to incompatibility with material public policy. However, neither the Convention nor the doctrine indicate so. Therefore, the Convention and the Regulation provide for the same scale of defense of public policy in spite of their differences in scope.

Review of jurisdiction. The Regulation and the Convention generally prohibit the review of the jurisdiction of the court of origin. While the Convention does not explicitly establish this rule, it allows the review of the jurisdiction of the court of origin only for the purpose of assessing whether that court upheld the jurisdiction in accordance with the party's choice of court agreement or designation in a trust instrument. In addition, the Convention provides that a judgement that ruled on *rights in rem* in immovable property shall be recognized and enforced if, and only if, the property is situated in the State of origin. The rule of Article 6

45 Peter Mankowski and Ulrich Magnus, eds., *European Commentaries on Private International Law ECPIL: Commentary*, vol. I, Brussels Ibis Regulation (Köln: Verlag Dr. Otto Schmidt KG, 2016), 887.

of the Convention and Article 24(1) of the Regulation are fully compatible, since they aim to ensure that the judgement is delivered by the court of a State where the *right in rem* of immovable property is situated.

However, the Regulation allows the review of the jurisdiction of the court of origin in matters relating to insurance, consumer contracts, contracts of employment, the registration or validity of industrial property rights, the validity of entries in public registers and the validity of the constitution, and the nullity or dissolution of legal persons or associations. Moreover, the Regulation does not provide the possibility to review jurisdiction with regard to the choice of the parties. Therefore, the Convention and the Brussels Ibis Regulation establish different bases for the review of jurisdiction as a ground for the refusal of the recognition and enforcement of judgements.

Conclusions

One of the main aspects of the current state of development of private international law is the abolition of exequatur and the application of the principle of the free circulation of judgments. The Brussels Ibis Regulation and the Convention both aim to achieve these goals. However, both instruments establish grounds which restrict the application of the principle of the free circulation of judgments in certain cases. The grounds for the refusal of recognition of foreign judgments under both instruments are almost compatible and include similar grounds for the non-recognition of judgments, such as a failure to properly inform parties about the proceedings, irreconcilable judgements, public policy, and a review of the jurisdiction in exceptional cases. However, there are some peculiarities with regard to the scope of the concepts and differences with regard to the review of the jurisdiction. While both the Regulation and the Convention protect parties' right to present their case, the latter allows recognition and enforcement to be refused if the defendant was not served with documents or was notified in a

manner incompatible with the principle of the State requested. With regard to the irreconcilability of judgements, both instruments give preference to domestic judgements in disputes between the same parties. Nevertheless, the Regulation establishes a stricter approach to the concept of the irreconcilability of two foreign judgements, requiring both to have the same subject matter, cause of action, and parties, while the Convention operates only with the same subject matter and parties.

The scope of public policy as a ground for the non-recognition of judgments under both instruments differs. While the Convention establishes fraud as a separate ground for the refusal of recognition and enforcement to meet the needs of all stakeholders, the Regulation includes fraud in the concept of public policy.

Lastly, while the Convention allows the review of the jurisdiction of the court of origin with regard to parties' choice of court or designation in a trust instrument, the Brussels Ibis Regulation does not establish the review of the parties' choice. It also broadens the review with regard to consumer, employment, and insurance contracts, as well as concerning the question of the validity of entries into public registers, industrial property rights, the validity of the constitution, and the nullity or dissolution of legal persons or associations.

2019 M. HAGOS SPRENDIMO KONVENCIJOS IR BRIUSELIO IBIS REGLAMENTO ATSAKOMYBĖS PRIPAŽINTI IR VYKDYTI PALYGINIMAS

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Santrauka. Šio straipsnio tikslas – išanalizuoti atsisakymo pripažinti ir vykdyti sprendimus civilinėse ir komercinėse bylose pagrindų apimtį šiuolaikinėje tarptautinėje privatinėje teisėje. Rašant darbą taikyti šie metodai: aprašymas, analizė ir palyginimas. Straipsnyje daugiausia dėmesio skiriama teismo sprendimų nepripažinimo pagrindų analizei pagal 2019 metų Hagos konvenciją dėl užsienio teismo sprendimų civilinėse ar komercinėse bylose pripažinimo ir vykdymo bei Europos Parlamento ir Tarybos reglamentą Nr. 1215/2012 dėl jurisdikcijos ir teismo sprendimų civilinėse ir komercinėse bylose pripažinimo ir vykdymo. Straipsnyje išsamiai analizuojamos praktinės šių pagrindų taikymo problemos: viešoji tvarka, nesuderinami sprendimai, sukčiavimas, informavimo atsakovui veiksmingumas, jurisdikcijos peržiūra. Teigtina, kad materialinė atsisakymo pagrindų taikymo sritis pagal abu dokumentus skiriasi, todėl gali atsirasti nacionalinių teismų taikymo nenuoseklumo.

Reikšminiai žodžiai: 2019 m. Hagos teismo sprendimų konvencija; Briuselio Ibis reglamentas; teismo sprendimo civilinėse bylose nepripažinimo pagrindai; nesuderinamas sprendimas; viešoji tvarka.

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