Richmond Journal of Global Law & Business

Volume 14 | Issue 1 Article 4

2015

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Recommended Citation
Justyna Regan, *Recognition and Enforcement of Foreign Judgments - A Second Attempt in the Hague?*, 14 Rich. J. Global L. & Bus. 63 (2015).
Available at: http://scholarship.richmond.edu/global/vol14/iss1/4

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS - A SECOND ATTEMPT IN THE HAGUE?

*Justyna Regan**

INTRODUCTION

Anyone who has ever experienced litigating against a foreigner, even in the case of a successful suit, realizes how difficult it is to recognize or enforce that judgment abroad. Therefore, for decades there has been a need to adopt an international instrument that could facilitate this thorny path. The Hague Conference on International Private Law, a neutral body established in 1893, has always played the main role. Calling itself "a melting pot of different legal traditions,"[1] the Conference currently has seventy-eight Members (seventy-seven States and one Regional Economic Integration Organization, i.e. the European Union).[2] In the words of its Secretary General, the Hague Conference "has offered a forum to the emerging international community to deepen its understanding of the diversity of civil and commercial legal systems and to develop coordination to resolve these cross-border legal issues."[3]

In this paper I present the current *status quo* as to the recognition and enforcement of foreign judgments, which must be done with reference to the first attempt to draw an international instrument in this field. However, given that many sheets of paper have already been dedicated to elaborating on the failure of the negotiations in the Hague in the 1990s, Part I of this paper is limited to the main turning points that played a decisive role in the final, disappointing outcome of the talks. Against this background, Part II will discuss the consequences of the lack of any international instrument to emerge. Given my European background, this discussion will mostly concentrate around the current situation on the "old continent," with emphasis on the recogni-

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[1] *Home*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php (last visited Nov. 1, 2014).

[2] *Overview*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited Nov. 1, 2014).

[3] *See* Hans van Loon, *Legal Diversity in a Flat, Crowded Word: The Role of the Hague Conference*, 39 INT'L J. LEGAL INFO. 172, 174 (2011).

tion and enforcement of judgments for punitive damages. I will pay special attention to this, as in my opinion, punitive damages constitute the main reason why foreign judgments are denied recognition or enforcement. Moreover, I will try to dispel the current myths as to the rapprochement of both civil and common law systems.

Further, the American approach will be introduced, including the Speech Act,[4] which was adopted by Congress on August 10, 2010. I believe that, along with the European approach, this illustrates the nature of the current deadlock and the failure of the idea of an international movement of judgments. Part III will investigate the "Judgment Project" as referred to by the Hague Conference—the newest development which will begin work on an international instrument that would go far beyond the Convention of June 30, 2005 on Choice of Court Agreements. I then conclude that we should learn from the previous negotiations and try not to repeat those mistakes. Therefore, in the course of the new project, instead of dreaming of a convention that would reconcile feuding parties, we should be realistic and opt for a reachable solution; most likely this would comprise a single convention. This proposal may not solve all the problems that have arisen so far, but step-by-step it could deal with all the drawbacks, which make the life of the foreign litigant or creditor so difficult.

I. The History of Previous Negotiations in the Hague

In the 1960s, the need for an international instrument making the international movement of judgments easier became apparent with the development of international trade, an increase in the number of cross-border transactions, and the growing divergence between an individual's country of residence and the country where his or her assets are located. Bearing in mind previous successes[5] achieved by the Hague Conference on International Private Law,[6] it seemed natural to commence the drafting of a new international convention laying down jurisdictional rules as well as recognition and enforcement of foreign judgments. The first endeavor in dealing with these issues consti-

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[4] Securing the Protection of Our Enduring and Established Constitutional Heritage Act of 2010, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (hereinafter "SPEECH Act").

[5] *See generally* Convention on Judicial Procedure for Abolishing Requirement of Legalization for Foreign Public Document, U.S.–Neth., *done* Oct 5, 1961, 33 U.S.T. 883; Convention on Service Abroad of Judicial and Extrajudicial Documents, U.S.–Neth., *done* Nov 15, 1965, 20 U.N.S.T. 361; Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, *concluded* Oct 10, 1961, 510 U.N.T.S. 175; Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law For International Civil Litigation*, 57 SUM L. & CONTEMP. PROBS. 103 (1994).

[6] Hans Van Loon, *supra* note 3, at 180.

tuted the Convention of February 1, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters that entered into force in August 1979.[7] Because of the political situation in the European negotiating countries, the conference excluded jurisdiction from the substantive scope of this instrument.[8] With only five countries ratifying the convention, it cannot be described as "successful."[9] Moreover, it is not even operational.[10] This is due to the mechanism of supplementary agreements that requires making bilateral agreements between the parties of the convention in order to recognize and enforce judgments rendered in another state.[11] Because the convention concluded no such agreement, the convention constitutes an example of a well-drafted theoretical proposal only. The fact that the single convention proved unable to serve the needs of litigants in international litigation explains the failure of the 1971 convention.[12] Further explanation showed that "although it is vital to secure for a judgment obtained in any one country effects in one or more other countries, the first priority is to ascertain which court has international jurisdiction to adjudicate initially on the merits of the case."[13]

The U.S. took the initiative in the early 1990s to start working on an international instrument that could repeat the success of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[14] Members focused only on the area of judgments.[15]

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[7] Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, *available at* http://www.hcch.net/upload/conventions/txt16en.pdf.

[8] Kurt H. Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282 (1969).

[9] Albania ratified it in April 8, 2010; Cyprus in June 8, 1976; the Netherlands in June 21, 1979; Portugal in June 21, 1983; Kuwait in May 8, 2002. *See Status Table*, HAGUE CONF. ON PRIVATE INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=78 (last visited Nov. 7, 2014).

[10] *See generally* Hague Convention, *supra* note 7, art. 21.

[11] *Id.* art. 21 ("Decisions rendered in a Contracting State shall not be recognized or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect".).

[12] David McClean, *The Hague Conference's Judgments Project, in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW, ESSAYS IN HONOUR OF SIR PETER NORTH 259 (Peter North & James Fawcett eds., 2002).

[13] CATHERINE KESSEDJIAN, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY. DOCUMENT NO. 7, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 8 (1997), *available at* http://www.hcch.net/upload/wop/jdgm_pd7.pdf.

[14] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 330 U.N.T.S. 4739.

[15] *Id.* art 1.

In a letter to the Secretary General of the Hague Conference on International Private Law, the Legal Advisor from the U.S. Department of State suggested that the Conference could take up the negotiation of a single treaty applicable to Hague Conference Member States and other countries.[16] The proposal derived from a presumably unequal situation of U.S. judgment holders trying to enforce their judgments abroad versus foreign plaintiffs seeking enforcement of judgments in America.[17] This situation resulted from overseas authorities' reluctance to let U.S. judgments adjudicating punitive damages or constituting "'excessive'" jury awards[18] enter into their legal systems, as well as deficiencies in service of process on the defendant.[19] On the other hand, authorities claimed American law, which supposedly enforces any judgments that are valid and fair,[20] in practice proved to be respectively lenient.[21]

The U.S. initiative was greeted with enthusiasm.[22] It was seen as abnormal that there was a lack of any multilateral instrument available on a global scale for the recognition and enforcement of judicial decisions in a world where various economic regions were becoming more interdependent every day and where more international conventions were in place every year.[23] In the opinion of the Hague Conference's Permanent Bureau, such *status quo* made a highly unsat-

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[16] Letter from Edwin D. Williamson, Legal Advisor, U.S. Dep't of State, to Georges Droz, Sec'y Gen., Hague Conference of Private Int'l Law (May 5, 1992), *available at* http://www.state.gov/documents/organization/ 65973.pdf .

[17] *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 A.J.I.L. 387, 418-19 (2001) (discussing the ease of enforcing foreign judgments in the United States and the difficulty of enforcing United States judgments abroad).

[18] *See id.* at 419.

[19] Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7, 9 (1998).

[20] *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 202–03 (1895).

[21] *See* Eric B. Fastiff, *The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems,* 28 CORNELL INT'L L.J.469, 470–73 (1995) (contrasting the U.S. standard of enforcing any judgment that is "valid and fair" with the reluctance of foreign countries to enforce U.S. judgments).

[22] *See* THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 19, CONCLUSIONS OF THE WORKING GROUP MEETING ON ENFORCEMENT OF JUDGMENTS 257 (1992), *available at* http://www.hcch.net/upload/wop/jdgm_concl1992e.pdf.

[23] THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 17, SOME REFLECTIONS OF THE PERMANENT BUREAU ON A GENERAL CONVENTION ON ENFORCEMENT OF JUDGMENTS 231 (1992), *available at* http://www.hcch.net/upload/wop/jdgm_pd17e.pdf.

isfactory situation for international commerce and trade, resulting in legal uncertainty, delays, and costs which increasingly interfered with the needs of trade and business.[24] It concluded:

> [I]n the short-term, it may seem as if doing business abroad in a far-off region in the world with little risk of any judgment made in that remote region ever being enforceable in one's own country is a comfortable affair, but in the long-term the net result of this policy of burying one's head in the sand will be that the foreign courts will be tempted to exercise less self-restraint in assuming jurisdiction in international circumstances and be less willing to recognize and enforce judgments from one's own country, or a combination of both.[25]

Before work began on the wording of the future convention, the Working Group established the convention's character. Instead of a single convention, the Working Group decided to draft a "mixed convention"[26] that would address recognition and enforcement of foreign judgments only, because a single convention "would fall short of meeting present needs."[27] The Group intended this kind of international agreement to follow the pattern of a double convention; hence it would cover enforcement and recognition as well as jurisdiction.[28] However, unlike a double convention, it would also include a *grey area*, allowing the court of origin to assume jurisdiction outside the grounds listed in the "white list;" those which the "black list" disapproved.[29] This approach would allow some basis of jurisdiction to remain available without subjecting it to the convention's rules for recognition and enforcement of a resulting judgment.[30] Such a judgment would have to

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[24] *See* THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 1, ANNOTATED Checklist of Issues to Be Discussed at The Meeting of the Special Commission on Jurisdiction and Enforcement of Judgments 4 (1994), *available at* http://www.hcch.net/upload/wop/jdgm_pd01%281994%29.pdf.

[25] *Id.*

[26] Ronald A. Brand, *Intellectual Property, Electronic Commerce and The Preliminary Draft Hague Jurisdiction and Judgments Convention*, 62 U. PITT. L. REV. 581, 585 (2001); Ronald A. Brand, *Community Competence for Matters of Judicial Cooperation at The Hague Conference on Private International Law: A View From The United States*, 21 J.L. & COM. 191, 196 (2002).

[27] THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 19, CONCLUSIONS OF THE WORKING GROUP MEETING ON ENFORCEMENT OF JUDGMENTS 257 (1992), *available at* http://www.hcch.net/upload/wop/jdgm_concl1992e.pdf.

[28] *Id.*

[29] *Id.* at 259–61.

[30] Ronald A. Brand, *supra* note 26, at 584.

be reviewed by a recognizing court in an applicable manner, in the absence of a treaty.[31] This approach would prevent the Hague Member States from drafting an agreement covering and connecting the entire set of jurisdictional rules.[32] Therefore, it would allow some areas of disagreement and leave some issues not referred to in national civil procedure regulations outside of the drafted international instrument.[33] These issues could be covered by a later convention or protocol after a commonly acceptable solution was reached.[34]

However, as can be seen in a report on international jurisdiction and foreign judgments in civil and commercial matters drawn up by the Permanent Bureau for Special Commission, which was convened to prepare a preliminary draft convention, the commission was advised to pay special attention and priority to jurisdiction.[35] The report claimed that, apart from an intricate constructional system provided by the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of February 1, 1971, another reason underlying its lack of success was the lack of rules applicable to jurisdiction.[36] The Brussels Convention[37] was used as a point of reference and a model to follow.[38] The report further explained that the main role of the future instrument would be to provide litigants with the ability to predict with a significant degree of certainty which court would have jurisdiction to adjudicate a dispute.[39] Moreover, once the convention resolved this dispute, litigants would benefit from the effects of the judgment, in other States if necessary, and without having to start cumbersome and complex proceedings all over again.[40]

The Special Commission adopted a preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial

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[31] *Id.* at 585.

[32] Ronald A. Brand, *Community Competence*, *supra* note, 26, at 196.

[33] *See id.*

[34] *Id.*

[35] CATHERINE KESSEDJIAN, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO.7, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (1997), *available at* http://www.hcch.net/upload/wop/jdgm_pd7.pdf.

[36] *See id.* at 8.

[37] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm [Brussels Convention].

[38] *See* KESSEDJIAN, *supra* note 35, at 8.

[39] Id.

[40] *See* Letter from Edwin D. Williamson, *supra* note 15 (suggesting that the Hague Conference could take up the negotiation of a single treaty applicable to Hague Conference Member States and other countries).

Matters in 1999.[41] Nevertheless, experts heavily criticized the draft convention, mostly for remaining a "close-knit double convention [rather than] a loose-jointed mixed convention"[42] that seemed to result from promoting mechanisms provided by the Brussels Convention, without considering the fundamental differences that existed between the negotiating countries.[43] Moreover, it was difficult to reach consensus in the following six major areas: Internet and e-commerce activity-based jurisdiction, consumer and employment contracts, intellectual property rights, the relationship of the future convention with other regional instruments, and bilateralism.[44] Therefore, in order to reconcile conflicting approaches, the commission presented a second draft during a diplomatic conference in June 2001.[45] However, instead of providing a commonly accepted solution, it merely reflected the existing dissent[46] and hence led to the final failure of the project. In addition, the Internet, e-commerce, and de-territorialization issues that came up during the negotiations constituted new challenges with which the members would have to consider.[47] The longer the work continued, the more visible the differences became between the approaches adopted by the U.S. and European delegations.

The main reason that made it impossible for the American group to accept the conventional draft was the proposed system of jurisdictional law. The group declared on several occasions that "their

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[41] *See* PETER NYGH & FAUSTO POCAR, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 11, PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (2000), *available at* http://www.hcch.net/upload/wop/jdgmpd11.pdf.

[42] Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 200 (2001).

[43] *See, e.g.*, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 16, SOME REELECTIONS ON THE PRESENT STATE OF NEGOTIATIONS ON THE JUDGMENTS PROJECT IN THE CONTEXT OF THE FUTURE WORK PROGRAMME OF THE CONFERENCE 5 (2002), *available at* http://www.hcch.net/upload/wop/gen_pd16e.pdf.

[44] *Id.* at 7.

[45] *See generally* THE PERMANENT BUREAU & CO-REPORTERS, HAGUE CONFERENCE ON PRIVATE INT'L LAW, SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE 6 - 20 JUNE 200 1 (2001), *available at* http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf.

[46] *See* Gralf-Peter Calliess, *Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy failed in The Hague*, 5 GERMAN L. J. 1490 (2004).

[47] *See* AVRIL D. HAINES, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 17, THE IMPACT OF THE INTERNET ON THE JUDGMENTS PROJECT: THOUGHTS FOR THE FUTURE, 22 (2002), *available at* http://www.hcch.net/upload/wop/gen_pd17e.pdf.

hands were tied . . . since the case law established by the U.S. Supreme Court was non-negotiable."[48] On the other hand, "the Europeans seemed to be delighted with the Brussels Convention"[49] which led to the tendency to make the Hague drafts as similar as possible.[50] Given this, along with the Brussels Convention and its successor, the Brussels Regulation, rules governing conflict of laws within the European Union have already been harmonized.[51] However, the same could not have been said about the situation on the international scene.

Progressing toward a solution to the existing shortcomings of the system, the Permanent Bureau proposed the "*nucleus* approach."[52] Informal working groups followed this approach in core areas such as jurisdiction based on choice of court agreements in business-to-business cases, submission, defendant's forum, counterclaims, trusts, physical torts, and certain other possible grounds.[53] In February 2002, doubts first appeared as to the chances of achieving consensus over a multinational convention versus some smaller instrument that would either be a first step towards reaching the original goal, or the final accomplishment.[54] "The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the convention."[55] It may be concluded that this concern, together with a detailed analysis of the problem of choice of court clauses,[56] and a proposal of

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[48] Knut Woestehoff, *The Drafting Process for a Hague Convention on Jurisdiction and Judgments with Special Consideration of Intellectual Property and E-Commerce* 13 (LLM Theses & Essays, Paper No. 54, 2005), *available at* http://digitalcommons.law.uga.edu/stu_llm/54.

[49] Brussels Convention, *supra* note 37.

[50] THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS 8 (Fausto Pocar & Costanza Honorati eds., 2005).

[51] *See* Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I"), art. 33, 34, 2001 O.J. (L 12), 1, 10. (EC) [hereinafter Brussels I]

[52] THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, SOME REFLECTIONS ON THE PRESENT STATE OF NEGOTIATIONS ON THE JUDGMENTS PROJECT IN THE CONTEXT OF THE FUTURE WORK PROGRAM OF THE CONFERENCE 8 (2002).

[53] Id.

[54] Ronald A. Brand, *Community Competence for Matters of Judicial Cooperation at The Hague Conference on Private International Law*, *supra.* note 26, at 195–97.

[55] MASATO DOGAUCHI A & TREVOR C. HARTLEY, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO: 26, PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT 6 (2004), *available at* http://www.hcch.net/upload/wop/ jdgm_pd26e.pdf.

[56] MASATO DOGAUCHI & TREVOR C. HARTLEY, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 19, REFLECTION PAPER TO ASSIST IN THE PREPARATION OF A CONVENTION ON JURISDICTION AND REC-

the informal group working on choice of court agreements in business-to-business cases,[57] resulted in limiting the project to choice of court only.

However, because the Hague Convention was not meant to be a bilateral instrument between Europe and the U.S., but rather a multilateral treaty enabling the enforcement of judgments on a global scale, it was a serious mistake to draft it based on the European standards, "for on a global scale there was just not enough trust in order to apply the Brussels Convention's philosophy, of a general presumption of equivalence of norms and procedure, and thus to strictly follow the principle of mutual recognition."[58] According to Yoav Oestreicher, in addition to being politically incorrect, this mistake caused a lack of trust, taking the form of suspicion between various countries and legal systems.[59] Therefore, the original project failed, with the results limited to the Convention of June 30, 2005, and to the matter of choice of court agreements only.

II. THE CURRENT *STATUS QUO*

Given the lack of any international convention in this respect,[60] currently countries have to apply their own laws that govern rules on the enforcement and recognition of foreign judgments. National rules do not apply if there are any regional instruments in place

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[57] MASATO DOGAUCHI & TREVOR C. HARTLEY, THE PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DOCUMENT NO. 26, PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS, EXPLANATORY REPORT , *available at* http://www.hcch.net/upload/wop/jdgm_pd26e.pdf

[58] Gralf-Peter Calliess, *supra* note 46, at 1498.

[59] *See* Yoav Oestreicher, *The Rise and Fall of the Mixed and Double Convention Models Regarding Recognition and Enforcement of Foreign Judgments*, 6 WASH. U. GLOBAL STUD. L. REV. 339, 342–43 (2007).

[60] *See, e.g.*, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 1439 U.N.T.S. 24392; Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, O.A.S.T.S. No. 64; Brussels I, *supra* note 52; Council Decision 2007/712, New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L339) 1 (EC); Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983, *available at* http://www.refworld.org/docid/3ae6b38d8.html; Agreement Between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, Jul. 24, 2007, *available at* http://www.justice.govt.nz/policy/international-justice/trans-tasman-court-proceedings/documents/TTCP_signed_treaty.pdf.

such as the Brussels I Regulation, which constitutes the main source of European law as to the subject matter under analysis.[61] However, the Brussels I Regulation applies jurisdiction to persons domiciled in a Member State[62] and provides recognition and enforcement to any judgment given by a court or tribunal of a Member State only.[63] Therefore, calling it an intra-European civil procedure instrument is absolutely justified.

The current situation on the international movement of judgments will be presented from two perspectives: a European one, which is more familiar to the author and which will be elaborated on in detail, and an American viewpoint. Special attention will be paid to punitive damages in Europe, which are a prime example of the inconsistencies and differing understandings that make it impossible for some local courts to enforce foreign judgments.

A. *The Situation in Europe*

The European perspective on punitive damages, in most cases, is inconsistent with a public policy of the forum,[64] and constitutes the main reason why foreign judgments are not recognized or enforced. There is a wealth of literature on the subject from both sides of the Atlantic.[65] The main reason for Europe's refusal to enforce foreign

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[61] *See* Brussels I, *supra* note 52.

[62] *Id.* art 2 ("[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.").

[63] *Id.* art 32 ("For the purposes of this Regulation, '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 the determination of costs or expenses by an officer of the court.").

[64] *See, e.g.*, Madeleine Tolani, *U.S. Punitive Damages Before German Courts: a Comparative Analysis with respect to the Ordre Public*, 17 ANN. SURV. INT'L & COMP. L. 185, 202 (2011) (describing the method to determine whether German *ordre public* was violated under German law).

[65] *See generally* Volker Behr, *Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 109 (2003); Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far*, 24 J.L. & COM. 181 (2005); Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NETH. INT'L L. REV. 143 (1996); Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175 (2005); John Y. Gotanda, *Punitive Damages: a Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391 (2006); Juliana Mörsdorf-Schulte, *Funktion und Dogmatik US-amerikanischer Punitive Damages*, 67 STUDIEN ZUM AUSLÄNDISCHEN UND INTERNATIONALEN PRIVATRECHT [STUDIPR] (1999) (Ger.); Stephan Lüke, *Punitive Damages in der schiedsgerichtsbarkeit*, 105 STUDIEN ZUM AUSLÄNDISCHEN UND INTERNATION-

judgments, which have adjudicated punitive damages, are their inconsistency with the European movement's understanding of damages. All civil law systems, whether they follow the BGB[66] or the French Napoleonic model,[67] provide a monistic structure of rules of damages.[68] This assumes that the sole role of damages is to compensate the victim; therefore, adjudicated damages must be directly proportional to actual damages suffered.[69] As a consequence, there is an assumption that damages are restricted to compensation damages only.[70] Accordingly, tortfeasor punishment is under no circumstances a legitimate function of damages; punishment may only be pursued in the context and by the means of criminal law.[71]

To clarify the nature of punitive damages, Volker Behr identified four main differences between punitive damages and compensatory damages.[72] His first main distinction lists the purpose of damages—compensation damages are aimed at compensating a victim's losses, whereas punitive damages are intended to punish, deter and enforce the law.[73] Punitive damages are awarded to punish the tortfeasor for outrageous conduct and to deter similar conduct in the future.[74]

Second, the way that damages are calculated is significantly dissimilar—compensatory damages must equal the losses of the vic-

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ALEN PRIVATRECHT [STUDIPR] (2003) (Ger.); Gert Brüggemeier, *Haftungsrecht: Struktur, Prinzipien, Schutzbereich*, 36 ENZYKLOPÄDIE DER RECHTS- UND STAATSWISSENSCHAFT. ABTEILUNG RECHTSWISSENSCHAFT (2006) (Ger.); Annina Schramm, *Haftung Für Tötung*, 7 STUDIEN ZUM PRIVATRECHT [STUDPRIV] (2010) (Ger.); Ansgar Staudinger, *Tatort USA: Fallstricke bei der Prozessführung in deutschamerikanischen Sachverhalten* (DEUTSCHEN GESELLSCHAFT für REISERECHT eV), *available at*: http://www.dgfr.de/dgfr/download/reiserechtstage_13-staudinger 02.pdf.

[66] Bürgerliches Gesetzbuch [BGB][Civil Code], Aug.18, 1896, Das Bundesgesetzblatt [BGBI.] 1, as amended, art. 4, para. 5 (Ger.).

[67] Code Civil [C. Civ.] (Fr.). The French civil is followed by legal systems of Italy, the Netherlands, Belgium, Spain and Portugal. *See Napoleonic Code*, ENCYCLOPÆDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/403196/Napoleonic-code (last visited Nov.3, 2014).

[68] George Georgiades, *Punitive Damages in Europe and the USA: Doctrinal Differences and Practical Convergence*, 58 Revue Hellénique de Droit International [RHDI] 145, 145 (2005).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Volker Behr, *Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 109-12 (2003).

[73] *Id.* at 110.

[74] *Id.* at 111–12.

tim, whereas punitive damages are not determined exclusively, or even primarily, by the losses the plaintiff suffered.[75] Instead,

> [t]he award is determined by the seriousness of the wrong, the seriousness of the plaintiff's injury, the extent of the defendant's wealth, the profit the defendant made from his wrongful act, the necessity to deter the defendant and others like him from similar wrongful conduct, and the necessity to improve law enforcement.[76]

Third, the latter does not focus on the victim, as is the case for compensatory damages, but instead focuses on the tortfeasor's intent, recklessness, or similar attitude which, not only determines whether punitive damages are awarded, but also influences the amount of the damages.[77] In adjudicating punitive damages, the court considers the economic situation of the wrongdoer, and whether, and to what extent, he profited from his wrongful act.[78]

Lastly, the timeline perspective is different. With compensatory damages, it is assumed that in the analysis of a tort, damages are done retrospectively. By contrast, punitive damages are more prospectively oriented as they are aimed at deterring the tortfeasor from future wrongful acts and misbehavior.[79]

Currently, some scholars claim that recent developments in some European civil law systems are blurring the border between compensatory damages and punitive damages.[80] For example, under German and Polish copyright law, in damages adjudicated in cases of right of personality infringement, employment discrimination, and intellectual property, the cases resemble American-style punitive damages due to the multiplicity of due royalties available; explaining that such a measure shall be adopted because the owner of the intellectual property rights usually has difficulty proving actual damage.[81]

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[75] *Id.* at 113.

[76] *Id.* 111.

[77] *Id.* 111-12.

[78] *Id.* at 112,

[79] *Id.* at 113.

[80] Hartwin Bungert, *Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exorbitanter Höhe*, 23-24 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1707 (1992) (Ger.); Christoph Böhmer, *Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen*, 1990 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3049 (1990) (Ger.); Ernst C. Stiefel & Rolf Stürner, *Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exzessiver Höhe*, 1987 VERSICHERUNGSRECHT [VersR] 829 (1987); Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Order Public*, 17 ANN. SURV. INT'L & COMP. L. 185 (2011).

[81] *See generally* Heinrich Götz, *Die Überwachung der Aktiengesellschaft*, 40 AG 337 (1995).

However, some valid counterarguments can be made. The first is rooted in the European law and the second in the economic analysis of law. First, it seems that European law, particularly European copyright law, refuses the idea of punitive damages existing in the field of intellectual property. This position is declared in the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.[82] With a view of compensating for the prejudice suffered as a result of an infringement, the Directive's preamble states that "the amount of damages awarded to the rightsholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightsholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightsholder."[83] As an alternative example, where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees that would have been due if the infringer had requested authorization for intellectual property rights used. "The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightsholder, such as the costs of identification and research."[84]

Further, Article 13 of the Directive provides a catalog of damages such as a "lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual property right in question",[85] which constitutes an alternative to regular compensatory damages.[86] However, one important additional factor must be mentioned—the Directive sets out a minimum standard of protection that implies that Member States can provide for measures more favorable to the rightholder[87] while observing the principles of effectiveness, dis-

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[82] Directive 2004/48, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Pights, 2004 O.J. (L195) 16, 18.

[83] *Id.* ¶ 26, at 18.

[84] *Id.* ¶ 26, at 18–19.

[85] *Id.* art. 13(1)(b).

[86] *See, e.g.*, *Id.* art 13(1)(a) ("they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement."

[87] *Id.* art 2(1) at 19. ("Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favorable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement

suasiveness, and proportionality,[88] of which the latter is perceived to be the most important.[89] It is claimed by doctrine that all of the above lead to a conclusion that any European copyright law may raise the standard of protection as high as it finds it appropriate,[90] unless it serves the purpose declared in Article 13 of the Directive (i.e. it enables the awarding of damages appropriate to the actual prejudice suffered as a result of the infringement). Therefore, this shows that even multiplicity of due royalties, listed by the Directive as possible damages, as long as it complies with standards spelled out above, is allowed and hence does not constitute punitive damages, as long as it is aimed at compensating damage and not punishing the tortfeasor.

From an economic analysis of law's perspective, it is also clear that intellectual property damages deserve some special treatment. It is stressed that they must balance protecting the rightholders' rights on one hand and providing encouragement for others to build on existing knowledge on the other.[91] Moreover, in line with the principle that wrongdoing must not pay, if a rightsholder only receives damages equivalent to royalties that would be due without tortious interference, a potential infringer might as well take the risk, hoping that it will go undetected. Therefore, analysts claim that damages should also deter infringement by rendering it unprofitable—by making the infringer no better off than he would have been had he never used other peoples' property.[92] All the above explain why intellectual property damages cannot always correspond with the actual losses a rightsholder suffers, as sometimes they must also encompass unfair profits the infringer achieves. However, and this remark deserves special at-

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of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.").

[88] *Supra* note 68, art. 3.2. ("Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.")

[89] Ansgar Ohly, *Three Principles of European IP Enforcement Law: Effectiveness, Proportionality, Dissuasiveness*, in TECHNOLOGY AND COMPETITION, CONTRIBUTIONS IN HONOUR OF HANNS ULLRICH 257, 270–71 (Josef Drexl ed., 2009).

[90] Piotr Machnikowski, *Damages for the Infringement of Intellectual Property Rights under EU Law, in* COMPENSATION OF PRIVATE LOSSES: THE EVOLUTION OF TORTS IN EUROPEAN BUSINESS LAW 88 (Reiner Schulze ed., 2011).

[91] Edward F. Sherry, David J. Teece, *Some Economic Aspects of Intellectual Property Damages*, 573 PLI/Pat 399 (1999); Michael P. Akemann and Christopher J. Pleatsikas, *An Economic Perspective on Damages Calculations: Common Problems in Specifying the But-For World*, 830 PLI/Lit 105 (2010).

[92] Roger D. Blair & Thomas F. Cotter, INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES 42 (2005); Roger D. Blair, Thomas F. Cotter, *An Economic Analysis of Damages Rules In Intellectual Property Law*, 39 WM. & MARY L. REV. 1595–96 (1998).

tention, it never leads to punishing the tortfeasor; in the worst-case scenario, one can only be deprived of any means one should have paid to the rightsholder or one earned because of the infringement. From that perspective, the bundle of damages is defendant-oriented, because it refers to his financial situation when attempting to return things to their original state, as opposed to plaintiff-oriented damages, which consider only the victim's feelings and estate. In any case, intellectual property damages are never aimed at punishing the defendant, but rather, they attempt to refrain from rewarding his conduct.

The above facts prove that the traditional view on damages is evolving, and in certain fields, it modifies calculation of an amount due to the plaintiff. However, from the author's point of view, as long as the purpose thereof is to compensate rather than punish, damages shall not fall into the punitive category.[93] But, one must also note that the U.S. legal order, which constitutes a flag example of a system providing for punitive damages, is slowly modifying its approach to punitive damages by trying to impose some restrictions on the method of their calculation.[94] Moreover, many state courts and legislatures have already adopted standards and procedures limiting the jury's discretion in awarding punitive damages. For instance, some legislatures enacted statutes limiting the amount of punitive damages by capping possible awards.[95]

Hence, one can conclude that even though both civil and common law systems seem to modify their approaches to damages, resulting in a situation where the differences between them are not as clear as some decades ago, claiming that this change could result in the adoption of a more favorable attitude towards the enforcement of foreign punitive judgments in Europe appears an overstatement.[96] As long as damages serve a different purpose, even though the gap between adjudicated amounts may decrease, European nations will not enforce them.

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[93] The European reluctance as to punitive damages is particularly visible in 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) that in recital 26 declares that the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.

[94] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

[95] *E.g.*, VA. CODE ANN. § 8.01-38.1 (West 2014).

[96] *See supra* note 56 and accompanying text.

B. The Situation in the US

In the opinion of many academics from the U.S., "the judgments of foreign courts find a warmer welcome [in the U.S.] . . . than U.S. judgments do in the foreign courts."[97] However, even if this enthusiasm is justified with regard to judgments issued by the courts of jurisdictions with legal cultures resembling the U.S., it is not so evident in the case of judgments delivered in other places.[98] This is why the first recognition of a Chinese judgment[99] was seen as a milestone.[100] The U.S. grounds its beliefs regarding foreign judgments in

[97] David P. Steward, *Recognition and Enforcement of Foreign Judgments In the United States*, 12 Y.B. PRIVATE INT'L L. 179 (2010). *See also* Matthew H. Adler, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 81 (1994) (stating that "the consensus" in academic circles and in the U.S. Department of State "is that individuals seeking enforcement of U.S. judgments abroad have not had the same good fortune as foreign litigants seeking enforcement in the United States"); Linda J. Silberman, *Enforcement And Recognition Of Foreign Country Judgments In The United States*, 704 PLI/Lit 365 (2004); Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783 (2004); J. Noelle Hicks, *Andrew P. Vance Memorial Writing Competition Winner Facilitating International Trade: The U.S. Needs Federal Legislation Governing The Enforcement Of Foreign Judgments*, 28 BROOK. J. INT'L L. 155 (2002); Melinda Luthin, *U.S. Enforcement Of Foreign Money Judgments And The Need For Reform*, 14 U.C. DAVIS J. INT'L L. & POL'Y 111 (2007); Arthur W. Rovine, *Enforcement In The United States Of Foreign Judgments And Foreign Arbitration Awards*, 41 RMMLF-INST 9 (1995).

[98] *See* Ramon E. Reyes, Jr., *The Enforcement Of Foreign Court Judgments In The People's Republic Of China: What The American Lawyer Needs To Know*, 23 BROOK. J. INT'L L. 241 (1997) (highlighting how differently China and the United States enforce foreign judgments).

[99] Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., 425 F. App'x 580, 581 (9th Cir. 2011).

[100] *See generally* Mark Moedritzer, Kay C. Whittaker, & Ariel Ye, *Judgments 'Made In China' But Enforceable in The United States?: Obtaining Recognition and Enforcement in the United States of Monetary Judgments Entered in China Against U.S. Companies Doing Business Abroad*, 44 INT'L LAW. 817 (2010) (explaining how to obtain recognition and enforcement of a Chinese monetary judgment in the United States); Jie Huang, *Conflicts Between Civil Law and Common Law in Judgment Recognition and Enforcement: When is the Finality Dispute Final?*, 29 WIS. INT'L L.J. 70 (2011) (discussing the conflict in judgment recognition and enforcement between civil law-abiding mainland China and Macao and common-law following Hong Kong); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011) (discussing how plaintiffs in transnational lawsuits are frequently denied both court access in the United States and a remedy based on a foreign court's judgment); Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Con-*

the notion of comity that the American Supreme Court explained in *Hilton v. Guyot*:

> [N]either a matter of absolute obligation, nor of mere courtesy and good will. It is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws."[101]

However, recently, the first dark cloud—the Speech Act—gathered on this recognition-friendly horizon. British "libel tourism"[102] triggered it, meaning that it was easy for foreign plaintiffs to bring their defamation claims in front of British courts, with the application of English law, even though the connections between the cases and the English jurisdiction was remote.[103] The problem of foreign and, more precisely, European defamation judgments, became the subject of a public debate started by the American journalist Rachel Ehrenfeld, who an Arabic businessman and his family sued in London because they took offense with Ehrenfeld listing their name in a book entitled "Funding Evil" amongst terrorism financiers.[104] Even though her counterclaim brought in New York was unsuccessful,[105] the debate as to British libel tourism's influence on American citizens commenced. As a result, the State of New York adopted the "Libel Terrorism Protection Act" that enabled New York courts to assert jurisdiction over anyone who obtains a foreign libel judgment against a New York publisher or writer, and limited enforcement to those judgments that sat-

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duct Abroad, 25 EMORY INT'L L. REV. 731 (2011) (discussing the barriers foreign plaintiffs face when seeking civil recovery against American corporations).

[101] *Id.*

[102] Geoffrey Ronald Robertson, *Media Inquiry Ducked Key Reforms*, Guardian, Feb. 23, 2010, *available at* http://www.guardian.co.uk/media/2010/feb/24/mps-media-legal-geoffrey-robertson (coining the term "libel tourism").

[103] *See generally* Daniel C. Taylor, *Libel Tourism: Protecting Authors And Preserving Comity*, 99 GEO. L.J. 189 (2010) (discussing the increasing number of lawsuits for libel against American authors in plaintiff-friendly jurisdictions); Robert L. McFarland, *Please Do Not Publish This Article In England: A Jurisdictional Response To Libel Tourism*, 79 MISS. L.J. 617 (2010) (discussing the use of plaintiff-friendly British courts for libel suits against American authors on the basis of insignificant British contacts); Andrew R. Klein *Some Thoughts on Libel Tourism* 38 PEPP. L. REV. 375 (2011) (discussing the dodging of American free speech protections by plaintiffs suing American authors for libel in more plaintiff-friendly foreign jurisdictions).

[104] Lili Levi, *The Problem Of Trans-National Libel*, 60 AM. J. COMP. L. 507, 512-514 (2012).

[105] Ehrenfeld v. Mahfouz, 489 F.3d 542, 545 (2nd. Cir. N.Y. 2007).

isfy the freedom of speech and press protections guaranteed by both the United States and New York Constitutions.[106] Legislatures from Illinois,[107] Florida,[108] California,[109] Tennessee,[110] and Maryland[111] followed New York's lead. However, this trend proved to be only an introduction to the Speech Act that was finally adopted in August 2010. In the body of the statute it claims that

> [s]ome persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.[112]

The Speech Act continues by stating that the above "not only suppress the free speech rights of the defendants to the suit, but inhibits other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit."[113]

Against this background, the statute adopts a rule that any American federal or state court shall not recognize or enforce a foreign defamation judgment without the presence of one of two factors. Either the law the foreign court applies must comply with the requirements laid down by the First Amendment of the American Constitution and the Constitution and law of the state housing the domestic court, or the U.S. court proceedings must lead to the same conclusion that the defendant is liable for defamation.

However, as noted by Mark Rosen, one may assert that the wording of the Speech Act, and hence its scope of application, is broader than its creators planned.[114] This is true as to both the personal and subject matter of application. Regarding personal application, even though one may expect that the Speech Act would aim at

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[106] NY CLS CPLR § 302(d); NY CLS CPLR § 5304(b)(8).

[107] 735 ILL COMP STAT. 5/12-621(b)(7) (2008); 735 ILL COMP STAT. 5/2-209(14)(b-5) (2014).

[108] FLA. STAT. §§ 55.605(2)(h); FLA. STAT. 55.6055 (2009).

[109] CAL. CIV. PRO. CODE §§1716(c)(9) & 1717(c) (West 2009).

[110] TENN. CODE ANN. §§ 26-6-108(3)(c) & 26-6-104(d) (West 2010).

[111] MD. CODE ANN., CTS. & JUD. PROC. §§ 6-103.3(b) & 10-704(5)(c) (West 2010).

[112] Securing The Protection Of Our Enduring And Established Constitutional Heritage Act, Pub. L. No. 111-223, § 2(2) (codified as amended at 28 U.S.C. §§ 4101–05 (2010)).

[113] *Id.* at § 2(3).

[114] Mark Rosen, *The Speech Act's Unfortunate Parochialism: of Libel Tourism and Legitimate Pluralism*, 53 VA. J. INT'L L. 99, 101–02.

protecting American citizens and corporations,[115] it makes no reference of this kind when defining its personal scope of application. This simply means that in any proceeding as to the recognition or enforcement of a foreign defamation judgment, the court must apply the Speech Act. It also weakens arguments that try to explain the need to adopt the Speech Act constitutionally,[116] as it seems that the scope of its personal application is broader than the U.S. Constitution. Regarding subject matter application, the Speech Act, even though it literally cites British libel tourism as its trigger, applies to all kinds of defamation judgments without differentiating its country of origin or kind of alleged defamatory statement. This means that the Speech Act could apply to some matters that do not fall under U.S. interests. An example of this could be a case between citizens of a foreign jurisdiction, with a verdict affecting that jurisdiction only, but whose judgment the plaintiff attempts to enforce in the U.S. because the defendant transferred or locates its assets there.

In light of these facts, because of the unfortunately wide scope of application of the Speech Act, in the opinion of this paper's author, the Act does not articulate a national "public policy" based on the First Amendment of the U.S. Constitution. Rather, it heralds a new American approach in the field of recognition and enforcement of foreign judgments.[117] Because of the prerequisites it laid down, the court will have to revise the foreign judgment (referred to as *"révision au fond")* by applying American defamation law. In other words, the procedure comprises checking whether the foreign judgment complies with U.S. standards. One could say that this resembles the procedure European courts follow when it comes to recognizing judgments allowing punitive damages. As one can observe from German,[118] Italian,[119] and Polish[120] case law, such judgments may enter the local movement of judgments in the part that refers to compensatory damages. However, in contrast to procedures the Speech Act lays down, the judgment's

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[115] There is even a definition of a United States person. *See* 28 U.S.C. § 4101(6).

[116] Marissa Gerny, *The Speech Act Defends The First Amendment: A Visible And Targeted Response To Libel Tourism*, 36 SETON HALL LEGIS. J. 409, 416, 420–21 (2012).

[117] David P. Stewart, *Recognition and Enforcement of Foreign Judgments in the United States*, 12 Y.B. PRIVATE INT'L L. 179, 197 (2010).

[118] Gerhard Wegen & James Sherer, *Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages*, 32 INT'L LEGAL MATERIALS 1320, 1324 (1993).

[119] Parrott v. Fimez S.p.A., App. sez. trez, 15 Jan. 1995, n.0319, Giur. it. 1995 I.1,132 (It.), *translated in* Lucia Ostoni, *Italian Rejection of Punitive Damages in a U.S. Judgment*, 24 J.L. & COM. 245, 251-62 (2005).

[120] Sąd Apelacyjny w Warszawie I Wydział Cywilny [Warsaw Court of Appeal Civil Division] Jan. 26, 2012 Sygn. akt I ACz 2059/11 (Pol.).

merits are never checked, and the sole discretionary decision is the final amount adjudicated.

III. The Current Development in the Hague

Currently, the Hague Conference on International Private Law considers resuming work on an international instrument that would deal with the issue at stake.[121] In order to do so, the Council consented to a suggestion to convene a group of experts to examine current developments in the area of international litigation and the feasibility of a new global instrument. Currently, the group comprises representatives from fifteen countries along with one representative from the Regional Economic Integration Organization (i.e. the European Union). The increasing number of cross-border transactions and foreign investments explained the need for a movement of judgments structure, as did current developments on both sides of the ocean.[122] However, this growing internationalization triggers a need for effective public institutions and an efficient dispute resolution process.[123] Otherwise, entrepreneurs conducting cross-border trade, particularly small and medium enterprises, will become vulnerable to the costs of resolving international disputes, which could influence their decisions of whether to begin or continue doing business abroad.[124]

Nevertheless, the fundamental aspect the group of experts must decide is the type and model of the future instrument. Regarding the type, there are three options available: a convention, an "*à la carte* convention,"[125] and a non-binding instrument. There are arguments supporting each of the above alternatives: if the experts indeed begin

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[121] Permanent Bureau, Continuation of the Judgments Project, (Hague Conference on Private Int'l Law, Prel. Doc. No. 14, Feb. 2010) at 3, 5, *available at* http://www.hcch.net/upload/wop/genaff2010pd14e.pdf. *See* Hans Van Loon, *The Hague Conference on Private International Law: Work in Progress (2008-2010)*, *in* 12 Y.B. Private Int'l L. 419, 431 (2010).

[122] *See generally* Republic of Ecuador v. ChevronTexaco Corp., 426 F. Supp. 2d 159, 160–62 (S.D.N.Y. 2006) (concerning a possible conflict between the laws of forum state New York and Ecuador).

[123] *See generally* World Bank Group Staff, *Investing Across Borders 2010: Indicators of Foreign Direct Investment Regulation in 87 Economies* (2010) (detailing the need for an effective commercial arbitration regime for foreign investors), *available at* http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/IAB-report.pdf.

[124] Permanent Bureau, Ongoing Work on International Litigation and Possible Continuation of the Judgment Project, (Hague Conference on Private Int'l Law, Prel. Doc. No 5, Mar. 2012), at 8, *available at*: http://ww w.hcch.net/upload/wop/gap12pd05e.pdf.

[125] David Goddard QC, *Forum allocation and Judgments Convention – Next Steps*, received upon request of the Author of this paper from the Hague Conference on International Private Law.

working on a future convention, it would need to be commensurate with the Statute of the Conference on International Private Law,[126] and this type of an instrument would increase its possible applicability. However, given the previous difficulties during the negotiations in the 1990s in reaching an agreement on grounds of jurisdiction, David Goddard proposed drafting a convention for which the participants would not have to sign up for every chapter. In other words, it would include a number of "optional chapters," and it could therefore eliminate or at least reduce possible controversies.[127] The third possible scenario assumes working on a non-binding instrument, such as model law, based on the successful experiences of other international organizations.[128] However, the Permanent Bureau of the Hague Conference has already indicated that it will consider that only if the other options are exhausted.[129]

A model must be established in case the experts decide that work shall commence on a convention. There are three possibilities in this respect: a "simple" model, a "reinforced simple" model, or a double convention. The simple convention—reflecting a "bottom up" approach that concentrates on those areas where achieving consensus is feasible[130]—would deal with recognition and enforcement of foreign judgments only, and would not embrace the problem of jurisdiction directly.[131] However, it would have to address this issue indirectly by defining both permissible bases of jurisdiction (a positive catalogue) and non-permissible (a negative catalogue). Such a reinforced simple

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[126] Statute of the Hague Conference on Private International Law, July 15, 1955, 220 U.N.T.S.121, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=29.

[127] Goddard, *supra* note 126, at 8.

[128] *See* United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html; *see also* European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), *Principles on Conflict of Laws in Intellectual Property* 1, 6 (2011), http://www.cl-ip.eu/files/pdf2/Final_Text_1_December_2011.pdf.

[129] Permanent Bureau, Continuation of the Judgments Project, (Hague Conference on Private Int'l Law, Prel. Doc. No. 14, Feb. 2010), at 7, *available at* http://www.hcch.net/upload/wop/genaff2010pd14e.pdf.

[130] Permanent Bureau, Review of the Activities of the Conference in Regard to the Convention on Choice of Court Agreements, (Hague Conference on Private Int'l Law, Prel. Doc. No. 12, March 2011), at 3, *available at* http://www.hcch.net/upload/wop/genaff2011pd12e.pdf.

[131] *See* Ronald A. Brand, *Jurisdictional Developments and The New Hague Judgment Project, in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW — ESSAYS IN HONOUR OF HANS VAN LOON 89, 90 (Legal Studies Research Paper Series, Working Paper No. 2013-19, 2013).

model would follow the pattern of the simple convention, but additional provisions on the circulation of judgments either at the jurisdiction stage or at the recognition and enforcement stage would complement it.[132] The double convention, on the contrary, would address enforcement and recognition, as well as jurisdiction.

Before analyzing the above possible scenarios, experts must investigate a new approach aimed at proving that no international instrument dealing with foreign judgments is needed. These days, many claim that because of the emergence of "*spontaneous harmonization*"[133] of the prerequisites for recognition and enforcement of foreign judgments, a convention on an international level is no longer necessary.[134] This view is deemed rooted in the rapprochement of regimes resulting from negotiations of many international and bilateral conventions that, even if not successful, national courts and legislators have reconsidered and adopted similar approaches.[135] Moreover, (it is believed that) most of the negotiations on international instruments have been more concentrated on jurisdiction than enforcement and recognition of foreign judgments which, in the opinion of some scholars, would prove the lack of need for an international convention in this respect. Even more, it would prove that it is possible to solve this question with bilateral agreements only.[136]

However, some sound counterarguments exist. Even if the optimism about liberalization of recognition and enforcement requirements is justified regarding most of the Member States of the European Union and the U.S., the same cannot be said about Nordic countries. There, foreign judgments that do not fall into any international agreement are not recognized.[137] Also, many Arabic countries

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[132] *Id.* at 98.

[133] *See* Friedrich. K. Juenger, *The Recognition and Enforcement of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 8 (1988) (explaining this concept as a moving trend toward unilateral liberalization of recognition and enforcement prerequisites resulting from a moving trend).

[134] Béligh Elbalti, *Armonización Espontánea de los Requisitos para el Reconocimiento y Ejecución de Decisiones Judiciales Extranjeras y la Necesidad de un Convenio Global Sobre Decisiones Judiciales*, 11 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO 246 (2011).

[135] *See* Gerhard Walter & Samuel P. Baumgartner, *General Report Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, *in* RECOGNITION AND ENOFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS 1, 12–14 (Gerhard Walter & Samuel P. Baumgartner eds., 2000)

[136] Walter & Baumgartner, *supra* note 133, at 252.

[137] *See* Dan Jerker B. Svantesson, *Private International Law and the Internet* 182 (Klüwer Law Int'l, 2007); *see also* Mikael Berlund, *Recognition and Enforcement of Foreign Judgments in Sweden, in* RECOGNITION AND ENFORCEMENT OF FOREIGN

provide for a jurisdictional test[138] as one of the prerequisites for recognition and enforcement, which involves re-examining the jurisdiction of an issuing court and thereby applying a double standard.[139] Furthermore, one must bear in mind that some countries still apply reciprocity in order to recognize or enforce foreign judgments.[140] Nevertheless, the fact that most countries follow a similar pattern as to enforcement and recognition prerequisites should be perceived as a good sign before entering into international negotiations. Regarding the history of the Hague negotiations, (it is justified to say that) the discussion was focused on jurisdictional matters, as this sphere was perceived as the most difficult. In the end, this led to the failure of the entire project.

As to the proposal of replacing a future multi-national agreement with bilateral conventions, one may appropriately examine the analysis performed by David Goddard, proving that the success behind the Trans-Tasman agreement[141] resulted from seven factors.[142] Goddard pointed out the features that contributed to the success of the agreement as: a high level of confidence in the ability and willingness of the courts of both countries to apply a structured discretion in relation to the granting of a stay; their willingness to address, through appeals or other mechanisms, concerns about process issues raised in

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JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS 529-36 (Gerhard Walter & Samuel P. Baumgartner eds., 2000); Juha Lappalainen, *Recognition and Enforcement of Foreign Judgments Outside the Scope of Application of the Brussels and Lugano Conventions: Finland, in* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS 169-81 (Gerhard Walter & Samuel P. Baumgartner eds., 2000).

[138] *See generally* Mark Wakim, *Public Policy Concerns Regarding Enforcement Of Foreign International Arbitral Awards in the Middle East,* 21 N.Y. INT'L L. REV. 1, 37–38 (2008) (discussing choice of law in international commercial disputes in the middle east); Husain M. Al-Baharna, *The Enforcement of Foreign Judgments and Arbitral Awards in the GCC countries with Particular Reference to Bahrain,* 4 ARAB L.Q. 332, 334-35 (1989) (discussing the application of the Arab League Convention of 1952 to foreign arbitral awards); Jalila Sayed Ahmed, *Enforcement of Foreign Judgments in Some Arab Countries—Legal Provisions and Court Precedents: Focus on Bahrain,* 14 ARAB L.Q. 169, 171 (1999) (discussing the enforcement of foreign commercial judgments in Bahrain).

[139] Goddard, *supra* note 126, at 259.

[140] *See* Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgments In The United Kingdom And Germany,* 18 S. ILL. U. L.J. 517 (1994) (evoking Germany as an example of a country that applies reciprocity in recognition and enforcement of international judgments).

[141] *See* Kim Pham, *Enforcement of Non-Monetary Foreign Judgments in Australia,* 30 SYDNEY L. REV. 663. (2008).

[142] Goddard, *supra* note 126 at 15.

relation to a judgment given in other countries; and the history of judicial cooperation between the two countries involved, resulting in them encountering few concerns in practice in relation to civil proceedings and judgments.[143] However, he also indicated two other factors which may seem to throw up merely logistical challenges, but actually make concluding effective bilateral agreements between any two given countries impossible. These are the sometimes long and expensive travel between two countries and a lack of confidence that remote appearances by parties and counsel can work on a practical level.[144] Given that in cases of countries that are distant from each other, the above negative features will always exist, adopting an effective and operative bilateral agreement seems rather unlikely. Therefore, the only way to ensure an international movement of judgments is to deal with the problem in the international arena.

CONCLUSION

The question that I strove to answer in this paper referred to a need for agreement on a movement-of-judgments international instrument, and the feasibility of reaching such an agreement. Regarding the need, I opine that due to the internationalization of the market and the continuous increase of cross-border trade and resulting increase in disputes involving parties from different regions of the world, the demand for an international convention that would embrace jurisdiction, enforcement, and recognition of foreign judgments is unquestionable. However, the lesson learned during the colossal failure of the multi-national dream of creating an instrument that could bridge many nations in the Hague led the international community to realize that basing the agreement on a "mixed" or "double" conventional model was a big mistake from the very beginning.[145] Even though the problems of jurisdiction, enforcement, and recognition of judgments are intertwined, it does not mean that they are inseparable.

Therefore, in the opinion of this paper's author, it is highly advisable to continue work on the latter issue only and come back to jurisdiction issues when an agreement regarding enforcement and recognition is reached. As suggested by Yoav Oestreicher, "even though . . . [this] solution . . . may be less attractive than a double or mixed convention because it provides less predictability and certainty, it is still a good solution, at least in the short run."[146] However, it must

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[143] *Id.* at 6.
[144] *Id.* at 7.
[145] Yoav Oestreicher, *"We're on a Road to Nowhere" – Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments*, 42 INT'L LAW. 59, 59, 71–72 (2008).
[146] Pocar & Honorati, *supra* note 47, at 351.

be stressed that continuing work on recognition and enforcement only would not mean that the problem of jurisdiction would disappear. The future instrument would have to address tolerable grounds of jurisdiction only for the purpose of recognition and enforcement of the foreign judgment[147] and the circumstances under which the court of the state of origin's jurisdiction may go unrecognized.

However, as optimistically suggested by the Hague Conference on Private International Law, agreeing on the above "would be more feasible than reaching consensus on direct grounds of jurisdiction."[148] This confidence is also rooted in the new rule of undertaking decisions which was switched from the traditional voting procedure to the consensus principle.[149] This, according to the opinion of the Secretary General of the Hague Conference on Private International Law, "has its price in terms of negotiation time, but recent experience tends to show its benefits in terms of greater inclusiveness."[150] This solution also meets the expectation of Peter D. Trooboff—an American delegate who took part in the negotiations over the convention in the 1990s—to work out a mechanism in which no participating states would prevail by votes that would ignore the legitimate concern of other delegations.[151]

There are several advantages to the proposal of working on the multi-national convention instead of covering the world with a net of bilateral agreements. First, such an international agreement could end problems with reciprocity. Given that it would be binding in every state that acceded to the convention, the treatment of foreign judgment would be standardized, and would be the same in every country that is party to the convention. Second, it could provide some definition of public policy that thus far has been understood differently by

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[147] Also referred to as "indirect grounds of jurisdiction."

[148] Permanent Bureau, Continuation of the Judgments Project, (Hague Conference on Private Int'l Law, Prel. Doc. No. 14, Feb. 2010), at 6, *available at* http://www.hcch.net/upload/wop/genaff2010pd14e.pdf.

[149] Statute of the Hague Conference on Private International Law, July 15, 1955, 220 U.N.T.S. 121, at art. 8(2) ("The Sessions, Council and Special Commissions shall, to the furthest extent possible, operate on the basis of consensus."), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=29.

[150] Hans van Loon, *Legal Diversity in a Flat, Crowded World: The Role of the Hague Conference*, 39 INT'L J. LEGAL INFO. 172, 183 (2011).

[151] Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, *in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 263, 277 (John J. Barceló III & Kevin M. Clermont eds., 2002).

different jurisdictions,[152] resulting in many inconsistencies between conflicting systems. What is also notable, even though it represents an argument against adopting a multi-state convention, is the fact that in most cases, the refusal of recognition or enforcement of a foreign judgment is based on public-policy exception.[153] This is something we simply have to live with as any international instrument will not be able to change this *status quo*.

Moreover, it would be advisable to include in the future convention a substantive provision that would require the court of origin to specify the various heads of damage. In particular, it would be advisable to indicate which constitute compensatory damages and which are of a punitive character. That would significantly facilitate a role of the requested court which, in the case of a refusal based on punitive damages falling into a public policy exception, would know which part of the judgment it can recognize and which it must reject.[154] This is in line with the recommendations laid down by the Hague Conference on International Private Law.[155]

Another thing that needs to be carefully weighed is the choice between a single-subject convention and a single trans-substantive convention. As suggested by Mark Rosen, given the complexity and diversity between the different areas of civil and business law, it may be easier to come up with a convention or conventions that would apply to a certain area of the law only. This could further serve as an experiment to work out best practices that could be further extended and used to cover all kinds of judgments.[156] Whichever method is chosen to effect the final result (i.e. adopting a multi-national convention which

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[152] *See* Karen E. Minehan, *The Public Policy Exception To The Enforcement Of Foreign Judgments: Necessary Or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795, 817–18 (1996).

[153] Gralf-Peter Calliess, *Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy Failed in the Hague*, 5 GERMAN L. J. 1490, 1496 (2004) (Summarizing "[a]t the end of the day both the citizens of Europe and of the USA seem to be quite comfortable with the idea that the mutual enforcement of judgments is possible in principle but subject to a public-policy test on a case-by-case basis.").

[154] The fact that a judgment can be recognized or enforced partially, is not a subject of any discussion anymore. *See* John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake* of Mastrobuono v. Shearson Lehman Hutton, Inc., 38 HARV. INT'L L.J. 59, 104 (1997).

[155] Permanent Bureau, Note on the Recognition and Enforcement of Decisions in the Perspective of a Double Convention With Special Regard to Foreign Judgments Awarding Punitive or Excessive Damages, (Hague Conference on Private Int'l Law, Prel. Doc. No. 4, May 1996), at 16, 24, *available at* http://www.hcch.net/upload/wop/jdgm_pd04%281996%29.pdf.

[156] Mark Rosen, *The Speech Act's Unfortunate Parochialism: of Libel Tourism and Legitimate Pluralism*, 53 VA. J. INT'L L. 99, 122–23 (2012).

overcomes the current impasse), it will be justified because given the current *status quo*, the end justifies the means. However, only time will tell whether the newest initiative of the Hague Conference on Private International Law will be successful.