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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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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-


\(^6\) 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. Because of the political situation in the European negotiating countries, the conference excluded jurisdiction from the substantive scope of this instrument. With only five countries ratifying the convention, it cannot be described as "successful." Moreover, it is not even operational. 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. 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. 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." 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. Members focused only on the area of judgments.

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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.").
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. 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. This situation resulted from overseas authorities' reluctance to let U.S. judgments adjudicating punitive damages or constituting "excessive" jury awards enter into their legal systems, as well as deficiencies in service of process on the defendant. On the other hand, authorities claimed American law, which supposedly enforces any judgments that are valid and fair, in practice proved to be respectively lenient.

The U.S. initiative was greeted with enthusiasm. 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. In the opinion of the Hague Conference's Permanent Bureau, such status quo made a highly unsat-

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18 See id. at 419.
isfactory situation for international commerce and trade, resulting in legal uncertainty, delays, and costs which increasingly interfered with the needs of trade and business.\textsuperscript{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.\textsuperscript{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"\textsuperscript{26} that would address recognition and enforcement of foreign judgments only, because a single convention "would fall short of meeting present needs."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{30} Such a judgment would have to


\textsuperscript{25} Id.


\textsuperscript{28} Id.

\textsuperscript{29} Id. at 259–61.

\textsuperscript{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.\textsuperscript{31} This approach would prevent the Hague Member States from drafting an agreement covering and connecting the entire set of jurisdictional rules.\textsuperscript{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.\textsuperscript{33} These issues could be covered by a later convention or protocol after a commonly acceptable solution was reached.\textsuperscript{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.\textsuperscript{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.\textsuperscript{36} The Brussels Convention\textsuperscript{37} was used as a point of reference and a model to follow.\textsuperscript{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.\textsuperscript{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.\textsuperscript{40}


\textsuperscript{31} Id. at 585.
\textsuperscript{32} Ronald A. Brand, \textit{Community Competence, supra} note 26, at 196.
\textsuperscript{33} See id.
\textsuperscript{34} Id.
\textsuperscript{36} See id. at 8.
\textsuperscript{38} See Kessedjian, supra note 35, at 8.
\textsuperscript{39} Id.
\textsuperscript{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.\textsuperscript{41} Nevertheless, experts heavily criticized the draft convention, mostly for remaining a “close-knit double convention [rather than] a loose-jointed mixed convention”\textsuperscript{42} that seemed to result from promoting mechanisms provided by the Brussels Convention, without considering the fundamental differences that existed between the negotiating countries.\textsuperscript{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.\textsuperscript{44} Therefore, in order to reconcile conflicting approaches, the commission presented a second draft during a diplomatic conference in June 2001.\textsuperscript{45} However, instead of providing a commonly accepted solution, it merely reflected the existing dissent\textsuperscript{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.\textsuperscript{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


\textsuperscript{44} Id. at 7.


hands were tied . . . since the case law established by the U.S. Supreme Court was non-negotiable. On the other hand, "the Europeans seemed to be delighted with the Brussels Convention" which led to the tendency to make the Hague drafts as similar as possible. 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. 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." 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. 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. 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. It may be concluded that this concern, together with a detailed analysis of the problem of choice of court clauses, and a proposal of

49 Brussels Convention, supra note 37.
50 THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS 8 (Fausto Pocar & Costanza Honorati eds., 2005).
53 Id.
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, 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." 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. 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, 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.


58 Graif-Peter Calliess, supra note 46, at 1498.


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 State62 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

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 Orde 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).
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\textsuperscript{66} or the French Napoleonic model,\textsuperscript{67} provide a monistic structure of rules of damages.\textsuperscript{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.\textsuperscript{69} As a consequence, there is an assumption that damages are restricted to compensation damages only.\textsuperscript{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.\textsuperscript{71}

To clarify the nature of punitive damages, Volker Behr identified four main differences between punitive damages and compensatory damages.\textsuperscript{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.\textsuperscript{73} Punitive damages are awarded to punish the tortfeasor for outrageous conduct and to deter similar conduct in the future.\textsuperscript{74}

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

\textsuperscript{65} Bürgerliches Gesetzbuch [BGB][Civil Code], Aug.18, 1896, Das Bundesgesetzblatt [BGBl.] 1, as amended, art. 4, para. 5 (Ger.).
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{73} Id. at 110.
\textsuperscript{74} Id. at 111–12.
tim, whereas punitive damages are not determined exclusively, or even primarily, by the losses the plaintiff suffered.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{79}

Currently, some scholars claim that recent developments in some European civil law systems are blurring the border between compensatory damages and punitive damages.\textsuperscript{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.\textsuperscript{81}

\textsuperscript{75} Id. at 113.
\textsuperscript{76} Id. 111.
\textsuperscript{77} Id. 111-12.
\textsuperscript{78} Id. at 112.
\textsuperscript{79} Id. at 113.
\textsuperscript{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-


\(^{83}\) 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 rightsholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement
suasiveness, and proportionality,\textsuperscript{88} of which the latter is perceived to be the most important.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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.”)


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. 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. 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.

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. 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.


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.” 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. This is why the first recognition of a Chinese judgment was seen as a milestone. The U.S. grounds its beliefs regarding foreign judgments in

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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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isfy the freedom of speech and press protections guaranteed by both the United States and New York Constitutions.\textsuperscript{106} Legislatures from Illinois,\textsuperscript{107} Florida,\textsuperscript{108} California,\textsuperscript{109} Tennessee,\textsuperscript{110} and Maryland\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{106} NY CLS CPLR § 302(d); NY CLS CPLR § 5304(b)(8).
\textsuperscript{107} 735 ILL COMP STAT. 5/12-621(b)(7) (2008); 735 ILL COMP STAT. 5/2-209(14)(b-5) (2014).
\textsuperscript{108} FLA. STAT. §§ 55.605(2)(h); FLA. STAT. 55.6055 (2009).
\textsuperscript{109} CAL. CIV. PRO. CODE §§1716(c)(9) & 1717(c) (West 2009).
\textsuperscript{110} TENN. CODE ANN. §§ 26-6-108(3)(c) & 26-6-104(d) (West 2010).
\textsuperscript{111} MD. CODE ANN., CTS. & JUD. PROC. §§ 6-103.3(b) & 10-704(5)(c) (West 2010).
\textsuperscript{113} Id. at § 2(3).
protecting American citizens and corporations,\textsuperscript{115} it makes no refer-
ence of this kind when defining its personal scope of application. This
simply means that in any proceeding as to the recognition or enforce-
ment 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,\textsuperscript{116} as it seems that the scope of
its personal application is broader than the U.S. Constitution. Regard-
ing subject matter application, the Speech Act, even though it literally
cites British libel tourism as its trigger, applies to all kinds of defama-
tion 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 exam-
ple 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 trans-
ferred 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 Ameri-
can approach in the field of recognition and enforcement of foreign
judgments.\textsuperscript{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 punit-
tive damages. As one can observe from German,\textsuperscript{118} Italian,\textsuperscript{119} and Po-
lish\textsuperscript{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

\textsuperscript{115} There is even a definition of a United States person. See 28 U.S.C. § 4101(6).
\textsuperscript{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).
\textsuperscript{117} David P. Stewart, Recognition and Enforcement of Foreign Judgments in the
\textsuperscript{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).
I.1,132 (It.), translated in Lucia Ostoni, Italian Rejection of Punitive Damages in a
\textsuperscript{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.\textsuperscript{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.\textsuperscript{122} However, this growing internationalization triggers a need for effective public institutions and an efficient dispute resolution process.\textsuperscript{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.\textsuperscript{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 "\textit{à la carte} convention,"\textsuperscript{125} and a non-binding instrument. There are arguments supporting each of the above alternatives: if the experts indeed begin


\textsuperscript{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, 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. The third possible scenario assumes working on a non-binding instrument, such as model law, based on the successful experiences of other international organizations. However, the Permanent Bureau of the Hague Conference has already indicated that it will consider that only if the other options are exhausted.

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—would deal with recognition and enforcement of foreign judgments only, and would not embrace the problem of jurisdiction directly. 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

127 Goddard, supra note 126, at 8.
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. 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” of the prerequisites for recognition and enforcement of foreign judgments, a convention on an international level is no longer necessary. 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. 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.

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. Also, many Arabic countries

132 Id. at 98.
136 Walter & Baumgartner, supra note 133, at 252.
137 See Dan Jerker B. Svanesson, 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\textsuperscript{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.\textsuperscript{139} Furthermore, one must bear in mind that some countries still apply reciprocity in order to recognize or enforce foreign judgments.\textsuperscript{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\textsuperscript{141} resulted from seven factors.\textsuperscript{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


\textsuperscript{139} Goddard, \textit{supra} note 126, at 259.

\textsuperscript{140} See Dennis Campbell & Dharmendra Popat, \textit{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).


\textsuperscript{142} Goddard, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{146} However, it must

\textsuperscript{143} Id. at 6.
\textsuperscript{144} Id. at 7.
\textsuperscript{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. L\textsc{aw}. 59, 59, 71–72 (2008).
\textsuperscript{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 judgment147 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

147 Also referred to as “indirect grounds of jurisdiction.”
different jurisdictions, 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. 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. This is in line with the recommendations laid down by the Hague Conference on International Private Law.

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. Whichever method is chosen to effect the final result (i.e. adopting a multi-national convention which

153 Graf-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).
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.