

Alexander Trunk | Nikitas Hatzimihail (eds.)

EU Civil Procedure Law and Third Countries

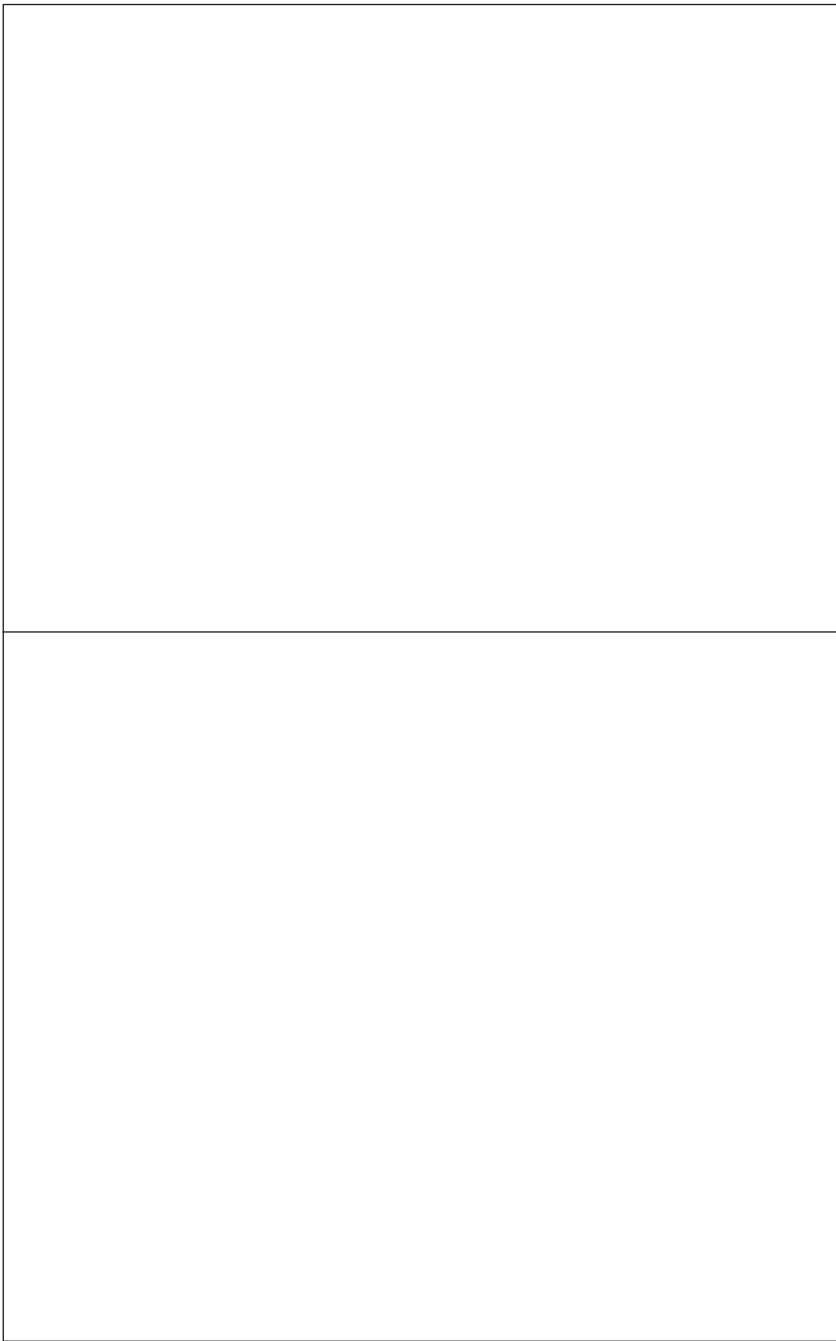
Which Way Forward?



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Assisted by Josephine Doll



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Introduction

Alexander Trunk and Nikitas Hatzimihail

In the timespan between 1968 and today, the European Union has created a complex and detailed web of legislation and international treaties dealing with cross-border judicial cooperation¹. The centerpiece (today) is the Regulation No 1215/2012 of 12 December 2012 (“Brussels Ia [or Ibis]² Regulation”) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). The Regulation is the successor of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, itself a landmark in the legislative and doctrinal history of private international law³. But also the Regulation 44/2001, which “Brussels Ia/Ibis” replaced, constituted another legislative landmark: what had begun as an intergovernmental project, using public international law tools to ensure the “simplification of formalities governing the reciprocal recognition and enforcement of judgments and courts or tribunals and of arbitral awards” became an integral part of the Community/Union edifice leading to a veritable system of EU private international law. Brussels I was supplemented by the “Rome” Regulations on applicable law (conflict of laws). Similar Regulations have been passed with regard to jurisdiction and recognition/enforcement in

1 See, e.g. https://eur-lex.europa.eu/summary/chapter/justice_freedom_security/2302.html?root=2302 and <https://www.europarl.europa.eu/factsheets/en/sheet/154/judicial-cooperation-in-civil-matters> (last access at: 01.12.2020). Matters of civil procedure are also addressed by the EU in other contexts (usually involving approximation of laws), e.g. consumer protection, and then do not necessarily require a cross-border dimension.

2 The terms Brussels Ia and Brussels Ibis are used in this book interchangeably, following the preference of the contributors.

3 Asser, ‘De l’effet ou de l’exécution des jugements rendus à l’étranger en matière civile et commerciale’ (1869) 1 *Revue de droit international et de législation comparée*, 82–99.

The term private international law is used in this book in a broad sense, as comprising both conflict of laws and cross-border civil procedure.

other civil proceedings, mainly in family law and succession⁴. In addition, the EU has passed Regulations on other aspects of cross-border civil proceedings, e.g. on cross-border service of documents and cross-border taking of evidence, which expanded significantly the means of judicial cooperation compared to the Hague Conventions in these subjects. More recently, the EU has even started to establish specific proceedings with a cross-border orientation, such as small claims proceedings, proceedings leading to a European Enforcement Order for uncontested claims and proceedings leading to a European Payment Order⁵.

The focus of the EU's legislative activity in this field is mainly on inner-EU cooperation, e.g. recognition and enforcement between EU Member States, even though relations with non-EU countries ("third countries" or "third States") are sometimes touched in specific provisions of the above-mentioned Regulations⁶. The Brussels I regime constructed "external frontiers", primarily on the basis of the defendant's domicile in a Member State (general jurisdiction, *forum actoris*) complemented by certain specific jurisdictional grounds whose reach over third-country domiciliaries was justified on the basis of public policy⁷, or party autonomy.⁸ But, outside that framework, the national laws on jurisdiction of the Member States continued to govern cases involving third-country domiciliaries, leading to a binary jurisdictional system with increased protection for EU residents under EU law and increased subjection of non-residents under national law and leading to orders and judgments whose EU-wide enforcement was facilitated by EU law.

This state of affairs may have contributed to the astonishing doctrinal development of European international civil and commercial litigation

4 Some of them combine provisions on cross-border civil procedure with conflict of laws and even substantive law, e.g. the 2012 Rome IV Regulation on Matters of Succession or the 2015 (recast) European Insolvency Regulation.

5 The 2014 EU Account Preservation Order Regulation, the 2000/2015 EU Insolvency Regulation and partly also the 2006 EU Payment Order Regulation extend into the field of civil execution and insolvency.

6 The same is true for some other EU Regulations or Directives, which (also) address matters of civil procedure, e.g. the 2016 General Data Protection Regulation (cf. Art. 79 para. 2 sentence 2 – the defendant may be established outside the EU).

7 Such as the exclusive jurisdiction grounds of Article 16 of the Convention, 22 of the Brussels I Regulation and now 24 of the Brussels Ia, to which must now be added the provisions of Art. 18 para. 1 and 21 para. 1 concerning consumer and employment contracts respectively.

8 See Art. 17 of the Brussels Convention, 23 of the Brussels I Regulation and especially Article 25 of Brussels Ia.

over the past half-century. But it has also created problems globally and complaints outside Europe, which have only partially been remedied by EU and international legislative activity. The 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters have extended the Brussels I regime – and a unitary judicial area – to some of the major Western European trading partners of the EU Member States. Conventions developed under the auspices of the Hague Conference on Private International Law have also an important role to play in this regard. New doctrines have been promoted, by courts and scholars, in order to bridge the gap, with modest success.

As personal and business relations between the EU (more precisely: persons established in the EU or having EU citizenship) and third countries have considerable practical importance, there is a long-going discussion whether the EU should address relations with non-EU countries also in the field of judicial cooperation in a more complete, coherent and equitable manner⁹. The issue was raised, in particular, in the context of the 2012 revision of the Brussels I Regulation of 22.12.2000, but did not come to a result. However, Art. 79 of the Brussels Ia Regulation obliges the European Commission to specifically address relations with non-EU countries in its next evaluation report due on 11 January 2022.

The present collection of essays intends to make a contribution to this discussion. The origins of the book lay in a Conference organized by the Institute of East European Law of Kiel University (Germany) on 2/3 February 2017, where an early version of most chapters was first presented for discussion.¹⁰ Since the time of the Kiel Conference, two major developments have taken place. The first one has been the finalization and signature of the Hague Judgments Convention on 2 July 2019, which constitutes an important step in the decades-old process of producing a global convention on civil litigation.¹¹ The second one has been the withdrawal of the United Kingdom from the EU (“Brexit”) on 1 February 2020, which

9 See e.g. the deliberations and documents of the European Group for Private International Law, https://www.gedip-egpil.eu/gedip_documents.html (since 2007) (last access at: 01.12.2020).

10 The program of the Conference is still available at https://www.eastlaw.uni-kiel.de/en/events/program_draft_eng_with_speakers_v5a_long (last access at: 01.12.2020). The contributions of *Richard Fentiman* and of *Iryna Izarova* have been added due to the topicality of the Brexit issue and in order to add the perspective of an EU-associated country.

11 See <https://www.hcch.net/en/news-archive/details/?varevent=687> (last access at: 01.12.2020).

however, includes a transitional period ending (as of today) on 31 December 2020¹². During this transitional period the UK is still treated like an EU Member country, but will be a “third country” after the end of this transition. As judicial cooperation in civil matters has not been addressed specifically in the 2019 Withdrawal Treaty, the legal treatment of judicial cooperation in civil matters between the EU and the UK after the end of the transition period remains at least as much a matter of concern today as it was at the time of the Kiel Conference in 2017: if anything, the prospect of the UK being treated as a third country and foregoing, at least in the short to medium term, a privileged relationship with the EU, has increased. A very recent additional development is the publication of the final draft (26 May 2020) of the ELI/Unidroit Model European Rules of Civil Procedure which are planned to be adopted by the two organizations in September 2020. Although the general ideas underlying this project were known to the authors of this book and were taken account of in this book, only now is the full text of the planned Rules available and has, to the authors’ best possibilities, been included into their analyses in this book.

The purpose of this book is to rethink and structure arguments relating to possible legislative reforms, conclusion of treaties or other steps which could – or should from the authors’ perspective – be done in order to improve judicial cooperation between the EU and non-EU countries in comparison with the status quo. For the development of legislative proposal, the status quo will have to be analysed in brief, but merely with a view to developing arguments for legislative changes. Also, more weight has been given to the development of fresh ideas than to completeness of references about the status quo.

A particularity of this book is that it understands judicial cooperation in civil and commercial matters broadly, in the sense that the study is not limited to the Brussels Ia Regulation, but includes other EU Regulations on cross-border civil and commercial proceedings as well. However, family and succession matters as well as civil execution and insolvency had to be excluded from this study because of their specifics, even if some structural ideas developed in this book might also be of use for third-country relations as to those proceedings.

A further particularity of this book is that it tries to establish a dialogue with authors from (or dealing with) third countries. It seems evident that a feasible concept for legislative changes with regard to judicial cooperation

12 See <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html> (last access at: 01.12.2020).

with third countries cannot be developed by the EU alone (nor only within the Hague Conference on Private International Law), but needs an exchange of views, experiences and ideas with such countries. Moreover, traditionally the most vivid discussions had been the ones between U.S. and Western European academics. In contrast, the Kiel Conference achieved not only a balanced representation of EU and non-EU participants, but also a diversity of perspectives, in terms of both legal traditions and geographical regions. As is usual in the academic milieu, not all of this diversity and vibrant discussion is represented in this collection of essays,¹³ but the spirit of the Conference and ensuing discussions have helped the authors to base their views on a broader comparative ground. Should the EU decide to review its legislation on cross-border judicial cooperation with non-EU countries in a more general manner, it would certainly be helpful to create a discussion structure with several third countries on these topics.

The book has been organized in a logical sequence that takes account of the major subject areas of cross-border civil procedure. It begins with two essays asking us to think about the forms that institutional/legislative organization of international judicial cooperation may take. Jürgen Basedow brings together EU governance and civil procedure in addressing the case of the European Neighbourhood Policy and the private international law aspects of the EU agreements with Ukraine, Moldova and Georgia. Elina Moustaira uses Greece as a case study in addressing the often-neglected topic of bilateral treaties on judicial assistance between Member States and third countries.

The second part of the book is devoted to the fundamental question of (direct) international jurisdiction. Alexander Trunk addresses the general jurisdictional framework at the EU level. Jurisdiction under the EU Regulations works in tandem with residual jurisdiction of the Member States, and Michael Stürner and Friederike Pförtner address one of the most salient aspects of residual jurisdiction. Having established the general picture of jurisdiction, Alberto Miglio contributes a study on a case with its own particularities and present-day interest, namely, how will the operation of the Unified Patent Court impact the Brussels I jurisdictional regime, which

13 Among the speakers of the Conference who were unable to contribute a written chapter for this volume, but whose insights have helped the contributions to this book, Dr. Johannes Koepp (London, UK), Doc. Dr. Svetlana Kroupko (Moscow, Russia), Prof. Dr. Marta Pertegás (then with the Hague Conference), Dr. George Svanadze (Tbilisi State University, Georgia), Prof. Kono Toshiyuki (Fukuoka, Japan) and Prof. Dr. Dr. h.c. Fryderyk Zoll (Cracow, Poland/Osnabrück, Germany), must be especially acknowledged.

had upheld a very strict territoriality of patent disputes. Parallel proceedings are the elephant in the room, when it comes to EU-third country litigation, and an effort made for reform under Brussels Ibis does not settle the matter. The contribution by Luboš *Tichý*, provides a systematic approach of international *lis pendens* doctrine is therefore especially important.

The next part of the book focuses on the second “big” topic of international civil procedure – mutual recognition and enforcement of judicia decisions. Dieter *Martiny* provides a systematic overview, identifying and evaluating all possible avenues – from multilateral instruments to reforming the law on third-country judgments. Dimitrios *Tsikrikas* is more concerned with the effects of Member States’ judgments in third countries, as well as with the effects of provisional measures. The two chapters showcase the areas of consensus as well as the differing preferences in normative approaches, which characterize EU legal doctrine today.

These general contributions are followed by several area studies in the fourth part. Richard *Fentiman* addresses the complex question of the future judicial cooperation between EU and post-Brexit UK. Vladimir *Yarkov* provides a Russian perspective, and Iryna *Izarova* adds the perspective of an EU-associated country in Eastern Europe, Ukraine. Michael *Stöber* takes us to an often neglected South American continent, with a study of Colombia.

The fifth and final part of the book includes concrete subjects often neglected as compared to jurisdiction and recognition/enforcement. Henriette-Christine *Boscheinen-Duursma* examines international service of documents and taking evidence: these are the two vital areas of judicial assistance, where EU Regulations coexist with very successful Hague Conventions. The next two essays concern the third-country impact of the EU Regulations instituting new civil processes. Alexander *Trunk* gives a general evaluation of such Regulations with regard to third States, and Azar *Aliyev* focuses on the third-State potential of the EU Order for Payment Regulation. Finally, Nazar *Panych* gives an assessment of the new European Rules of Civil Procedure from the perspective of EU neighborhood countries, thus including the instrument of soft law into the book.

The conclusion by Alexander *Trunk* and Nikitas *Hatzimihail* aims at summarizing and reflecting upon these contributions, and developing some tentative ideas for future action.

In closing, the editors would like to thank the association Ostrecht Kiel e.V. for its generous support and the staff of the Institute of East European Law, Kiel University, for editorial support. Particular mention should be made of Mr. Vladimir Dzoubinski, part-time intern at the Institute, for his

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Alexander Trunk and Nikitas Hatzimihail (eds.)

Kiel and Nicosia, 1 December 2020

EU Law of Civil Procedure and Third Countries: The Case of the European Neighbourhood Policy

Jürgen Basedow, Hamburg

Abstract

The countries outside the European Union, targeted by this collection of papers, are each of a very different nature. Some have the ambition or even the legitimate expectation to join the EU in the future; others will stay outside and may not be eligible for membership. This article focuses on three countries somewhere in between: under the European Neighbourhood Policy (ENP) Georgia, Moldova and Ukraine have concluded 'Deep and Comprehensive Free Trade Agreements' with the EU that promise the implementation of some of the basic freedoms and require them to approximate their legal systems to that of the EU. Recalling Art. 220 of the 1957 EEC Treaty and its call for the mutual recognition of judgments between the Member States of the EU, the author points out the lack of corresponding provisions in the three association agreements and criticizes this inconsistency. Several ways of filling the gap are examined at the end of the article.

Keywords

EU law – civil procedure – European Neighbourhood Policy (ENP) – Georgia – Moldova – Ukraine – deep and comprehensive free trade agreements – recognition and enforcement of judgments – Lugano Convention.

The EU Law of Civil Procedure is a common designation for all EU enactments, mostly regulations that deal with international civil litigation, i.e. with issues of jurisdiction, *lis pendens*, the recognition and enforcement of foreign judgments and with forms of cooperation of the courts of different countries in civil and commercial matters. It is essentially confined to cross-border relations *within* the European Union. Its extension to third-State relations, suggested *inter alia* by the European Group on Private In-

ternational Law,¹ has so far been rejected. It is only in the context of some international conventions such as the Lugano Convention² and the Hague Choice of Court Convention³ that the Union has adopted provisions pertaining to international civil litigation with regard to third States; but unlike many States which have implemented national legislation, the EU has not enacted any autonomous rules in this respect. The present contribution provides an opportunity to reconsider this limitation.

In the context of this inquiry, it is useful to consider the policy environment. The EU law on international civil procedure did not emerge from nothing but played a certain role in the overall composition of EU policies. After a survey of this policy context (*infra* A), we shall take a look at the policies pursued by the EU *vis-à-vis* third States. Since there is no uniform foreign policy of this kind, we will examine a selection of specific third States. Our considerations will focus on the ENP, which the EU started to conceive shortly after the turn of the millennium and has pursued in recent years. In particular, we shall inquire into the ENP *vis-à-vis* the eastern neighbors of the Union (*infra* B). This will allow for some consequences for private international law, in general, and international civil litigation, in particular, (*infra* C) to be highlighted and for some conclusions for the future development of EU policy, related to international civil litigation *vis-à-vis* the countries in question, to be drawn (*infra* D).

A. EU civil procedure law in the context of EU policies

The core of EU Law on international civil litigation is the Brussels I-Regulation.⁴ Its historical root and predecessor was the Brussels Convention on

1 See in GEDIP Proposal, Text in Fallon, Kinsch and Kohler (eds), '*Building European Private International Law - Twenty Years' Work by GEDIP*' (2011) 792 et seq., with a proposal in both English and French of draft articles intended to amend the Brussels-I Regulation.

2 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 30.10.2007, Official Journal of the European Union (OJ) 2009 L 147/5; the other Contracting Parties are Iceland, Norway and Switzerland.

3 Convention on choice of court agreements, done at The Hague on 30.06.2005, OJ 2009 L 133/1, 3; see the Council Decision (2014/887/EU) of 04.12.2014 on the approval, on behalf of the European Union, of the Hague Convention of 30.06.2005 on Choice of Court Agreements, OJ 2014 L 353/5; so far the Convention has taken effect for the EU, Mexico, Montenegro and Singapore.

4 Regulation (EU), No. 1215/2012, OJ 2012 L 351/1.

Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.⁵ That convention had been negotiated between the six initial Member States of the European Economic Community (EEC); they had acted in compliance with the instruction laid down in Art. 220 of the Rome Treaty of 1957 establishing the EEC. The Article provided:

“Member States shall, so far as is necessary, enter into negotiations with a view to securing for the benefit of their nationals: ... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”⁶

The Brussels Convention was not Community law strictly speaking, but was agreed upon by the Member States in the framework of the Community institutions and for the implementation of its purposes. As laid down in Art. 2 of the original version of the EEC Treaty, the EEC had the prime objective of establishing a Common Market which was later renamed Internal Market; all further objectives listed in Art. 3 and other provisions of the Treaty were subordinate to this ultimate goal. Thus, the negotiations that led to the Brussels Convention and this instrument itself were considered to promote the establishment of the Common Market as well.

This was a realistic assumption. The international trade relations envisaged by the founders of the Community/Union were not to be implemented by governments exclusively; there were no foreign trade monopolies in the Western European countries as there were in the socialist regimes of Eastern Europe. Consequently, legal disputes arising from cross-border trade between contracting parties were unlikely to be resolved by mechanisms such as set-off and clearance, or diplomatic protection and negotiations, at the governmental level. According to the model underlying the EEC Treaty, it was rather a matter for private undertakings to carry out their commercial activities in the future Common Market and thereby to breathe life into this central institution of the EEC. For private actors,

5 Übereinkommen über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, geschlossen in Brüssel am 27.09.1968, OJ 1972 L 299/32; the Brussels Convention was concluded in Dutch, French, German and Italian; an English translation is reproduced in 1262 UNTS 222.

6 The Treaty establishing the European Economic Community, done at Rome on 25.03.1957 was concluded in Dutch, French, German and Italian; for an English translation see 298 UNTS 11.

however, the likelihood of their rights being enforced in other countries was of crucial importance for their decision to engage in cross-border trade. In the words of the Court of Justice, Art. 220 EEC was meant “to facilitate the working of the common market...”⁷ Thus, the mutual recognition of judgments and all consequential steps taken to promote cross-border judicial cooperation in the Union were primarily linked to the operation of the Internal Market.

It is not necessary, in this context, to detail the further steps that led to the present version of the founding Treaties: The Treaty of Maastricht addressed for the first time joint activities of the Member States connected to, but outside, the framework of the EEC in respect of “judicial cooperation in civil matters”;⁸ the Treaty of Amsterdam transferred this policy area from the cooperation of the Member States within the European Union to the legislative competence of the Community⁹ which was later characterized by the Court of Justice to be of an exclusive nature,¹⁰ and finally the Treaty of Lisbon introduced the current wording of Art. 67 para. 4 and Art. 81 of the Treaty on the Functioning of the European Union (TFEU).¹¹

The close link between the objective of judicial cooperation in civil matters and the functioning of the Internal Market has been maintained to date, as can be inferred from Art. 81 para. 2 TFEU. According to this provision, the Union “shall adopt measures, particularly when necessary for the proper functioning of the Internal Market”, aimed at ensuring judicial cooperation in civil matters in its various aspects. As compared with the early years, the Union nowadays pursues a wide array of different policies; nevertheless, judicial cooperation in civil matters is still seen as particularly relevant for the operation of the Internal Market. The special weight given to this linkage should be kept in mind when considering the Union’s ex-

7 Case C-398/92, 10.02.1994, *Mund & Fester v. Hatrex International Transport*, ECR 1994 I-00467, para. 11.

8 Treaty on European Union, Art. K, para. 1, subpara. 6 and Art. K, para. 3, subpara 7, OJ 1992 C 191/1, 61.

9 Treaty establishing the European Community, Art. 73, para. I, subpara. d and Art. 73 m, as amended by the Treaty of Amsterdam, Art. 2, OJ 1997 C 340/1, 28 and 30.

10 Case A-1/03, 07.02.2006, *Nouvelle convention de Lugano*, ECLI: EU:C:2006:81; Case A-1/13, 14.10.2014, *Hague Convention on the civil aspects of international child abduction*, ECLI: EU:C:2014:2303.

11 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (Treaty of Lisbon), Art. 67, para. 4 and Art. 81 TFEU, see OJ 2007 C 306/136 and OJ 2016 C 202/47.

ternal relations policy, in particular the one *vis-à-vis* its European neighbors.

B. The European Neighbourhood Policy

The 2004 enlargement round added two Mediterranean countries and eight Eastern European States as new Member States to the European Union; in 2007 two more States – Bulgaria and Romania – joined the Union, and Croatia followed in 2013. This unprecedented growth gave support to the aspirations of further States to become candidates; but it also highlighted the need to define what should be the final borders of the Union in the future. In the resulting process, the States of the Western Balkans and Turkey were promised membership provided they met certain conditions. Such a perspective was excluded for other countries, in particular, those south of the Mediterranean and in Eastern Europe.¹² But developments in the countries belonging to the latter group would also affect the interests of the Union. For example, the poverty of third State neighbors risked threatening the security of the Union's external borders, and cross-border pollution endangered its environment. Therefore, the *Prodi* Commission conceived of an ENP, which was meant "to offer more than partnership and less than membership, without precluding the latter"; the perspective for the neighbors which were said to be a "ring of friends" was described as "sharing everything but institutions".¹³

The ENP was built upon several soft law programs and previous agreements of the Union with the States concerned.¹⁴ In the late 1990s, the EU had concluded so-called Partnership and Cooperation Agreements (PCA) with some of the successor States of the Union of Soviet Socialist Re-

12 Smith, K., 'The Outsiders: The European Neighbourhood Policy' (2005), 81 *International Affairs*, 757–773.

13 Prodi, A Wider Europe: A proximity policy as the key to stability, Speech 02/619, Brussels 5-6.12.2002, reproduced on the website of the European Commission, Press releases database.

14 For a comprehensive survey see Vooren, *EU External Relations Law and the European Neighbourhood Policy* (2012), 179 ff.

15 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part, done at Luxembourg on 22.04.1996, OJ 1999 L 239/3.

16 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, done at Luxembourg on 22.04.1996, OJ 1999 L 246/3.

publics (USSR), i.e. with Armenia,¹⁵ Azerbaijan,¹⁶ Georgia,¹⁷ Moldova,¹⁸ and Ukraine,¹⁹; it had also agreed on a roadmap for further negotiations with Russia.²⁰ These Partnership and Cooperation Agreements enunciated numerous objectives and general cooperation intentions, but very few hard rules. At that time, trade issues were left to universal negotiations in the framework of the World Trade Organization (WTO). When the Doha Round of the WTO came to a halt after 2003, the EU turned to a bilateralization of trade relations. The focus of the ENP shifted towards trade issues and the Union started to negotiate new treaties with the Eastern partners. This aroused the opposition of Russia with well-known results: Only Georgia, Moldova and Ukraine accepted the offer of the EU and negotiated so-called Deep and Comprehensive Free Trade Agreements (DCFTAs), but they had to pay a high political price in terms of civil commotions and territorial disintegration.

The three association agreements establishing DCFTAs with Georgia²¹, Moldova²², and Ukraine²³ were concluded under the exception from universal trade principles, permitted in Art. XXIV GATT for customs unions

17 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part, done at Luxembourg on 22.04.1996, OJ 1999 L 205/3.

18 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other part, done at Brussels on 28.11.1994, OJ 1998 L 181/3.

19 Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and Ukraine, of the other part, done at Luxembourg on 14.06.1994, OJ 1998 L 49/3.

20 See Wesselink and Boschma, 'European Neighbourhood Policy: History, Structure, and Implemented Policy Measures' (2017) *Tijdschrift voor economische en sociale geografie* 108, 6 (4–20).

21 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, done at Brussels on 27.06.2014, OJ 2014 L 261/4.

22 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and of the Republic of Moldova, of the other part, done at Luxembourg on 16.06.2014, OJ 2014 L 260/4.

23 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21.03.2014, OJ 2014 L 161/3. After an initial rejection of this Agreement by a referendum in the Netherlands the European Council adopted the declaration cited below in fn. 26 which led to the eventual approval of the Agreement by the Dutch parliament, see "Abkommen der Ukraine mit der EU ratifiziert", *Frankfurter Allgemeine Zeitung* 25.02.2017, p. 4.

and free trade areas.²⁴ The Agreements take note of the three countries' aspiration towards membership in the European Union,²⁵ but do not give evidence of a corresponding intention of the Union. With regard to Ukraine, the Heads of State and Government of the Member States, meeting within the European Council even agreed on a declaration to the effect that the Association Agreement "does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future".²⁶

The three Association Agreements come close to integrating the partner States into the Internal Market.²⁷ In particular, they aim for the implementation of the free movement of payments and of capital, of the free trade in goods and of the freedom of establishment. However, the freedom to provide services is only liberalized in accordance with specific commitments and the free movement of workers is not even enunciated as an objective of these free trade areas.

The designation of the envisaged free trade areas as "deep and comprehensive" can be explained by the commitments of the partner countries to adapt their legislation to hundreds of EU enactments listed in the Association Agreements and their Annexes. The regulatory framework of trade will thus be assimilated to the one prevailing in the Internal Market to a very large extent. The significance of non-tariff trade barriers, which have

24 For the General Agreement on Tariffs and Trade (GATT), signed at Geneva on 30.10.1947, see 55 UNTS 187; see also the Special Protocol relating to Art. XXIV of the General Agreement on Tariffs and Trade, signed at Havana on 24.03.1948, 62 UNTS 56; cf. Lowenfeld, *International Economic Law* (2nd edn, 2008), 42; Nowrot, in Tietje (ed), *Internationales Wirtschaftsrecht* (2009), § 2 para. 133 ff., 152 ff.

25 For Ukraine see § 6 of the Preamble of the Association Agreement which simply points out that the EU "acknowledges the European aspirations of Ukraine"; this is considered as a novel concept designated as "integration without membership" by van der Loo, the EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area, Leiden and Boston, Brill Nijhoff 2016, 175 ff.

26 See the Annex to the Conclusions of the European Council Meeting of 15.12.2016, EUCO 34/16, para. A, reproduced on the website of the Council, <https://www.consilium.europa.eu/en/european-council/conclusions/> (last access at: 29.10.2020).

27 See Koeth, *The 'Deep and Comprehensive Free Trade Agreements': An appropriate response by the EU to the challenges in its neighbourhood?* (2014) Eipascope. 25, see the website of the European Institute for Public Administration at Maastricht: https://www.eipa.eu/wp-content/uploads/2017/11/EIPASCOPE_2014_WKO.pdf (last access at: 29.10.2020).

become more and more important over the years is thereby drastically reduced.

It may suffice to exemplify the extent of the envisaged assimilation with regard to financial services: Annex XVII of the EU-Ukraine Association Agreement lists almost 60 binding EU instruments, which Ukraine promises to take over, some of them comprising several hundred articles. The partner States have accepted similar obligations for almost all areas of EU law. The sheer length of the DCFTAs conveys an impression of their comprehensive nature: Each of the Agreements with Georgia and Moldova fills about 740 pages in the Official Journal, the one with Ukraine even more than 2100 pages. The only area of EU law and policy that appears to be almost a blind spot in these Agreements is the conflict of laws.

C. Mutual recognition of judgments in the association agreements

The antecedent of Art. 220 EEC mentioned above²⁸ suggests that treaties such as the Association Agreements in question, establishing not only a free trade area or a customs union but providing for a far-reaching adjustment of the legal framework of markets, should also address the question of how to increase the confidence of market actors in the enforceability of their rights and judgments obtained in the whole market area. This is all the more so as the Agreements with the post-Soviet Republics are intended to divert their trade from Russia to the European Union.²⁹ This goal is unlikely to be achieved if market actors with bilateral relationships with EU countries are afforded less legal security than that which is ensured by the multilateral Minsk and Kiev Agreements within the Community of Independent States.³⁰

28 See above, fn. 6.

29 This intention emerges for example from Art. 39 para. 1 of the EU-Ukraine Association Agreement which lays down the prohibition against maintaining or establishing customs unions or free trade areas with other States which are in conflict with the trade arrangements of the EU-Ukraine Agreement. Similar provisions are contained in Art. 36 of the EU-Georgia Agreement and in Art. 157 of the EU-Moldova Agreement.

30 The Treaty concerning the modalities of the settlements of disputes related to the exercise of commercial activity, done at Kiev on 20.03.1992, and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, done at Minsk on 22.01.1993 are in force for Georgia, Moldova and Ukraine; English translations, as well as an introductory note prepared by *Gerasimchuk* and entitled "The relationship between the judgments project and certain regional in-

The need for rules on judicial cooperation in civil and commercial matters is further illustrated by population statistics, as can be inferred from the example of Ukraine. Ukrainian citizens are by far the most important group of third State nationals who have been granted a first residence permit in the European Union: about 500,000 people in the year 2015.³¹ According to German statistics, 134,000 Ukrainian citizens lived in Germany in December 2015.³² While the Association Agreements do not grant the free movement of workers to these people as a matter of EU law, some Member States are apparently more generous. In any case, the large scale immigration gives rise to a growing number of legal disputes, for example in family matters relating to maintenance or parental responsibility, which require a functioning system of cross-border judicial cooperation.

The present law governing the multiple facets of judicial cooperation cannot be analysed in this contribution. Some remarks on the mutual recognition and enforcement of judgments must suffice. At the level of the Union, there are no general rules governing the recognition and enforcement of judgments originating in Georgia, Moldova or Ukraine. The matter is entirely left to the law of the individual Member States. Some Member States have concluded bilateral recognition and enforcement treaties with Georgia, Moldova or Ukraine. In particular, 10 Member States have concluded such bilateral treaties with Ukraine.³³ Outside the scope of such conventions, the national law of Member States applies to the recognition of foreign judgments. It displays a wide variety of solutions. On the liberal side, more recent statutes such as the Italian one, limit scrutiny of a foreign judgment to an assessment of its compatibility with some procedural guar-

struments in the arena of the Commonwealth of Independent States” Doc. no. 27 of April 2005, reproduced on the website of the Hague Conference on Private International Law: <https://www.hcch.net/en/publications-and-studies/details4/?pid=3513&ctid=35> (last access at: 29.10.2020); see also Kurzynsky-Singer, ‘Commonwealth of Independent States (CIS)’ in: Basedow, Hopt and Zimmermann (eds) (2012), Vol. I *The Max Planck Encyclopedia of European Private Law*, 267–277 (271).

31 See <https://ec.europa.eu/eurostat/documents/2995521/7715617/3-27102016-BP-EN.pdf> (last access at: 29.10.2020).

32 Statistisches Bundesamt, Bevölkerung und Erwerbstätigkeit – Ausländische Bevölkerung. Ergebnisse des Ausländerzentralregisters 2015 (Fachserie 1, Reihe 2), Wiesbaden, Statistisches Bundesamt 2016, p. 37.

33 Cyprus, Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland and Rumania; the author is indebted for this information to Dr. Volodymyr Korol, senior research fellow, Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Law Sciences of Ukraine, Kyiv. It should be noted that the Treaty with Italy is not mentioned on the website of the Italian government.

antees and national public policy.³⁴ A more restrictive solution, laid down, for example, in German law posits the additional requirement of reciprocity.³⁵ The other extreme that can be found *inter alia* in Swedish law is the complete rejection of enforcement in the absence of an international commitment³⁶.

The latter solution, i.e. the rejection of foreign judgments in the absence of a treaty, was also espoused by the law of the USSR.³⁷ The three successor States in question have replaced it and require reciprocity alongside some other conditions; however, the handling of this requirement appears to be rather uncertain. While Ukrainian law is said to provide for a rebuttable presumption in favor of the existence of reciprocity³⁸, no such clarification seems to be generally accepted in Georgia³⁹ and Moldova.⁴⁰

All in all, the mutual recognition and enforcement of judgments in civil and commercial matters is far from being ensured or, at least, predictable in the relations between the EU and its Member States on the one side and the three Eastern partners on the other. Moreover, EU creditors can avail

34 See Art. 64 of the Italian law of 31.05.1995 no. 218 on the Reform of the Italian system of private international law.

35 See for Germany § 328 para. 1 Nr. 5 ZPO.

36 See Bogdan, *Private International Law in Sweden* (2015), p. 117.

37 See with many references Gerasimchuk, 'Die Urteilsanerkennung im deutsch-russischen Rechtsverkehr' (2007), 16–22.

38 See Navrotskyi and Sykaluk, 'Anerkennung und Vollstreckung von deutschen Urteilen in der Ukraine', in AHK – Delegation der deutschen Wirtschaft in der Ukraine (ed), *Rechtliche Rahmenbedingungen und Investitionsschutz in der Ukraine* (2015), 14–16; Korol, above at fn. 33 has kindly confirmed this information.

39 See Art. 68 para. 2 (e) of the Georgian Law on Private International Law no. 1362 – II of 29.04.1998; an English translation of the provision can be found in Svanadze, Jurisdiction clauses and the recognition and enforcement of foreign judgments in Georgia (2016), in *Beiträge und Informationen zum Recht im postsowjetischen Raum*, see https://www.mpipriv.de/files/pdf3/2009_12_09_023.pdf (last access at: 29.10.2020), see also Svanadze, *Recognition of Foreign Judgments in Georgia: Is the recognition of foreign judgments predictable?* (2009), p. 14–16 on the interpretation of the reciprocity requirement in Georgia: https://www.mpipriv.de/files/pdf3/2009_12_09_023.pdf (last access at: 29.10.2020).

40 See Art. 467 para. 1 of the Code of Civil Procedure of Moldova of 30.05.2003; a German author interprets this provision as requiring not more than a recognition, in the foreign country, of the effects of Moldovan judgments that appears appropriate in the circumstances of the case, see Aden in: Reinhold Geimer/Rolf A. Schütze, eds., Bülow/Böckstiegel, *Der internationale Rechtsverkehr in Zivil- und Handelssachen*, C.H.Beck, München 1973 ff., Loose leaf, Vol. VI, no. 1091, p. 6; the conclusion that Moldova basically enforces foreign judgments is, however, difficult to understand.

themselves, in legal disputes with debtors domiciled in the East, of ‘exorbitant’ heads of jurisdiction as laid down in the national law of the respective Member State.⁴¹ The resulting judgment is enforceable in all Member States. On the other hand, the effect that a judgment originating in one of the Eastern partner countries may have in the Member States of the EU depends on where the judgment debtor disposes of assets and where the creditor therefore applies for enforcement. An enforcement decision obtained in one Member State does not entitle the creditor to enforce the third State judgment in other Member States: “*exequatur sur exequatur ne vaut*”.

EU debtors are thereby encouraged to relocate their assets to Member States such as the Sweden⁴² which exclude the enforcement of judgments from the Eastern partner States; a situation that does not stimulate trade with EU partners. Commercial arbitration is a possible escape, since all countries involved are Contracting Parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;⁴³ but this instrument is of little avail for non-contractual claims and small or medium-sized claims.

The Association Agreements address this problem in a single provision. The relevant provision in the Association Agreement of Georgia, is drafted as follows:

“The parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the Conventions of the Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children.”⁴⁴

As compared with Art. 220 EEC, this provision establishes no duty of subsequent negotiations on the mutual recognition of judgments. It is also noteworthy that the EU did not require the acceptance of private international law instruments such as the Rome I and II Regulations⁴⁵ which would have ensured the application of the same national law in cross-border cases in the courts of both EU Member States and the partner coun-

41 See Regulation (EC), No 44/2001, Art. 6, Regulation (EU), No. 1215/2012.

42 See above at fn. 36.

43 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10.06.1958, 330 UNTS 3.

44 EU-Georgia Agreement, Art. 21, para. 1; almost identical EU-Moldova Agreement, Art. 20, para. 1; similar EU-Ukraine Agreement, Art. 24, para. 2.

45 Regulation (EC), No 593/2008; Regulation (EC) No 864/2007.

tries. One might further question why the protection of children is given particular attention, but not e.g. the enforcement of maintenance claims. Finally, it is remarkable that the Parties did not contemplate the need for rules specifically designed for legal cooperation between the EU and the respective partner State.

Instead, the appropriate tools for the development of judicial cooperation are considered to be multilateral conventions, in particular those of the Hague Conference. But those conventions, tailored for universal needs, do not have a regional purview and are not designed to support the development of economic exchange in a Deep and Comprehensive Free Trade Area. What is more, the recently adopted Hague Convention intended to secure the mutual recognition and enforcement of judgments has a doubtful future. It is a *convention simple* dealing purely with recognition and enforcement and clearly falls short of the double convention model reflected in the Brussels and Lugano conventions.⁴⁶

All in all, the significance of international civil litigation for the development of a cross-border market appears to be much greater than that which emerges from the three Association Agreements. While the negotiators dedicated much time to quotas for the trade in honey, eggs and other agricultural products,⁴⁷ they did not care for the legal framework that encourages private market actors to actually engage in cross-border trade.

D. Conclusion: What are the next steps?

Private International Law, in general, and the law of international civil procedure, in particular, is often considered as a legal discipline that exclusively affects private interests: the interests of sellers and buyers, of carriers and shippers, and of plaintiffs and defendants. It therefore appears appropriate to note that, quite to the contrary, there is a wider background in international law that determines the attitude of States towards foreign judicial proceedings and judgments. In the aftermath of World War II, the countries of the West abandoned their previous nationalistic view of the world, opening their markets, their political regimes and also their judicial

46 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=13>; so far, the Convention has been signed but not ratified by Uruguay and Ukraine (last access at: 29.10.2020).

47 'Ukrainian farmers, poised for growth, stumble after E.U. deal', New York Times, 23.12.2016.

systems to influences from abroad. Art. 220 EEC gives clear evidence of the interdependence between judicial integration on the one side and the economic and political integration on the other. To the extent that specialists determine the course of discussions in the various fields of law, this interdependence falls into oblivion.

The socialist systems of Eastern Europe were kept imprisoned in nationalistic confinement for a much longer period than the West. They started to open their markets, their politics and their cultures only after the collapse of the USSR in 1991. For the three countries treated in this paper, the Association Agreements of 2014 have created Deep and Comprehensive Free Trade Areas with the European Union which give evidence of the Contracting Parties' intention to open their respective markets and to adjust their legal framework to European standards. In many respects, these Free Trade Areas come close to the Internal Market.

With regard to judicial cooperation, the three Eastern countries appear to have made a remarkable step from the previous blanket rejection of foreign judgments to their acceptance on the basis of reciprocity. So far, the European Union has done nothing to support this tendency towards the increasing openness of national judiciaries. While the Association Agreements provide for the integration of thousands of EU provisions into the legal systems of the partner States, they are outright taciturn on the issue of judicial cooperation in civil matters. Considering the close relations between neighbors, it is surprising that the Association Agreements have done so little for the resolution of disputes which are well-known to be more frequent between neighbors than in other relations.

The solution outlined in the three Agreements, i.e. constructive cooperation in the framework of the Hague Conference on Private International Law refers to global standards in circumstances where regional standards are needed. In former years and *vis-à-vis* some Western European neighbors, the Union created a system of mutual recognition based upon unified rules on jurisdiction, i.e. the Lugano Convention. It is not unlikely that the Contracting Parties to the Lugano Convention will approve the accession of the United Kingdom after its exit from the Union; in the alternative, a similar instrument might be negotiated. Thus, a model for a future instrument on jurisdiction and the recognition and enforcement of judgments with the Eastern partner States is already in existence.

If the Contracting Parties of the Lugano Convention do not approve the accession of the Eastern countries, a separate convention could be concluded following the model of Lugano. The need for such an instrument cannot be disputed. Critics may refer to the risks inherent in corruption which is still widespread in Eastern Europe. But it should not be forgotten

that the three Association Agreements explicitly address this risk with specific anticorruption programs. If the Union really wants to offer more than partnership but less than membership, the effective promotion of judicial cooperation would be an important contribution to this main objective of the ENP.

The Role of Bilateral Judicial Assistance Treaties in the Context of EU Civil Procedure Law and Third Countries

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Abstract

The article starts with general tendencies of judicial assistance both on the level of national, international and EU law. The European Union has not yet given much attention to the elaboration of rules on international legal cooperation with third States or on the recognition and enforcement of judgments from third States. Existing bilateral treaties of EU Member States with third States continue to apply, but new bilateral treaties of Member States and third States may only be concluded with the permission of the EU. Greece has concluded numerous bilateral treaties with third countries, some of which have led to considerable court practice. In general, Greek courts follow the “Günstigkeitsprinzip”, applying the provisions most favorable to recognition of foreign judgments. Generally speaking, the principle of *favor cooperationis* should be the axis of actual and future legal regimes of the EU Member States towards third countries.

Keywords

International judicial cooperation – exclusive external competence of EU – bilateral judicial assistance treaties – reciprocity – *favor cooperationis*.

A. Introduction

International judicial cooperation, an element of current private international law in its broad sense, has in recent times been seen an important change of its basis. Traditionally, international judicial cooperation was grounded mostly on the concept of “reciprocity”¹ While this concept still

1 As an important example one can mention the U.S. Supreme Court decision in *Hilton v. Guyot*, 159 U.S. 113 (1895).

characterizes – despite much critique² – the legal position of several countries of the world, it has never been of general use.

For example, in the U.S. the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) of 2005 and the states that have adopted it, do not use the reciprocity requirement³. The same is true for the Restatement (Third) Foreign Relations Law⁴. Several U.S. states, however, provide that their courts have the discretion to refuse to recognize or enforce a foreign judgment when reciprocity is not guaranteed, or make reciprocity even a mandatory requirement for recognition of a foreign judgment. In 2005, the American Law Institute drafted a Foreign Judgment Recognition and Enforcement Act (FJREA), which would provide for a modified reciprocity requirement⁵.

In most European countries, the requirement of reciprocity has been replaced by the conception that international judicial cooperation is regarded as obligatory. This is the case either when there are international treaties between some countries, or when such cooperation is based on national rules of private international law or international custom. An important example of a new principle of *favor cooperationis* is the recent Spanish Act 29/2015 on International Legal Cooperation in Civil Matters⁶. According to its preamble, the Act purports to cause Spanish authorities to open-up unilaterally to international cooperation, both actively and passively, with third countries, thus assuming a “general obligation of cooperation which emanates from general International Law”. According to the Art. 3 of this Act, the requirement of reciprocity is substituted by the principle of cooperation. Thus, reciprocity is not a condition for cooperation anymore. However, if the authorities of another State repeatedly refuse to cooperate with Spanish authorities or – even worse – have (to obey) a legal mandate not to cooperate, the Spanish Government could, by a royal decree, estab-

2 See, for example, Qisheng, The Recognition and Enforcement of Foreign Judgments Between the United States and China: A Study of *Sanlian v. Robinson*’ (2013) 6 *Tsinghua China L. Rev.*, 23, 30–31, 36.

3 The text of the UFCMJRA is available at <https://www.uniformlaws.org> (last access at: 29.10.2020).

4 See, e.g. <https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/usa> (at 2.7) (last access at: 29.10.2020).

5 As to this ongoing project see <https://www.ali.org/publications/show/recognition-and-enforcement-foreign-judgments-analysis-and-proposed-federal-statute/> (last access at: 29.10.2020).

6 *Ley 29/2015 de 30 julio 2015, de cooperación jurídica internacional en materia civil*, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8564 (last access at: 29.10.2020).