Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments

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I. Introduction*

Recognition and Enforcement of Foreign Judgments (REFJ) have always been at the centre of interest of both scholars and lawmakers. Since the 19th century, authors have been actively trying to identify the theoretical and practical obstacles that thwart achieving the main objective of judgments recognition, i.e. to ensure that a judgment obtained in one state is granted effect abroad. Being acutely critical of the status quo of foreign judgments law and practice, they have been clamouring for a global scale of harmonization that would eliminate most of the impediments to judgments recognition;[1] this has been done by pointing out the contradiction between the relevant need for an international instrument on judgments recognition and the reality of its practice.[2]

On the other hand, the significant progress made towards the liberalization of domestic recognitions practices should not be underestimated. This liberalization is the result of the recent trend of codification of PIL, law reforms and case law developments. A cursory comparative glance at the law of foreign judgments reveals that the states that have traditionally been clinging to restrictive requisites are slowly abandoning, or likely to abandon, their narrow-minded approach towards judgments recognition.[3] The result of this unilateral liberalization is the *convergence* of many aspects of judgments recognition regimes. In other words, without any prior agreement between different states, the process of unilateral liberalization of national law has so far ended up in harmonizing the different approaches to judgments recognition.[4] It is this trend that will be hereinafter referred to as *spontaneous harmonization.*[5]

The concept of *spontaneous* harmonization describes the trend towards approximation of foreign judgments recognition regimes which is the outcome of the modification of national laws and practices. It can be opposed to the concept of "organised/formal harmonization" whereby two or more states utilise international instruments to regulate their mu-

tual or reciprocal recognition regimes. Hence, spontaneous harmonization underlines the unilateral liberalization process of the domestic recognition law in several states; a liberalization which has so far resulted in improving the national recognition practices, and has, consequently, led to a certain convergence of the national REFJ regimes.

In the present work, "spontaneous harmonization" does not mean that the solutions in all legal orders have become similar in terms of regulating judgments recognition. The author is aware that several restrictive judgments regimes still exist and are not likely to change in the near future.[6] Nevertheless, as it will be discussed below, the movement towards the liberalization of the REFJ is an undeniable fact. The developments of domestic laws in the major legal systems, which are usually taken as examples in comparative studies,[7] reveal spectacular changes. This unilateral liberalization of REFJ is indicative of the emergence of the phenomenon of spontaneous harmonization, i.e. the spontaneous convergence of the REFJ regimes.

This being said, the primary aim of this paper is to shed light on some recent developments in foreign national law of foreign judgments.[8] To that end, the focus will essentially be placed on certain legal orders that are commonly exemplified as orders with restrictive judgments recognition regimes. Due to space restrictions, only a general descriptive overview of the phenomenon of convergence will be provided in order to have a general insight into this emerging phenomenon.

The phenomenon of convergence resulting from the liberalization of the REFJ is twofold. It can be first observed with regards to the attitude towards foreign judgments. The parochial attitude of non-recognition is clearly on the wane as it is being supplanted by a pro recognition attitude. The convergence of legal systems can also be observed in terms of the requirements with which foreign judgments have to comply in order to obtain extraterritorial effects. Here again, many of the most questionable requirements have either been suppressed or had their stance softened in a way they no longer constitute serious hurdles to REFJ. These issues will be dealt with in Parts Two and Three of this work which will respectively be devoted to describing the most important developments with regard to the principle of non-recognition (II) and the requirements for the REFJ (III).

This paper will also seek to explain the reasons underlining spontaneous harmonization. It argues that the evolution of the perception of foreign judgments is the main reason behind these developments as the focus is increasingly placed on the private aspects of foreign judgments rather than their public aspects. This question will be examined in Part

Four (IV).

II. From the Principle of Non-Recognition to Principle of Recognition

Courts dealing with the REFJ have only two options: Either to give effects to foreign judgments or not. The traditional, and more or less instinctive, attitude has been that foreign judgments have in principal no extraterritorial effects in the absence of the consent of the local sovereign. Two different approaches can be distinguished, but both lead to the same result: foreign judgments are disregarded and parties have no choice but to litigate their dispute again, as a result.

According to the first approach, foreign judgments are disregarded unless there is a formal reciprocity established either by a treaty or a governmental declaration to the contrary. In this outlook, there is no need to check the regularity of foreign judgments or even re-examine their merits. The only permitted exception to this rule is the existence of a prior consent formally manifested by the local sovereign (1).

The second approach consists in subjecting the authority of the foreign judgment to procedural constraints in the absence of which foreign judgments are nothing more than a piece of paper. This consists basically in making the effects of foreign judgments depend on a complete re-examination of the foreign judgments findings of facts and conclusions of law (2). It can also consist in subjecting the "recognition" to a prior declaration of enforceability without which the foreign judgment is regarded as having no legal authority and cannot be invoked to prevent relitigation of the dispute (3).

1. Non-Recognition in the Absence of International Treaty or a Governmental Declaration

It is commonly agreed that subjecting REFJ to the prior existence of a treaty or a governmental declaration is the most restrictive approach to foreign judgments.[9] One of the important manifestations of the phenomenon of liberalization of judgments recognition regimes can be observed in certain countries where this anachronistic approach is traditionally adopted. In these countries, and in spite of the restrictive language of their respective recognition rules, domestic courts have managed to soften the impact of these rules by creating extensive exceptions propounding that the absence of a treaty or a governmental declaration is not an absolute barrier to judgments recognition.

1. In Russia,[10] for example, the principle of non-recognition in the absence of interna-

tional treaty is well established in Russian law[11] despite the several admitted exceptions.[12] Strictly construing the law, Russian courts traditionally apply these commands literally and refuse in principle to grant effects to foreign judgments in the absence of a treaty obligation to do so.[13]

However, in the light of recent developments, it seems that the requirement of a special international treaty no longer constitutes an unconditional ground for refusing the REFJ. Indeed, in 2002, the Russian Supreme Court considered that foreign courts decisions could be recognized and enforced on other bases such as Agreements on Partnership (AP) – concluded with certain European countries and in which access to justice is guaranteed – and/or reciprocity.[14] Later, in 2006, Russian courts formally acknowledged that AP could be a legal basis for the REFJ. They considered that access to justice guaranteed by AP was to be understood and interpreted in the light of the jurisprudence of the European Court of Human Rights (ECHR) according to which fair trial does not only mean that there be a competent court to hear the dispute but also include the enforcement of its decisions.[15]

More importantly, in 2009, Russian Courts – in a case that was considered as "turning point in the Russian judiciary's approach to foreign judgments"[16] – acknowledged that reciprocity and international comity, as general principles recognized by the Federal Constitution, could serve as ground for judgments recognition even in the absence of AP or international agreement.[17] Russian courts confirmed the new solutions in subsequent decisions. In November 2011, the State Commercial Court of the City of Moscow enforced an American Judgment rendered by a District Court of the State of New York.[18] The significance of the case resides in the fact that there were neither international conventions nor AP between Russia and the United States. Thus, the recognition and enforcement of the American judgment was allowed on the sole basis of reciprocity and international comity. Finally, in 2012, Russian courts, following closely the reasoning adopted in the 2009 decision, allowed again the recognition and enforcement of an English judgment.[19]

These developments illustrate that despite the statutory prohibition to recognize and enforce foreign judgments in the absence of any treaty obligation, foreign judgments are actually recognized and enforced if the judgment creditor establishes that Russian judgments are likely to be recognized and enforced abroad. It seems then that the onus is put on upon the parties to provide the evidence on how effectively Russian courts judgments are treated abroad.[20] If evidence is brought, foreign judgments are likely to be granted ef-

fect.

2. In the Netherlands[21] and other Nordic countries such as Norway, Sweden, Finland and Denmark,[22] foreign judgments are in principle denied recognition and enforcement.[23] The rule in these countries is that cases should be decided *de novo* in order to obtain a local judgment on the merits. Nevertheless and despite the statutory prohibition,[24] developments in these countries indicate that a more positive approach is being adopted. According to this approach, since foreign judgments cannot be recognized and enforced in the absence of applicable treaty,[25] a new action on the merits can be initiated. However, in the new proceedings, although it takes the form of a new trial, foreign judgments will be granted certain effects, and in certain cases more than a mere evidentiary weight. The result is that the recognizing court will base its decision on the foreign judgment. For instance, in the Netherlands, the Dutch courts practice has succeeded in changing the rule according to which disputes should be relitigated in the absence of a treaty obligation into a sort of *actio judicati* akin to an action on the foreign judgment as known in Common Law countries.[26] In the new action the foreign judgment will be regarded as having "binding force" when it meets certain requirements[27] that have been established by case law in the absence of legislative guidance.[28] In other situations, Dutch court simply recognize foreign judgments. This is the case for example, when the foreign judgment is rendered on the basis of choice of court agreement.[29] In any case, Dutch authors affirm that foreign judgments are likely to be recognized upon the fulfilment of the requirements established by case law.[30]

Similarly, in Nordic countries, although officially not binding, foreign judgments are often given considerable evidentiary weight so that they are almost recognized. In general, this would be the case when the foreign judgment is rendered by a competent court and when it does not violate the *ordre public* of the forum, although other factors can be taken into consideration.[31] In certain situations, however,[32] Nordic courts will literally recognize foreign judgments despite of legislative restriction especially when the foreign judgment is rendered by a foreign court having jurisdiction under an exclusive choice of court agreement.[33]

2. *Révision au Fond*

The principle of non-recognition also manifests itself in the practice that consists in subjecting the content of the foreign judgment to a reexamination of its finding of facts

and law, better known as *révision au fond*. The practice of *révision au fond*, which was originated in France,[34] used to be largely adopted by different legal systems.[35]

However, during the last few decades, one of the major developments is this trend towards the prohibition of the practice of *révision au fond* and the generalization of the REFJ. As is widely known, French courts abolished this practice in 1964, 150 years after its introduction into French law.[36] Before that, it was abolished in Luxembourg in 1956.[37] The practice of reviewing of the merits of the case was also formally abolished in Quebec in 1991[38], in Italy in 1995[39] and in Belgium in 2004.[40] These developments demonstrate that the prohibition of *révision au fond* has been elevated to an internationally acknowledged principle in modern PIL adopted by the majority of legal systems.[41]

3. Declaration of Enforceability as Prerequisite for Mere Recognition

In certain legal systems, foreign judgments may not be entitled to *any* effect as long as they are not declared enforceable. However, although it is logical to require a special proceeding when "enforcement" is at issue, the situation turns to be problematic when the "recognition" of certain effects, namely *res judicata,* is to be subject to a prior formal declaration. In such a case, a person divorced abroad will continue to be considered as married until the foreign divorce he/she obtained is declared enforceable. More importantly, a defendant will not be able to invoke the foreign judgment in order to prevent relitigation as long as it is not declared enforceable.

One of the drastic consequences of such rule is that a new action on the merits between the same parties will prevent the recognition of the foreign judgement.[42] In this respect, the generalization of *de plano* recognition is to be highlighted. For example, in Italy, the "*delibazione*" is no longer required for the mere recognition of foreign judgments.[43] Similarly, in Belgium, the new code of 2004 extends henceforth the *de plano* recognition – traditionally acknowledged only to family law judgments – to all foreign judgments.[44] Moreover, in France, even though the practice that makes *res judicata* conditional upon a prior declaration of enforceability has not been officially abolished yet, there is unanimous opinion among scholars that there is a general trend towards the generalization of the *de plano* recognition to all categories of foreign judgments.[45]

III. Liberalization of the Requirements for the Recognition of Foreign Judgments

Not only have the recent developments in national laws affected the attitude towards foreign judgments, but also the requirements with which foreign judgments have to comply. These developments suggest there exist two complementary trends which contribute to the liberalization of the requirements for the REFJ. The first consists in the reconsideration of certain requirements whose existence is firmly contested by scholars. In this regard, national law developments show that these requirements are either abolished or so softened that they become almost inoperative (1). The second consists in reconsidering the requirements that are deemed essential to any judgments recognition regime. These requirements are adapted to the modern objectives of PIL (2).

1. Developments with regard to Contested Requirements

a. Control of Choice of Law

Several legal systems require that the law applied by foreign courts should correspond to the applicable law designated by their choice of law rule. This requirement was even included, under certain conditions, in certain international conventions such as 1968 Brussels Convention[46] and the 1971 Hague Judgment Convention.[47] However, although certain influential scholars defended the control of choice of law rule,[48] and few others still defend it,[49] its legitimacy is in constant decline. It lost popularity among scholars who are either hostile towards its adoption[50] or call for its abolition.[51] It is also constantly excluded from recent instruments on judgments recognition.[52] More interestingly, the compatibility of the result of its application with human rights was seriously questioned as demonstrated by the decision the European Court of Human Rights (ECHR) in *Wagner v. Luxembourg*.[53]

Recent developments in national law confirm this trend. Often severely criticized for causing limping legal relationships or for being akin to a *révision au fond*, the control of choice of law was excluded from many codifications such as those of Germany (1986),[54] Quebec (1991),[55] Turkey (2007)[56] or Poland (2008).[57] In other countries, such as Japan,[58] France[59] or Luxembourg,[60] the condition was rather eliminated by case law. In any case, even though few legal systems still impose, with many restrictions, a certain review of the law applied by the rendering court,[61] it is now generally admitted that this anachronis-

tic requirement has nothing to do with REFJ.[62]

b. Reciprocity

Reciprocity is also a much-criticized requirement; "an ill-conceived notion"[63] that many scholars hope to see disappear from the law of judgments recognition one day. Considered as a factor of regression and a source of complication in PIL,[64] reciprocity has nothing to do with fairness between the parties nor it impedes unduly and abusive relitigation; yet it requires that perfectly valid judgments be disregarded.[65] In fact, support of reciprocity is not necessarily guided by its intrinsic qualities (if any), but it is rather deemed as necessary evil towards promoting the recognition of local judgments abroad.[66] As the developments outlined below will demonstrate, in many legal systems where reciprocity is still required, it has become a condition that can be easily satisfied. The principle being that foreign judgments should be recognized and enforced, it seems that reciprocity can effectively lead to the refusal of recognition of foreign judgments are limited to few extreme exceptional situations where the rendering state still adheres to outdated approaches such as *révision au fond,* treaty obligation or still cling to a restrictive conception of the reciprocity rule.[67]

Recent developments regarding the requirement of reciprocity are indicative of a two-fold trend. On the one hand, there is a tendency of a pure and simple abolition of reciprocity requirement. Many examples of recent codifications and law reforms show that reciprocity has been completely excluded from the law of recognition in a number of states including Venezuela (1999),[68] Bulgaria (2005),[69] Macedonia (2007),[70] Poland (2008)[71] etc... On the other hand, in other countries where reciprocity is still maintained, the legislative or the judiciary authorities have actively intervened in order to loosen the practical implications of the reciprocity rule. In several legislations the scope of application of the reciprocity requirement has been substantially reduced. For instance, some countries require reciprocity only for the recognition of judgments rendered against their national defendants.[72] In other countries, reciprocity applies only to the enforcement but not to the recognition of foreign judgments.[73] More importantly, in some other countries, reciprocity is presumed until evidence to the contrary is produced.[74]

In addition, case law in a number of countries has played a decisive role in limiting the undesirable effects of the reciprocity requirement. For instance, in Germany, it suffices that German judgments are likely to be recognized and enforced to establish reciprocity.[75] Simi-

larly, Japanese courts usually admit reciprocity when it is likely that Japanese judgments of the same kind would be recognized by the rendering court under conditions that are not significantly different from those adopted in Japan.[76] Moreover, in Spain, and despite the existence of two provisions dealing with judgments reciprocity,[77] Spanish authors point out that courts have made of provisions on reciprocity a mere slogan which has no practical implications.[78]

Nonetheless, the existence of recently reported cases in which reciprocity was employed to refuse the REFJ should be pointed out. For example, in 2003 the Osaka High Court refused to recognize a judgment rendered by a Chinese court in retaliation to the refusal of Chinese courts to recognize a Japanese court's decision for lack of reciprocity.[79] However, the reaction of Japanese courts can be contrasted with the reaction of Israeli and German courts.

In 2012, the Tel Aviv District Court, faced with the issue of the recognition of a Russian judgment, held that in the light of the recent developments in Russian case law, Israeli judgments were likely to be recognized and enforced in Russia although Russian statutory law required that reciprocity be established by a treaty. More importantly, in this case, the defendant opposed to the recognition of the Russian judgment because of the existence of a Russian precedent that refused the recognition of an Israeli judgment on the ground of reciprocity. However, the court considered that the existence of such precedent was not decisive because the refusal was only justified by the absence of proof of reciprocity between Russia and Israel. Therefore, according to the Israeli court, if evidence of reciprocity had been brought, the Israeli judgment would have been given effect in Russia.[80] Similarly, a German court accepted to recognize a Chinese judgment[81] although there was a precedent of a Chinese judgment refusing the recognition of a German judgment on the basis of reciprocity.[82] The German court justified its decision by the willingness of the German court to establish reciprocity with China expecting Chinese courts to reciprocate and start recognizing German judgments.

These cases are of great significance because they demonstrate that certain courts have adopted a more open-minded attitude that is in line with the phenomenon of liberalization of the REFJ. This attitude, which pave the path towards the complete ineffectiveness of reciprocity requirement, may inspire other foreign legal systems to adopt more liberal attitude towards the recognition of foreign judgments. In any case and in the light of the recent developments affecting the reciprocity requirement, one can hardly imagine how

this rule can still be operative outside a very few exceptional cases.[83]

2. Developments with regard to the Recognition Core Requirements

a. Jurisdiction of Foreign Courts

In number of legal systems, the jurisdiction of foreign courts is considered as the most important of all requirements of judgment recognition.[84] However, behind this basic consensus, rules and applications of this requirement do vary.[85] Nevertheless, new developments reveal that there is a general movement towards adapting the requirement of indirect jurisdiction to the present needs of international litigation. This consists in limiting the control of the jurisdiction of foreign courts into reasonable boundaries by requiring a certain connection between the dispute and the forum. These reasonable boundaries are usually justified by the protection of defendants from exorbitant jurisdictions, the violation of his/her procedural human rights and limiting forum shopping.[86]

Firstly, these developments consist in the abolition of certain restrictive rules that have turned the requirement of indirect jurisdiction into a serious impediment to the REFJ. In this respect, the abolition of the exclusive character of Articles 14 and 15 of the French Civil Code is very illustrative. Considered as "legal trap",[87] these Articles used to be understood as granting exclusive jurisdiction to French courts over any disputes involving French citizens. This was enough to make the REFJ almost impossible against French nationals who did not waive their privilege.[88] However, in two important decisions,[89] the French *cour de cassation* finally declared that these Articles no longer confer exclusive jurisdiction to the French courts but only set optional jurisdiction inadequate to exclude the indirect jurisdiction of foreign courts.[90]

Other restrictive rules can be found in other legal systems. For example, in certain legal systems default judgments cannot be recognized or enforced against foreign defendants unless they accept to submit to the jurisdiction of the foreign rendering court. This system prevailed for example in Spain.[91] It is also largely accepted in many common law countries.[92] However, simply denying the indirect jurisdiction of the foreign court because the defendant did not accept to submit to its jurisdiction is somehow excessive especially when the dispute has a reasonable connection with the foreign rendering State. Such a rule arbitrarily favors defendants and encourages tactical abuses.

To counter these excesses, Spanish courts later construed that default judgments *per se* would be recognized if they were rendered on the ground of acceptable jurisdictional bases

and the defendant had been duly notified.[93] Similarly, significant changes occurred in Canada where the Canadian Supreme Court questioned the adequacy of the traditional common law bases for assessing the jurisdiction of foreign courts to the modern judicial era. In two important decisions, the Supreme Court decided that traditional common law should be adapted and considered that foreign courts should be regarded as having jurisdiction when there existed a real and substantial connection between the rendering court and the dispute.[94]

As the foregoing demonstrates, the general tendency in the law of judgments recognition is to limit the impact of exclusive jurisdiction, and in other cases where jurisdiction is only concurrent, the onus of the jurisdictional control is placed on the existence of a connection with the dispute that justifies that jurisdiction of the foreign court, although the criteria according to which the control is exercised may differ from one legal system to another.

b. Public Policy

Similarly to the jurisdictional requirement, public policy is universally admitted.[95] Generally speaking, it is agreed that only serious violations of the forum fundamental notions and values can trigger public policy reactions although a certain connection with the forum is usually required. This means, *at least in principle*, that the recourse to public policy should be admitted only in very exceptional situations.[96] Despite these common features, the content of public policy does considerably vary from one legal order to another.[97] In addition, the nature of its changing and undefined content makes it is very difficult, not to say impossible, to generalize any conclusion.

Still, with regard to certain issues, certain developments relating to the operation of public policy are undeniable. For instance, the recognition of foreign judgments awarding punitive damages was one of the most controversial questions about which delegations and experts involved in the negotiation of a global convention on jurisdiction and judgments recognition had to find a certain compromise.[98] The traditional approach adopted in many countries is that punitive damages should *in principle* be ruled out.[99] However, a more moderate approach, which is gaining support among different scholars[100], is finding its way into the case law in a number of jurisdictions.[101] This approach consists in acknowledging that punitive damages awards are not *per se* contrary to public policy. Yet, it would be otherwise when the amount awarded is disproportionate to damages actually suffered.

Here, the intervention of public policy is *in concreto*, which makes rooms for the recognition of punitive damages awards. Such an approach is consistent with the recent solution adopted by certain international instruments including the 2005 Hague convention (Article 11), in which the rigid attitude of outright refusal to recognition is not admitted.[102]

In any case, the history of the REFJ teaches that categorical refusal to recognize and enforce foreign judgments is always excessive and that nuances brought to the traditional solutions usually paves the path towards a more tolerant approach.

IV. Reasons for the Emergence of the Phenomenon of Spontaneous Harmonization

As the foregoing demonstrates, in many legal orders, the adequacy of many of the most questionable rules for the REFJ has been seriously questioned at a national level by national courts and lawmakers. It should be remembered that it is exactly the abolition of these rules that has been the subject of negotiation of many international conventions.[103] These developments raise the question of the reasons behind this phenomenon of fast track of liberalization of judgment recognition regimes that can be observed in many legal systems.

1. Upon examination of the requirements that have been subject to reconsideration, one can notice that all of them share common feature i.e. all these impediments were conceived in order to protect the sovereignty of the recognition state at the detriment of fairness of the foreign proceeding and the protection of the interest of the parties.[104] Accordingly, these impediments reflect a certain perception of the REFJ in which foreign judgments are limited to their public law aspect i.e. as emanations or exercise of sovereignty prerogatives by foreign authorities. This perception is in line with a public law conception according to which PIL is primarily concerned with delimiting the sovereignty prerogative of foreign states.[105] Certain scholars, especially in the French academia, called it "publicist conception" of PIL (*conception publiciste*).[106]

As commonly known, PIL used to be conceived through the distorting lenses of sovereignty. Here, the concept of sovereignty is of primary significance as it used to be at the center of all the construction of PIL. Indeed, according to the opinion that prevailed until the middle of the 20th century, the primary function of PIL is to resolve conflict of sovereignty.[107] Thus, since foreign judgments are the result of the exercise of the sovereign prerogatives by foreign public authorities, emphasis used to be placed on foreign judgments as emanations from foreign sovereignty. As act of sovereign, foreign judgments are entitled to

no extraterritorial effect unless declared otherwise by the authorities of the local sovereign.[108]

This understanding entails that the principle of non-recognition and the recognition under unduly restrictive requirements are in line with the *raison d'être* of judgments recognition regime: the protection of the sovereign prerogatives from foreign intrusions.[109] This explains why one of the first approaches to foreign judgments was to completely disregard them in the absence of formal reciprocity established either via a treaty or a governmental declaration.[110] Later when *révision au fond* was admitted, it was understood that local judges can by no means be subject to the authority of foreign courts, and therefore, foreign judgments had to be subject to a full reexamination from both aspect of facts and law. The requirement of a declaration of enforceability for mere recognition also was considered from this perspective, i.e. unless the judiciary of the local sovereign declares by an act of sovereignty that the foreign judgment can have effect within its territory, the foreign judgments cannot be effective.

In addition, in a number of legal systems, even when "a more positive" approach are adopted, i.e. when it is admitted that foreign judgments can be effective if they meet certain requirements, the onus is still placed on the fact that the exequatur proceeding has to protect the interest of the local sovereign.[111] Under this perspective, choice of law rules is required in order to prevent parties from taking away the dispute outside the realm of the legislative jurisdiction of the forum. It is needless to insist on the political character of reciprocity which is the incarnation of public law in the field of PIL.[112] Similarly, public policy is often understood so largely that it encompasses any social, political, economic or legislative interests pursued by the local sovereign.[113]

With regard to the jurisdictional requirement, under the publicist conception, jurisdictional rules serve to determine the territorial reach and the scope of national sovereignty by allocating jurisdiction over international dispute. Consequently, when the courts of a state are regarded as having jurisdiction over certain disputes, it is then recognized that the adjudication of the disputes are subject to its sovereignty. When it comes to REFJ, the primary role of the jurisdictional rules (indirect jurisdiction) is to ensure that the foreign sovereignty does not exceed its scope and does not impinge on the juridical sovereignty of the state of recognition or that of a third state. Therefore, when applied at the recognition stage, jurisdictional rules serve to sanction the excess of exercise of jurisdiction by foreign courts.[114]

2. However, from the beginning of the second half of the last century, the publicist conception of PIL started losing popularity among scholars.[115] Its decline was fuelled by the revolutions in the technologies of transportation and telecommunications, the constant increase of the level of international commerce and the movements of people and goods. The weakening of nation-state under the increasing impact of globalization[116] and the critics against the concept of sovereignty were the key reasons behind the emergence of a new perception of PIL, a perception that places focus on the private aspects of PIL.

Nowadays, PIL is not concerned with resolving conflicts between sovereigns. The modern objective of modern PIL is to provide solutions to private disputes with foreign elements. Under the contemporary conception, all what matters is the fairness of the proceedings abroad and the respect of the legitimate previsions of the parties.[117] Therefore, it suffices that the dispute has reasonable connection with the foreign State in order for foreign judgments to be recognized abroad.[118] Jurisdictional rules are no longer regarded as delimiting the juridical sovereignty, but rather contended to a simple role of determining, unilaterally, the catalogue of cases in which the courts of the forum will take jurisdiction. The main criteria to determine those cases are fairness to the parties and good administration of justice, although other factors can be included. Accordingly, in modern REFJ the onus should be placed on the fairness of the foreign proceedings and the respect of rights and status obtained abroad. In other words, unless there is a serious reason for non-recognition, a judgments that is rendered by a competent court without fraud and that is compatible with the recognition State public policy, is likely to be recognized. The result is that unnecessary requirements, which are not in line with the modern objective of PIL, are likely to be abolished.

V. Concluding Remarks

Judgments recognition practices in many legal systems are on track for liberalization. What several conflict-of-laws scholars had predicted proved to be true.[119] Presently, the recognition regimes are pretty much advanced. A quick comparison with the judgments recognition practices prevailing during the sixties, the seventies or even the end of the twentieth century, demonstrates that considerable changes have occurred. Nowadays, major legal systems, notorious for their restrictive regime of judgments recognition, are adopting a more positive attitude towards foreign judgments because the process of liberalization necessarily entails relinquishing restrictive impediments to judgments recognition.

As it was pointed out, the logical result of this process is that the rules regulating recognition have become considerably similar.[120] In a nutshell, what negotiators and experts failed to achieve through the negotiations of a worldwide convention could have been proven unilaterally feasible at a national level via the proactive actions of local courts and lawmakers.

* List of abbreviations used in this paper: PIL: Private International Law; PILA/C: Private International Law Act/Code; CCP: Code of Civil Procedure; REFJ: Recognition and Enforcement of Foreign Judgments.

[1] See for example, A T. von Mehren, "Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful?", *RabelsZ*, (1993), pp. 449ff.

[2] See, Permanent Bureau, "Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments – Preliminary Document No 17 of May 1992", in *Acts & Proceedings of the Seventeenth Session, I*, (Hague, 1995), p. 231.

[3] For example, see G Cuniberti, "The Liberalization of the French Law of Foreign Judgments", *ICLQ* (2007), pp. 931ff. For detailed analysis, see *infra* Part II and III.

[4] This confirms the opinion expressed by Ch. N. Fragistas according to which the unsatisfactory situation of the REFJ can be improve by modifying domestic rules. Ch. F. Fragistas, "Rapport explicatif sur la Convention-Jugements de 1971", in *Actes et documents de la Session extraordinaire (1966), Exécution des Jugements*, (La Haye, 1969), p. 360.

[5] Cf. K Siehr, "National Private International Law and International Instruments", in *Essays in Honour of Sir Peter North* (Oxford, 2002) p. 336.

[6] For example, the recognition regimes in many Arab and Asian countries are rather restrictive and seem to be behind the liberalization movement of the REFJ. See, S Kantaria, "The Enforcement of Foreign Judgments in the UAE and DIFC Courts", *Arab L.Q.* (2014), pp. 193ff; P M. C. Koh, "Foreign judgments in Asean – A proposal", *ICLQ* (1996), pp. 844ff.

[7] For example, F K. Juenger, "The Recognition of Money Judgments in Civil and Commercial Matters", *AJC*, (1988), pp. 1ff; G Droz, "Regards sur le droit international privé comparé: Cours général de droit international privé", *Collected Courses*, (1991), pp. 9ff; S P. Baumgartner, "How Well Do U.S. Judgments Fare in Europe?", *Geo. Wash. Int'l L. Rev.*, (2008), pp. 173ff; K H. Nadelmann, "Non-Recognition of American Money Judgments Abroad and What to Do about It", *Iowa L. Rev.*, (1957), pp. 236ff; G Walter & S P. Baumgartner, "General Report", in *Recognition and Enforcement of Judgments outside the Scope of the Brussels and Lugano Conventions*, (Kluwer Law International, 2000) pp. 1ff.

[8] These developments are often not taken into consideration by some authors. See for example, Y Zeynalova, "The Law on Recognition and Enforcement of Foreign Judgments: Is it Broken and How Do We Fix It?", *Brook. J. Int'l. L*, (2013), pp. 150ff.

[9] One author even considers that "the attitude of refusing, as a matter of principle, to enforce foreign judgments (unless their enforcement is covered by a treaty) bears with it a serious risk of a

violation" of the parties' fundamental rights to enforcement as guaranteed by the European Convention of Human Rights. P Kinsch, Enforcement as a Fundamental Right, *Nederlands Internationaal Privaatrecht*, 2014, pp. 540ff.

[10] See, B Dutoit, "Reconnaissance et exécution des jugements en matière civile et commerciale et sentence arbitrale en Russie: Du vieux vin dans de nouvelles outres?", in *Mélanges en l'honneur de François Knoepfler* (Helbing & Lichtenhahn, 2005) pp. 129ff. The non-recognition principle was reaffirmed in 2002 in the reform of the Commercial Procedural Code (ComPC) and the Civil Procedural Code (CPC). For an overview of these reforms see T Kouteeva-Vathelot, "Russie, Conflits de jurisdictions", *rev. crit. DIP* (2003), pp. 790ff. See also, A Muranov & D Davydenko, "Summary of the Law and Practice of Enforcement of Foreign Judgments in Russia", *Arbitration*, (2007), pp. 305ff; D Litvinski, note sous Arrêts des 22 Fev. et 2 Mar. 2006 de la Cour Commerciale Fédérale du District de Moscou, *rev. crit. DIP* (2006), pp. 642ff.

[11] Article 241 ComPC of 24 July 2002; Article 409 CPC of 14 November 2002.

[12] For example, the law on Insolvency (Bankruptcy) adopted in 2002 expressly mentions reciprocity as a legal ground for judgments recognition (art. 1/6). Similarly, the principle of non-recognition in the absence of a treaty does not apply for the recognition of judgments relating to civil status such as divorce, annulment of marriage or adoption (art. 415 CPC and art. 165 Family Code of 1995).

[13] In addition to references in *supra* n 10, see O Vorobieva, "Reciprocity in Recognition and Enforcement of Foreign Judgments in Russia and the United States", in *Festschrift für Mark Moiseevič Boguslavskij* (Wessendhafts-verlag, 2004) pp. 254ff.

[14] The decision of the Supreme Court of the Federation of Russia of 7 June 2002, R*ev. Crit. DIP* (2003), pp. 100ff comm. T Kouteeva-Vathelot. The court overturned an inferior court decision that refused to recognize an English judgment on the ground of the absence of treaty between Russia and England. The Supreme Court sent back the case to the lower courts in order to examine whether AP and reciprocity could be considered as legal bases for the recognition of the English judgments.

[15] Decisions of the Federal Commercial Court of the District of Moscow of 22 February and 2 March 2006, *supra* n 10 (the recognition of an English judgment despite the absence of a recognition treaty between Russia and England).

[16] C Lightfoot, "Hope on Russian Enforcement", *Int'l. Fin. L. R.* (2010), pp. 38ff.

[17] *Rentpool B.V. v. Podjemnye Tekhnologii*, decision of the Commercial Court of Moscow Region No. A41-9613/09 of 5 June 2009 upheld by the Cassation Court of Moscow Circuit on 29 June 2009 and the Federal Supreme Court of the Republic of Russia on 7 December 2009 (ruling No. BAC-12688/09). The case concerned the recognition of a Dutch judgment rendered by the District court of Dordrecht with regard to a dispute which arose out of a commercial lease between a Dutch and a Russian companies.

[18] See, K Krasnokutskiy, "Russian Commercial Court Enforces a Judgment of a US NY District Court", available at http://navicus.ru/files/Enforcement%20of%20US%20jugdment%20in%20Russia.pdf (last visited 27 October 2014).

[19] *Boegli-Gravures SA v. Darsail-ASP Ltd v. Andrei Ivanovich Pyzhov* case decided by the Commer-

cial Court of the City of Moscow on 10 February 2012 upheld by the decisions of the Moscow Circuit Court on 12 April 2012 and the Supreme Commercial Court of the Russian Federation on 26 July 2012. I Nikiforov and T Sen, "Enforcement of Foreign Judgments in Russia – A Recent Case Study" (June 2013), available at, http://www.epam.ru/files/documents/publishes/51af2638337e9.pdf (last visited 27 October 2014).

[20] See, A Grishchenkova, "Recognition and Enforcement of Foreign Judgments in Russia – Recent Trends", *YBPIL* (2013-2014), at 442.

[21] See, R Ch. Verschuur, "Recognition and Enforcement of Foreign Judgments in the Netherlands", *in* G Walter & S P. Baumgartner, *supra* n 7, pp. 409ff; R van Rooij & M V. Polak, *Private International Law in the Netherlands*, (Kluwer Law and Taxation Publishers, 1987), pp. 71ff (hereinafter PIL); *idem, Private International Law in the Netherlands – Supplement* (1995) (hereinafter Supplement); Th. M. De Boer & R. Kotting, "Private International Law", *in* J.M.J Chorus et al. (ed.), *Introduction to Dutch Law 4th ed.* (Kluwer Law International, 2006) pp. 269ff.

[22] For Norway, see H Bull, *in* G Walter & S P. Baumgartner, *supra* n 7 at 425ff. For Sweden, see, M Berglund, *in* G Walter & S P. Baumgartner, *supra* n 7, pp. 529ff; M Bogdan, "The Recognition in Sweden of Money Judgments in Civil and Commercial Matters", *Nordisk Tidsskrift for International Ret* (1985), pp. 85ff. For Finland See, J Lappalainen, *in* G Walter & S P. Baumgartner, *supra* n 7, pp. 169ff; L Ervo, "Preclusive Effects of Foreign Judgments According to Finnish Law", in R Stürner et al. (ed.), *Current Topics of International Litigation* (Mohr Siebeck, 2009) pp. 256ff. For Denmark, see M Budtz, Denmark, *in* D Campbell (ed.), *International Execution against Judgment Debtors -Vol. 1*, (Center for International Legal Studies, 1993).

[23] However, judgments relating to status and capacity that usually do not require enforcement are excluded from the principle of non-recognition. For the Netherlands, the principle of recognition was reaffirmed by the new codification of PIL (the Book 10 of the Civil Code of the Netherlands) *YPIL* (2011), pp. 657ff. For Nordic countries, see references mentioned above for each country. Accordingly, a wide range of foreign judgments are excluded from the treaty obligation rule.

[24] Article 431 of the 1838 Dutch CCP; Section 19-16 para.1 of the Norwegian Dispute Resolution Act of 2005; Section 3 of the Swedish Enforcement Code of 1981; Section 16 of the Finnish Act on Cooperation between Finnish and Foreign Authorities of 10 June 1921; Sections 223 A (recognition) and Section 479 (enforcement) of the Danish Administration of Justice Act of 1916).

[25] However, in 1916, the Dutch Supreme Court declared that the statutory prohibition concerned only enforcement but not the recognition of foreign judgments. See, H Smit, "International Res Judicata in the Netherlands: A Comparative Analysis", *Buffalo Law Review*, (1966-1967), pp. 165ff.

[26] Th. M. De Boer & R. Kotting, *supra* n 21, pp. 294. F K. Juenger, *supra* n 7 at 27.

[27] These requirements include the jurisdiction of the foreign court; the foreign judgment is not subject to ordinary form of review in the state of origin and the foreign judgment is not contrary to the Dutch substantive and procedural public policy. For a detailed analysis of these requirements, see N Rosner, "The Requirements for Execution of Foreign Money Judgments in the

Netherlands Absent a Treaty", January 2, 2003, available at http://www.llrx.com/features/norel.htm (last visited 27 October 2014).

[28] However, Dutch courts considered that they were not obliged to recognize the binding force foreign judgments, but only allowed to do so in a case by case basis. This is usually done on the basis of good faith and fairness that requires from the parties to be bound by the foreign decision. Th. M. De Boer & R. Kotting, *supra* n 21, at 294.

[29] Decision of the Supreme Court of the Netherlands, 17 December 1993 (*Esmil International BV* v. *Enka Arabia Ltd.*), note L Th.L.G. Pellis, *NILR*, 1994, pp. 372ff. This decision was later confirmed in a similar case. See, Decision of the Supreme Court of the Netherlands, 16 June 1995, note R Ch. Verschuur, *NILR*, 1996, pp. 261ff.

[30] According to R van Rooij & M V. Polak, "in practice, courts are, more often than not, willing to recognize and enforce foreign judgments", *in* PIL, *supra* n 21, p. 73. See also N Rosner, *supra* n 27, who considers that the Dutch regime of REFJ as "fairly open towards foreign judgments"; F K. Juenger, *supra* n 7, at 27.

[31] For example, in Norway, it is admitted that considerable weight will be accorded if the foreign judgment is rendered by an appropriate court in accordance with the Norwegian rules of PIL. Other factors such as the quality of justice, fairness, intrinsic reasonableness, closeness of the evidence can also be considered. See, K Boye, Norway (Rel 28-2010), *in* L W. Newman (ed.), *Enforcement of Money Judgments* (Juris Publishing, 2011).

[32] For example, in Sweden and Finland, foreign judgments will be recognized when the case cannot be adjudicated in the forum for lack of jurisdiction. In Finland and Norway, the foreign judgment will be recognized when the dispute concern an immovable situated in a foreign country. For Sweden see, M Bogdan, *supra* n 22, p. 86-87; B Nilsson & J Westerberg, Sweden, *in* D Campbell (ed.), *International Execution against Judgment Debtors -Vol. 2*, (Center for International Legal Studies, 1993), p. 6. For Finland, see J Lappalainen, *supra* n 22, p. 169-170; For Norway, see, H Bull, *supra* n 22, p. 429.

[33] This solution is adopted by case law in Sweden (Swedish Supreme Court decision of 1973), Denmark (Eastern High Court decision 31 May 2001) and more recently in Finland (Supreme Court KKO; 2011; 74). On the other hand, in Norway, this rule is provided for by Section 19-16(2) of the Norwegian Dispute Resolution Act of 2005. In general, it seems that Nordic courts treat foreign judgments favorably when they (the Nordic courts) lack international jurisdiction over the claim brought abroad, either because the parties so decided (choice of court agreement) or because of the nature of the dispute (the dispute relates to immovable situated abroad). See, S P. Baumgartner, *supra* n 7, pp. 187-188.

[34] See the decision of the French *Cour de Cassation* in its decision *Holker v. Parker*, 19 April 1819.

[35] However, this practice was subject to certain limitations. For example, certain type of judgments such as judgments relating to civil status and capacity were excluded. In other countries, such as Italy before 1995 or Lebanon, the review is allowed only in certain circumstances such as default judgments or fraud.

[36] See the French *Cour de Cassation's* famous decision of 7 January 1964 (*Munzer* case).

[37] See T Hoscheit, *in* G Walter & S P. Baumgartner, *supra* n 7, p. 385.

[38] Article 3158 Civil Code. See, G Goldstein, "The Recognition and Enforcement of Foreign Judgments in Quebec", *YBPIL*, (2013-2014) at 294.

[39] See, A Bonomi, "Italian Statute on Private International Law", *Int'l J. Legal Info.*, (1999) at 266.

[40] See Article 25 §2 of the new Belgian PILC of 2004. P Wautelet, "Le Nouveau Régime des Décisions Etrangères dans le Code de Droit International Privé", *Rev. Dr. Judiciaire et de la Preuve*, (2004) at 208ff.

[41] This practice can still be found for example in Lebanon (Art. 1015 CCP, but limited to very exceptional situations) and some Asian countries such as Thailand or Philippines (*supra* n 6). However its prohibition is clearly stated in many recent codifications and law reform. Among the most recent ones see for example, Bulgarian 2005 CPIL Article 121 (1); Romanian New CCP (entered into force in 2013) Article 1097; Monaco proposed law relating to PIL of 2013 Article 16.

[42] See, I Szászy, *International Civil Procedure: A Comparative study* (A.W. Sijthoff, 1967) at 174 who considers it as "indirect requirement for recognition".

[43] Article 64 (1) of the Italian Statute on PIL.

[44] Article 22 paragraphs 2 and 3 CPIL of 2004.

[45] Cf. H Muir Watt, "Remarques sur les Effets en France des Jugements Etrangers Indépendamment de l'Exequatur", in *Mélanges Dédiés à D. Holleaux*, (Litec, 1990) pp. 301ff; A Huet, "L'autorité (négative) de la chose jugée des jugements étrangers, réflexions sur le DIP français", in *Mélanges en l'Honneur du Doyen G. Wiederkehr*, (Dalloz, 2009) pp. 397ff.

[46] Article 27 (4) of the Brussels Convention.

[47] Article 7 paragraph 2.

[48] In France, H. Batiffol & P. Lagarde, *Droit international privé* 7[e] éd., t. II (L.G.D.J., , 1983) at 584; in the United States, A T. von Mehren & D T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, *Harv. L. Rev.*, 1968, pp. 1636ff; In Germany, W Wengler, The General Principal of Private International Law, *Collected Courses*, 1961, pp. 443ff.

[49] For example in France see, Y Loussouarn, P Bourel & P de Vareilles-Sommière, *Droit International Privé*, 10[e] éd. (Dalloz, 2013) pp. 883ff.

[50] See The Conclusions of the Second Meeting of the Special Commission, Prel. Doc. No 6 of August 1996, prepared for the Eighteenth Session, p. 23, n°34 indicating that a virtual consensus was reached to exclude the control of choice of law by the expert of the Special Commission at the Hague Conference during the preparation of the 1999 Hague Draft Convention.

[51] See for example in France, S Gressot-Leger, "Faut-il supprimer le contrôle de la loi appliquée par le juge étranger lors de l'instance en exequatur", *Clunet* (2003), pp. 767ff.

[52] Both in civil and commercial matters (for example, Brussels I Regulation, 1999 Hague Draft Convention), as well as in family matters (for example 1998 Brussels II Convention (Brussels II *bis* Regulation).

[53] Decision of CEDH of 28 Juin 2007, *Rev. Crit. DIP*, 2007, p. 807, note P. Kinsch; *Clunet*, 2008, p. 199 note L d'Avout; *Dalloz*, 2007, p. 2700, note F Marchadier, in which the court considered that refusing the recognition of a foreign judicial adoption on the basis that the law ap-

plied by the foreign judge was not the same as the one designated by forum choice of law rules constitutes interference with the applicants' right to respect for family life as guaranteed under Article 8 of the Convention.

[54] See, D Martiny, "Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany", *AJCL* (1987), at 742–743.

[55] Article 3157 QcC. See, G Goldstein, *supra* n 38 at 295.

[56] G Tekinalp, "The 2007 Turkish code concerning Private International Law and International Civil Procedure", *YBPIL*, (2007) at 341.

[57] The condition was officially suppressed by the reform of 2008 (Act of 5 December 2008 on amendment of the Code of Civil Procedure and other acts (Official Journal of 30 December 2008)).

[58] Japanese courts as well as the practice of family registration (Circular Notice No. 280 of 14 January 1976) abandoned subjecting foreign divorces to a control of choice of law. For an overview see, Y Okuda, Divorce, "Protection of Minors, and Child Abduction in Japan's Private International Law", *in Japanese and European Private International Law in Comparative Perspective* (Mohr Siebeck, 2008) at 311.

[59] Cass. Civ. 20 févr. 2007, *Rev. Crit. DIP*, pp. 420ff, note B. Ancel et H. Muir Watt; *Clunet*, 2007, pp. 1195ff, note F.-X. Train. See also, B. Ancel et H. Muir Watt, "Les jugements étrangers et la règle de conflit de lois: chronique d'une séparation", *in Mélanges en l'honneur de Hélène Gaudement-Tallon* (Dalloz, 2008) pp. 133ff; M.-L. Niboyet, "L'abandon du contrôle de la compétence législative indirecte", *Gaz. des Palais* (2007), pp. 1387ff; L D'Avout & S Bollée, "L'abandon du contrôle de la loi appliquée par les jugements étrangers", *Dalloz* (2007), pp. 1115ff. For an overview in English see, G Cuniberti, *supra* n 3 at 937–938.

[60] Tribunal de l'Arrondissement de Luxembourg, 10 January 2008 (No. 13/2008), quoted by P Kinsch, "Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law", *in Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven International Publishing 2010) p. 264.

[61] For example, the control of choice of law is still required in Portugal when the foreign judgment is rendered against a Portuguese national (Article 1100 (2)). See, C M F Da Silva, "De la reconnaissance et de l'exécution de jugements étrangers au Portugal", *in* G Walter & S P. Baumgartner, *supra* n 7, at 480–481; H Soares de Moura, Portugal, *in* D Campbell (ed), *International Execution Against Judgment Debtors*, Oxford, 2010, POR-8.

[62] F K. Juenger, *supra* n 7 at 34; G Walter & S P. Baumgartner, General Report, *supra* n 7 at 32–33.

[63] F K Juenger, "A Hague Judgments Convention?" *Brook. J. Int'l L.*, (1998) at 113.

[64] P Lagarde, "La réciprocité en droit international privé", *Recueil des cours* (1977) at 189.

[65] From this perspective, one author questions the compatibility of the reciprocity requirement with the parties' fundamental right of enforcement. See, P Kinsch, *supra* n 9, footnote (30).

[66] For example, L J. Silberman, "Some Judgments on Judgments: A View from America", *King's L.J.* (2008) at 261.

[67] See, W Zhang, "Recognition and Enforcement of Foreign Judgments in China: A Call for Spe-

cial Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"", *Chinese J. Int'l L.* (2013) pp. 143ff, *idem*, "Recognition of Foreign Judgments in China: The Essentials and Strategies", *YBPIL*, (2013-2014) at 333-336, who explains that Chinese courts will not recognize foreign judgments if there are no existing precedents of recognition of Chinese judgments no matter how liberal are the practice and the law in the rendering state.

[68] See, G E. Parra-Aranguren, "The Venezuelan Act on Private International Law of 1998", *YBPIL*, (1999) at 116.

[69] C Jessel-Holst, "The Bulgarian Private International Law Code of 2005", *YBPIL*, (2007) at 383.

[70] T Deskoski, "The New Macedonian Private International Law Act of 2007", *YBPIL*, (2008) at 456.

[71] See, M Czernis & P Mickiewicz, Poland, in Mills-Webb (ed.), *Shipping Law 2013* (ICLG, 2013) n°7.1.

[72] See Article 15 para.1 (f) of the new Czech PILA of 25 January 2012. However the solution is not new and has only been reiterated.

[73] See the Turkish PILC of 2007 Article 54 and 58. The solution however is not new since it was admitted in the old PILC of 1982.

[74] See, Article 101 (1) of the Slovenian PIL and Procedure Act of 1999; Article 92 of the Croatian PILA of 1991.

[75] D Martiny, *supra* n 54, at 397-398; W Wurmnest, "Recognition and Enforcement of U.S. Money Judgments in Germany", *Berk. J. Int'l L.* (2005) at 186-188.

[76] Supreme Court, Judgment of 7 June 1983, *Minshu*, Vol. 37 (5), at 611; *Jap. Ann. Int'l. L.*, 1984, pp. 119ff. See, Y Okuda, Recognition and Enforcement of Foreign Judgments in Japan, *YBPIL*, 2013-2014, at 417-418. Similar interpretation is adopted by Korean courts. See, K Hyun Sunk, "Recognition and Enforcement of Foreign Judgments In Korea", *YBPIL*, (2013-2014) at 433-434.

[77] Articles 952 (positive reciprocity), and 953 (negative reciprocity) of the former CCP of 1881 which are still applicable because the new CCP of 2000 contains no special rules on recognition of foreign judgments.

[78] F Ramos Romeu, "Litigation under the Shadow of an Exequatur: The Spanish Recognition of U.S. Judgments", *Int'l Lawyer* (2004) at 947-949; J A Pérez Bevia, "Reconnaissance et exécution des décisions étrangères en marge de l'application des conventions de Bruxelles et Lugano – Rapport sur le droit espagnol", *in* G Walter & S P. Baumgartner, *supra* n 7, at 502-503.

[79] Osaka Hight Court decision of 9 April 2003, *Hanrei Jiho*, No. 1841 at 111; *Hanrei Taimuzu*, No. 1141 t 270; *Jap. Ann. Int'l. L*, 2005, pp. 171ff. See Y Okuda, *supra* n 76 at 417.

[80] Tel Aviv District court of 19 March 2012 (*Gazprom Transgaz Ochta Ltd. v. Double K Oil Products 1996 Ltd*). See, H Carmon, *Foreign Judgments In Israel: Recognition and Enforcement* (Springer, 2012) pp. 71-72.

[81] The Higher Regional Court of Berlin, Order of May 18 2006, File 20 Sch 13/04 (*German Züblin International Co. Ltd v. Wuxi Walker General Engineeering Co. Ltd.*). See, P Beckers, "German Court Takes First Step on Road to Mutual Recognition with China", available at http://www.

internationallawoffice.com/newsletters/detail.aspx?g=adddf577-7da5-4c00-ad45-4e597ec05809&redir=1 (last visited 27 October 2014).

[82] Case reported in Y Shen, *Resolution of Disputes between Foreign Banks and Chinese Sovereign Borrowers: Public and Private International Law Aspects* (Kluwer Law International, 2000) pp. 159-162.

[83] See J F. Coyle, "Rethinking Judgments Reciprocity", *N. C. L. Rev.* (2014) pp. 1109ff.

[84] See, B Elbalti, "The Jurisdiction of Foreign Courts and the Enforcement of their Judgments in Tunisia: A Need for Reconsideration", *JPIL* (2012) at 208.

[85] See for example, F K. Juenger, *supra* n 7 at 13ff; G Droz, *supra* n 7 at 88ff.

[86] For further developments, see, B Elbalti, *supra* n 84 pp. 210ff.

[87] A Cornec & J Losson, "French Supreme Court Restates Rules on Jurisdiction, Recognition and Enforcement of Foreign Decisions in Matrimonial Matters: A New Chance for Old Cases", *Fam. L. Q.* (2010) p. 84.

[88] See, T E. Carbonneau, "The French *Exequatur* Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (*Code Civil*) as Obstacles to the Enforcement of Foreign Judgments in France", *Hastings Int'l & Comp. L.R* (1979) pp. 307ff.

[89] Cass. Civ. 1re, 23 May 2006, *Prieur* case (which abolished the exclusive character of Article 15); cass. civ. 1re, 22 May 2007, *Fercometal* case (which abolished the exclusive character of Article 14).

[90] For further analyses, see G Cuniberti, *supra* n 3, pp. 934ff; A Sinay-Cytermann, "Etat des lieux sur les Articles 14 et 15 du code civil en droit international privé", in *Mélanges en l'honneur du Professeur Jean-Michel Jacquet*, (LexisNexis, 2013) pp. 434ff.

[91] Article 954 (2) of the former CCP. For further developments see, O A. Gonzalez-Arias, "The Enforcement of US Default Judgments in Spain", *Hastings Int'l & Comp. L.R.* (1986) pp. 97ff.

[92] See, T C. Hartley, *International Commercial Litigation* (Cambridge University Press, 2009) pp. 346ff.

[93] O A. Gonzalez-Arias, *supra* n 91.

[94] It is the "real and substantial connection test" adopted first in 1990 by *Morguard Investment Ltd. v De Savoy* ([1990] 3 SCR 1077) for the recognition and enforcement of interprovincial judgments. It was later extended to the recognition of foreign judgments in 2003 by *Beals v. Saldanha* ([2003] 3 SCR 416). *Contra*, see D Kenny, Re Flighlease: The 'Real and Substantial Connection' test for Recognition and Enforcement of Foreign Judgments Fails to Take Flight in Ireland, *ICLQ*, 2014, pp. 197ff. The solution is somehow similar with the one adopted by the French *cour de cassation* in 1985 in its famous *Simitch* decision when it declared that foreign courts should be deemed to have indirect jurisdiction whenever there existed "an actual connection (*lien caractérisé*) between the dispute and the country of the foreign court". See, G Cuniberti, *supra* n 3 at 933.

[95] Generally it is common to distinguish between the procedural and the substantive aspects of public policy. With regard to the procedural aspects, these usually include proper notice, the right of the defendant to be heard, the impartiality of the foreign judge etc... Despite the existence of disparity in the modalities of application of these aspects, it is possible to draw some general con-

clusions. For example, it is usually admitted that a proper notice should be timely and regularly served as to allow defendants to prepare their defense, or that procedure before foreign court should guarantee the right of the defendant to be heard and to be treated equally. As for substantive public policy, the concept can encompass a variety of notions such as fraud, mandatory law or even choice of law.

[96] F K. Juenger, *supra* n 7 at 21-23; G Walter & S P. Baumgartner, General Report, *supra* n 7 at 28.

[97] In most of legal systems, there is no statutory definition of public policy. Therefore, the meaning of requirement mostly depends on the peculiar historical and cultural environment of a certain legal system. See G Walter & S P. Baumgartner, General Report, *supra* n 7 at 10-11, 28-30.

[98] See P.D. Ttrooboff, "Ten (and probably more) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons, in J J. Barcelo III & K M. Clermont (ed.), *A Global Law of Jurisdiction and Judgments: Lessons from the Hague*, (Kluwer Law International, 2002), pp. 262ff.

[99] Either because of their nature (criminal but not civil) or because of their function (punitive but not compensatory). This approach is affirmed by court decisions in Germany, Japan and Italy. See, H D Tebbens, "Punitive Damages: Towards a Rule of Reason for U.S. Awards and their Recognition Elsewhere", *in Liber Fausto Pocar* (Giuffré, 2009) pp. 273ff.

[100] Many voices are asking for a change in perspective by adopting a more lenient approach towards punitive damages. In Germany, see V Behr, "Myth and Reality of Punitive Damages in Germany", *J.L & Com.* (2005) pp. 197ff; M Tolani, "US Punitive Damages before German Courts: A Comparative Analysis with respect to the Ordre Public", *Ann. Survey Int'l & Comp. L.* (2011) pp. 185. In Japan, see T Kono, "International Civil Procedure law, Recognition of Foreign Judgments, Punitive Damages", in *Business Law in Japan, Writings in Honour of Harald Baum* (Kluwer Law International, 2012) at 743.

[101] This approach is admitted in France, Spain, Greece and Switzerland. See, C I Nagy, "Recognition and Enforcement of US Judgments Involving Punitive Damages in Continental Europe", *Nederlands Internationaal Privaatrecht* (2012) pp. 4ff. Although the final outcome differed between jurisdictions that actually recognized and enforced punitive damages awards (Spain and Switzerland) and jurisdictions that did not (France and Greece), the adopted approach is quite similar.

[102] For further analysis see, C I Nagy, *supra* n 101, p. 10. Cf. H Gaudemet-Tallon who considered that in the light of recent developments, punitive damages cannot be possible declared as a rule contrary to the public policy of the forum; *in rev. crit. DIP*, 2010, at 100.

[103] See for example, P Jenard, "*Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*", 1979 O.J. C 59/6, stating all the questionable rules that should be eliminated by Brussels Convention among contracting states. See also, M Dogauchi, "The Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters from a Perspective of Japan", *Japanese Yearbook of PIL*, (2001) at 97 stating that the elimination of impediments to the recognition of Japanese judgments abroad is one of the most important objectives of Japan. As examples of these impediments, he gave exam-

ples of rules treated in this paper.

[104] In the same sense, F K. Juenger, *supra* n 7 at 26, 37.

[105] For further analysis see, A Mills, "The Identities of Private International Law: Lessons from the U.S and the EU Revolutions", *Duke J. Comp. & Int'l L.* (2013) at 445ff; Th.M. de Boer, "Living Apart Together: The Relationship between Public International Law and Private International Law", *NILR* (2010) at 183ff. P Mayer, "Le phénomène de la coordination des ordres étatiques en droit privé", *Collected Courses* (2007) pp. 95ff, *idem*, "Droit international privé et droit international public sous l'angle de la notion de compétence", *rev. crit. DIP* (1979), pp. 1ff, 349ff, pp. 537ff.

[106] In addition to the references *idem*, see among others, Ph. Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé* (Sirey, 1958) pp. 117ff; D Holleaux, *Compétence du juge étranger et reconnaissance des jugements* (Dalloz, 1970) pp. 203ff; D Bureau & H Muir Watt, *Droit International Privé, 3ᵉ éd. t.1* (Paris, 2014) pp. 80ff.

[107] For instance, choice of law rules used to be regarded as delimiting the legislative jurisdiction between national and foreign sovereigns. When a choice of law rule designates a foreign law, it is understood that the question at issue belongs to the sovereignty of the foreign state, and any disregard to the application of the foreign law entails an encroachment on the sovereignty of the foreign state. Similarly, rules of adjudicatory jurisdiction used to be considered as delimiting the territorial reach of judicial sovereignty. See, P Mayer, "Droit international privé et droit international public sous l'angle de la notion de compétence" *supra* n 105 pp. 13ff.

[108] A Briggs, "The Principle of Comity in Private International Law", *Collected Courses* (2012), p. 145ff. But, according to the common law tradition, the application of the principle of sovereignty, which is not based on the fear of foreign sovereignties but on their respect, has led to a different result i.e. the respect of foreign judgments rendered by sovereign with appropriate jurisdiction. A. Briggs, *id.* See also, F K Juenger, *supra* n 7, pp. 9ff; H. L. Ho, "Policies Underlying the Enforcement of Foreign Commercial Judgments", *ICLQ* (1997) pp. 448.

[109] See, S P. Baumgartner, "Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad", *N.Y.U.J. Int'l L. & Pol.* (2013) pp. 965ff.

[110] See article 121 of the French *Code Michaud* of 1629 which clearly stated that foreign judgments had no effect in France. The only exception to this rule was to conclude international convention with neighbouring foreign states.

[111] For example, in the famous *Munzer* case (*supra* n 36) by which the practice of *revision* was abolished, the *cour de cassation* nevertheless declared that the objective of the exequatur proceeding is to protect the interests of the French Republic.

[112] See, L B. Childs, "Shaky Foundations: Criticism of Reciprocity and the Distinction between Public and Private International Law", *N.Y.U.J. Int'l L.P.*, (2006) pp. 221 s.

[113] For example, M Antonov, "Theoretical Issues of Sovereignty in Russia and Russian Law", *Rev. Central & East Eu. L.* (2012), pp. 95ff. In this respect, the enforcement of punitive damages awards is very illustrative. Indeed the quasi-public law (penal) nature of these damages is usually presented as the main reason to rule them out. In addition, even when their civil law character is admitted, their recognition is regarded as a threat to the judicial integrity of the recognition state.

[114] For further analyses see, P Mayer, "Droit international privé et droit international public sous l'angle de la notion de compétence", *supra* n 105.

[115] See, Ph. Francescakis, *supra* n 106.

[116] J Guillaumé, "The Weakening of the Nation-State and Private International Law: The "Right to International Mobility"", *YBPIL* (2012-2013), pp. 519ff; J Basedow, The Effects of Globalization on Private International Law, *in* J Basedow & T Kono (ed.), *Legal Aspects of Globalization: Conflicts of Laws, Internet, Capital Markets and Insolvency in a Global Economy* (Kluwer Law International, 2000), pp. 1ff.

[117] This does not mean that interests of the states are no longer taken into consideration, but simply means that these interests are relegated to a position of secondary importance. See, P Mayer, *supra* n 105, p. 110

[118] E Jayme, "Recognition of Foreign Judgments: International Jurisdiction of Foreign Courts Revisited", in *Etudes en l'honneur de Roberto Ago*, IV, Giuffré, 1987, pp. 139ff.

[119] G Walter & S P. Baumgartner, General Report, *supra* n 7, at 38.

[120] G Walter & S P. Baumgartner, General Report, *ibid* at 40.