ARTICLE

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The Hague Judgments Convention versus national regimes of recognition and enforcement: a comparison between the Convention and the Belgian Code of Private International Law

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Abstract

The adoption of the Hague Judgments Convention marks a landmark step in the Judgments Project that the Hague Conference on Private International Law has undertaken since 1992 in the context of transnational disputes in civil and commercial matters. The creation of a uniform set of core rules on the recognition and enforcement of foreign judgments in a cross-border civil and commercial setting promotes effective access to justice and facilitates multilateral trade, investment, and mobility. As far as Belgium is concerned, in the relationship with other non-EU Contracting States the Convention will replace the Code of Private International Law that since 2004 has governed the recognition and enforcement of third State judgments in Belgium. The entry into force of the Convention calls for a comparison of the Convention's regime with that of the Code of Private International Law. As the two instruments fall within the same ballpark in terms of their openness and given the Convention's deferral to more favourable domestic rules, the Convention adds another avenue through which a successful party can enforce its foreign judgment in Belgium. From the Belgian perspective the potential circulation of Belgian judgments in other Contracting States with stringent national rules on enforcement perhaps constitutes the most considerable benefit of the Convention.

1. Introduction

On 1 September 2023 the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019 (Hague Judgments Convention) entered into force between the European Union (Denmark excluded) and Ukraine, triggered by the ratification by Ukraine and the accession by the European Union, both on 29 August 2022.[1]

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1 The text of the Convention and its status table can be found on the website of the Hague Conference: https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

There is already abundant scholarship discussing various aspects of the Convention.[2] In this contribution we compare the Convention's regime for recognition and enforcement with the current regime for recognition and enforcement of judgments laid down in the Belgian Code of Private International Law of 2004 (CPIL).[3] Currently, judgments in civil and commercial matters from third countries are, in the absence of a treaty, recognised and enforced in Belgium in accordance with the provisions of the CPIL. The Hague Judgments Convention will replace the CPIL as the governing instrument in the relationship between Belgium and third countries that are also Contracting States to the Convention. The Brussels I*bis* Regulation[4] remains applicable for the recognition and enforcement of civil and commercial judgments within the European Union as it takes precedence over the Convention (Art. 23.4 Hague Judgments Convention).[5]

It should be remarked that, subject to Article 6, the Convention does not prevent the recognition or enforcement of judgments under national law (Art. 15). With the exception of judgments regarding rights *in rem* in immovable property (Art. 6, see *infra* sect. 4.7), the party seeking recognition and enforcement may therefore base its request on the national regime, i.e. in Belgium the CPIL, if that is more favourable. The non-exclusive nature of the Convention makes the need for a comparison with the recognition and enforcement scheme of the CPIL even more essential.

2. Scope

According to Article 1.1 the Convention applies to the recognition and enforcement of judgments in civil or commercial matters. It does not extend in particular to revenue, customs or administrative matters. The Convention defines a judgment as any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under the Convention (Art. 3.1, b)).

The notion 'decision on the merits' implies contentious judicial proceedings in which a court disposes of the claim. The Convention does not make a distinction between monetary judgments and non-monetary judgments. Both can be recognised and enforced under

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2 See the bibliography for the instrument on the website of the Hague Conference (https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=137) as well as the Repository offered by the blog conflictoflaws.net (https://conflictoflaws.net/2023/update-repository-hcch-2019-judgments-convention-4/).

3 *Wet van 16 juli 2004 houdende het Wetboek van internationaal privaatrecht* [Law of 16 July 2004 on the Code of Private International Law], *BS* 27 July 2004, 57344. For an English translation of this instrument see the translation by C. Clijmans and P. Torremans, to be found at https://www.ipr.be/nl/wetgeving.

4 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 2012, L 351/1–32.

5 The Lugano Convention of 30 October 2007 similarly also remains applicable in the relationship between the EU and Switzerland, Norway and Iceland (Art. 23.2 Hague Judgments Convention).

the Convention.[6] Procedural rulings, such as decisions ordering the disclosure of documents or the hearing of a witness, *ex parte* orders for payment concerning uncontested pecuniary claims, decisions on the recognition and enforcement of foreign judgments or arbitral awards and enforcement orders, such as garnishee orders or orders for the seisure of property, do not qualify as judgments.[7] The Convention further explicitly determines that an interim measure of protection is not a judgment (Art. 3.1, b), final sentence). An order freezing the defendant's assets, an interim injunction or an interim order for payment therefore cannot be recognised or enforced under the Convention.[8] Injunctions that qualify as final and conclusive judgments on the merits, such as permanent injunctions, or final injunctive relief, are covered by the Convention.[9]

Furthermore, an extensive list of matters are excluded from the scope of the Convention (Art. 2.1). These include *inter alia* maintenance obligations, matrimonial property regimes, wills and successions, insolvency, the validity, nullity, or dissolution of legal persons and the validity of decisions of their organs. There are also a number of very notable exclusions: the carriage of passengers and goods, defamation, privacy, intellectual property and competition matters (with certain exceptions). The Convention also does not apply to arbitration and related proceedings (Art. 2.4). In contrast to the Hague Convention of 30 June 2005 on Choice of Court Agreements (Hague Choice of Court Convention), employment and consumer disputes do fall within the scope of the Judgments Convention.

Article 18 even allows Contracting States to further narrow the scope of the Convention.[10] Where a State has a strong interest in not applying the Convention to a specific matter, that State may declare that it will not apply the Convention to that matter (Art. 18.1). With regard to that matter, the Convention consequently does not apply in the Contracting State that made the declaration and in other Contracting States where the recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought (Art. 18.2). The European Union has made such a declaration. It will not apply the Convention to non-residential leases (tenancies) of immovable property situated in the European Union (see further *infra* sect. 4.7).

The scope of the CPIL is much broader. This is logical as it is the fallback instrument in the absence of international treaties, EU law or special statutes. According to its Article 2 the CPIL 'regulates in an international situation […] the conditions for the effect in Belgium of foreign judgments and authentic instruments in civil and commercial matters […]'. The CPIL is the instrument that governs the recognition and enforcement of all third country civil and

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6 F. Garcimartin, 'The Judgments Convention: Some Open Questions', *Netherlands International Law Review* (67/1) 2020, p. 21.

7 Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters by F. Garcimartin and G. Saumier, p. 73, no. 95.

8 Ibid., p. 75, no. 99.

9 J. Jang, 'The Public Policy Exception Under the New 2019 HCCH Judgments Convention', *Netherlands International Law Review* (67/1) 2020, no. 1, p. 107.

10 Art. 19 also permits a Contracting State to declare that it will not apply the Convention to judgments arising from proceedings involving that State or a government agency thereof, or a natural person representing that State or governmental agency. Art. 29 further allows States not to enter into treaty relations with other Contracting States if trust in the counterpart's legal system is lacking.

commercial judgments, irrespective of the subject matter. The term judgment is defined as any decision rendered by an authority exercising judicial power (Art. 22 §3, 1°). This neutral definition should be given a broad interpretation.[11] Arbitral awards are not considered to be judgments in the sense of Article 22.[12] The CPIL does not contain a list of exclusions. It thus covers the widest range of civil and commercial matters.

3. Architecture and general principles

The Hague Judgments Convention applies to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State (Art. 1.2). A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of the Convention and may only be refused on the grounds specified in the Convention (Art. 4.1). A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin (Art. 4.3).

A judgment is eligible for recognition and enforcement if one of the bases of (indirect) jurisdiction under Articles 5 and 6 are fulfilled. In the event that the rendering court accepted jurisdiction on another ground of jurisdiction, the judgment can still circulate as long as one of the listed grounds of jurisdiction are met.[13] Even if the judgment passes one (or more) of these 'jurisdiction filters', it can still be refused recognition and enforcement pursuant to the grounds of refusal found in Article 7. The Convention explicitly states that there shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of the Convention (Art. 4.2). A re-examination of the facts and laws is thus prohibited. Only an examination of the conditions for recognition and enforcement should be undertaken: this includes the characterisation as a civil or commercial matter, the factual and legal basis of the grounds of indirect jurisdiction, and any grounds for refusing recognition or enforcement.[14]

In the CPIL the relevant provisions dealing with the recognition and enforcement of judgments are Articles 22 to 25. A foreign judgment is recognised in Belgium, in whole or in part, without the need for any procedure (Art. 22 §1, para. 2). A foreign judgment, provided that it is enforceable in the State in which it was rendered, is declared enforceable in whole or in part in Belgium, in accordance with the procedure set out in Article 23 (Art. 22 §1, para. 1).

However, the judgment may only be recognised or declared enforceable if it does not violate the conditions laid down in Article 25 (Art. 22 §1, para. 4). Article 25 in essence contains a list of grounds for the refusal of recognition and enforcement. Although the text of the Article is silent on the issue, it is assumed that the requested court has to examine the existence of a ground

11 H. Storme, 'Artikel 22 WIPR', in: I. Couwenberg, A. Hansebout & L. Vanfraechem (eds.), *Duiding Internationaal Privaatrecht* [Interpretation of Private International Law], Ghent: Larcier 2014, p. 653.

12 P. Wautelet, 'Le nouveau régime des décisions étrangères dans le Code de droit international privé', *P&B* 2004, p. 210.

13 A. Bonomi & C. Mariottini, '(Breaking) news from the Hague – A game changer in international litigation? Roadmap to the 2019 Hague Judgments Convention', *Yearbook of Private International Law* 2018-2019, p. 550.

14 Jang 2020, p. 101 (see note 9).

for refusal *ex officio*.[15] Compared to the Hague Judgments Convention, the CPIL does not lay down jurisdictional filters that the judgment has to comply with. Two grounds for refusal do, however, indirectly impose requirements on the jurisdiction of the court of origin (Art. 25 §1, 7° and 8° CPIL, see *infra* sects. 4.7 and 4.8). As under the Hague Judgments Convention, a review of the merits of the foreign judgment is prohibited (Art. 25 §2).

4. Grounds for refusal

To gain an insight into the differences between the regime of the Hague Judgments Convention and that of the CPIL, it is necessary to compare the grounds for refusal in both instruments. For this analysis we start with the refusal grounds of the CPIL and subsequently compare them with the provisions of the Convention.

The grounds for the refusal of recognition and enforcement are laid down in Article 25 §1 of the CPIL. Article 25 CPIL lists in an exhaustive manner the circumstances in which a foreign judgment may not be recognised or declared enforceable.[16] It should be noted that refusal is obligatory ('shall') and not discretionary if one of the refusal grounds is triggered. In the Judgments Convention the refusal grounds are to be found in Article 7.[17] These are optional ('may') in the sense that, even if the requirements of one of the grounds are fulfilled, the requested court is under no obligation to deny recognition and enforcement. The non-mandatory nature of the refusal grounds under the Convention is not affected by the stricter formulation of the CPIL so that the Belgian courts, when applying the Convention, are not under an obligation to deny recognition and enforcement. Both the CPIL and the Convention allow for the partial recognition and enforcement of the foreign judgment.[18]

4.1 Public policy

Under Article 25 §1, 1° CPIL a foreign judgment shall not be recognised or declared enforceable if the result of the recognition or enforceability would be manifestly incompatible with public policy. The provision further specifies that upon determining the incompatibility with the public policy special consideration is given to the extent to which the situation is connected to the Belgian legal order and the seriousness of the consequences, which will be caused thereby.

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15 H. Boularbah, *Requête unilatérale et inversion du contentieux*, Brussels: Larcier 2010, p. 593.

16 Storme 2014, p. 661 (see note 11).

17 There is an additional refusal ground for purely internal disputes but it is only available if a Contracting State makes a declaration. According to Art. 17 a State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State. There is no equivalent refusal ground in the CPIL.

18 Art. 22 §1, paras. 1 and 2 CPIL make it clear that recognition and the declaration of enforceability can pertain to part of the judgment. Under Art. 9 of the Convention recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or if only part of the judgment is capable of being recognised or enforced.

This ground corresponds with Article 7.1, c) of the Hague Judgments Convention which allows for refusal if recognition and enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State. The public policy defence encompasses both procedural and substantive elements.[19] The reference to State sovereignty or security is no more than an example of the fundamental interests forming the content of public policy.[20] The mentioning of the 'fundamental principles of procedural fairness' is an expression of procedural public policy. In addition, the Judgments Convention has a separate refusal ground for judgments obtained by fraud (Art. 7.1, b)). Both procedural and substantive fraud are covered under this provision.[21] Under the CPIL fraud is not treated as a self-standing defence to recognition and enforcement but is subsumed within the public policy exception.[22] Also Article 7.1, a) on notice, Article 7.1, e) and f) on conflicting judgments and Article 7.2 on parallel proceedings (for all these see *infra*) within the Judgments Convention are clarifications of procedural public policy.[23]

In a private international law setting the public policy exception equates to international public policy. Despite its name, international public policy is a national concept.[24] In Belgium, international public policy is defined as principles that are essential to Belgium's moral, political or economic order.[25] The Hague Judgments Convention and the CPIL allow the requested court to verify whether the effects of granting recognition and enforcement would infringe the essential values of its domestic law. Both instruments do, however, employ a high threshold for the application of the public policy defence. The violation of public policy has to be manifest.[26] This ensures that the use of the public policy exception is restricted to cases in which the recognition and enforcement of the foreign judgment would be 'blatantly contrary to the fundamental values' of the forum State and giving effect to the judgment risks creating 'truly intolerable' consequences.[27] Where Article 25 §1, 1° CPIL explicitly determines that the extent to which the situation is connected to the Belgian legal order must be taken into account, this internal connection (*Inlandsbeziehung*) between the situation and the requested State is according to Jang implicit in Article 7.1, c) of the Hague Convention.[28] In sum, there is no material

19 M. Jovanovic, 'Thou Shall (Not) Pass – Grounds for Refusal of Recognition and Enforcement under the 2019 Hague Judgments Convention', *Yearbook of Private International Law* 2019-2020, p. 323.

20 Jang 2020, p. 103 (see note 9).

21 Explanatory Report, p. 118, no. 256 (see note 7).

22 I. Couwenberg, 'Tenuitvoerlegging in België van buitenlandse beslissingen' [Enforcement of foreign judgments in Belgium], in: M. Pertegas, S. Brijs & L. Samyn, *Betekenen en uitvoeren over de grenzen heen* [Service and execution across the borders], Antwerp: Intersentia 2008, p. 113; cf. Explanatory Report, p. 118, no. 255 (see note 7).

23 Jang 2020, pp. 98-99 (see note 9).

24 J. Dollinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws', *Texas International Law Journal* (17) 1982, p. 170; J. Kramberger Škerl, 'European Public Policy (with an Emphasis on Exequatur Proceedings)', *Journal of Private International Law* 2011, p. 462.

25 Court of Cassation 29 April 2002, *R.W.* 2002-2003, p. 862.

26 Storme 2014, p. 661 (see note 11).

27 Jovanovic 2019-2020, p. 323 (see note 19).

28 Jang 2020, p. 100 (see note 9). Jang does not offer any arguments for this assertion.

difference between the CPIL and the Convention in terms of the public policy exception: both instruments allow the requested court to test the acceptability of the foreign judgment in light of the fundamental principles contained in its own international public policy. Despite the autonomous interpretation that should be given to the Convention, it seems unlikely that the standard developed under the Convention will differ from the one under the CPIL.

When confronted with judgments from abroad in which punitive or exemplary damages were awarded, public policy is traditionally the yardstick that is used to determine whether to give effect to this alien remedy in the forum. As far as we are aware there are no Belgian (published) cases deciding on the enforcement of foreign punitive damages under the CPIL.[29] It remains to be seen how the Belgian courts would assess this legal institution's compatibility with the Belgian *ordre public*.[30] Article 10 of the Convention is explicitly devoted to punitive damages. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered (Art. 10.1). The Convention leaves the door open for Contracting States to reject punitive damages but orders the enforcing court to examine whether and to what extent the damages awarded serve to cover costs and expenses relating to the proceedings (Art. 10.2). To the extent that they pursue compensation, punitive damages should be granted enforcement.[31]

4.2 Violation of the rights of the defence

Article 25 §1, 2° CPIL provides that a foreign judgment shall not be recognised or declared enforceable if the rights of the defence were violated. The use of a refusal ground separate from the public policy exception emphasises that the procedural quality of the foreign judgment is at least as important as its substantive quality. It furthermore implies that a stringent check of the rights of the defence always needs to be undertaken, irrespective of the degree of the connection of the case with the Belgian legal order. The criteria used under Article 25 §1, 2° CPIL, namely the extent to which the situation is connected to the Belgian legal order and the seriousness of the consequences of recognition and enforcement, do not come into play.[32] This refusal ground has in common with the public policy exception that the assessment takes place *in concreto*: the court cannot resort to an assessment of abstract rules or of the foreign legal order but must verify whether the fundamental rights of the defence have been respected. Another common feature is that only the infringement of *fundamental* principles of Belgian law can justify a

29 This in contrast to the neighbouring countries of France and Germany where the issue has emerged in the case law and the literature. For an extensive discussion of those two countries: C. Vanleenhove, *Punitive Damages in Private International Law – Lessons for the European Union*, Cambridge – Antwerp – Portland: Intersentia 2016, pp. 99-108 and 123-138.

30 In the past we have suggested a number of guidelines for European judges on how to respond to requests for the enforcement of punitive damages: Vanleenhove 2016, pp. 210-236 (see note 29) and C. Vanleenhove, 'A normative framework for the enforcement of U.S. punitive damages in the European Union: transforming the traditional "¡No Pasarán!"', *Vermont Law Review* (41/2) 2016, pp. 377-401.

31 Vanleenhove 2016, pp. 215-220, nos. 501-508 (see note 29).

32 Storme 2014, p. 664 (see note 11).

refusal of recognition and enforcement.[33] The rights of the defence are determined according to Belgian procedural law.[34] One of the fundamental principles of Belgian law requires that the defendant is able to organise its defence in a timely and effective manner. The defendant has to be summoned in such a way that gives it the opportunity to prepare its defence.[35]

The refusal ground of Article 25 §1, 2° CPIL seems to be covered by Article 7.1, a) and c) of the Hague Judgments Convention. Both provisions demand respect for fundamental principles of procedural law. Article 7.1, a) deals with improper service and provides that recognition or enforcement may be refused if the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim, (i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence,[36] or (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents. The appropriateness and timeliness of the notice are factual questions that should be subject to an autonomous interpretation, leading to a common understanding.[37] As is the case under the CPIL,[38] Belgian judges will be bound by the standards of Article 6, para. 1 European Convention on Human Rights when applying Article 7.1, a).[39] Article 7.1, c) specifies that the public policy exception encompasses situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of the requested State.

4.3 Evasion of the law (fraude à la loi)

Article 25 §1, 3° CPIL lays down that a foreign judgment shall not be recognised or declared enforceable if, in a matter in which parties cannot freely dispose of their rights, the judgment is only obtained to evade the application of the law designated by the CPIL. In the context of the applicable law, the evasion of the law is also addressed in Article 18 CPIL. This Article provides that, for the determination of the applicable law in a matter where parties may not freely dispose of their rights, facts and acts committed with the sole purpose of evading the application of the law designated by the CPIL are not taken into account. For the field of conflict of laws this rule reflects the more general principle of *fraus omnia corrumpit*. The court has the possibility to ignore connecting factors that the parties have artificially created with the sole purpose of escaping from the applicable law that would normally apply.[40] The connecting factor can be

33 Ibid.

34 Court of Cassation 5 January 1995, *Arr.Cass.* 1995, 15, *Pas.* 1995, I, 15.

35 Court of Cassation 11 December 1995, *Rev.dr.étr.* 1996, 185, note M.-C. Foblets, *RW* 1995-96, 1339, note J. Erauw.

36 Unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested.

37 N. Meier, 'Notification as a Ground for Refusal', *Netherlands International Law Review* (67/1) 2020, pp. 87 and 90.

38 J. Erauw and co-authors, *Internationaal Privaatrecht* [Private International Law], Mechelen: Kluwer 2009, p. 282, no. 208.

39 Meier 2020, p. 93 (see note 37).

40 M. Traest, 'Artikel 18 WIPR' [Art. 18 Code of Private International Law on the Evasion of the Law], in: J. Erauw, M. Fallon, E. Guldix, J. Meeusen, M. Pertegas, H. Van Houtte, N. Watté & P. Wautelet (eds.),

wholly fictitious or can correspond to reality but solely be created in order to evade the law designated by the CPIL. When the change of the connecting factor also pursues other objectives or when the party accepts all consequences of the change, Article 18 cannot be applied. The intention of the parties therefore plays a crucial role.[41]

When dealing with requests for recognition and enforcement, the verification of law evasion does not entail an investigation of the law applied by the foreign court. Therein lies the difference with the recognition and enforcement of foreign authentic instruments: in order to obtain legal effect in Belgium the validity of such instruments needs to be established in accordance with the law that is applicable by virtue of the CPIL (Art. 27 §1, para. 1). Article 25 §1, 3° CPIL applies to the recognition and enforcement of foreign judgments and disapproves of illicit forum shopping.[42] The refusal ground is only triggered if the parties had the intention to escape from the law designated by the conflict of law rules of the CPIL and evasion was the sole reason for bringing the case before the foreign court. These subjective criteria reduce the number of judgments that will be blocked on the basis of this ground.[43] The ground for refusal based on an evasion of the law does not have an equivalent in the Hague Judgments Convention,[44] but it could be argued that a case of law evasion can be dealt with through the fraud (Art. 7.1, b)) or public policy exception (Art. 7.1, c)).

4.4 Judgment still subject to ordinary recourse in the State of origin

Only foreign judgments that are enforceable in the State of origin are declared enforceable in Belgium (Art. 22 §1, para. 1 CPIL). According to Article 25 §1, 4° CPIL a foreign judgment shall not be recognised or declared enforceable if, according to the law of the State where the judgment was rendered and without prejudice to Article 23 §4, the judgment would still be subject to an ordinary recourse in the State of origin. It is the law of the rendering court that determines whether a remedy has an 'ordinary' character.

The reference to Article 23 §4 CPIL intends to take the provisional enforceability of a foreign judgment into account. This provision states that the foreign judgment subject or open to an ordinary recourse can be enforced provisionally and that the judge may make the enforcement subject to the provision of a guarantee. It is surprising to refuse the granting of enforceability to a foreign judgment that can still be overturned in the rendering State, on the one hand, and to allow (provisional) enforcement measures on the basis of that judgment, on the other. There are two ways out of this internal contradiction caused by unfortunate drafting. The first is to interpret Article 23 §4 CPIL as allowing conservatory measures and not enforcement measures.[45] The second is to give precedence to Article 23 §4 CPIL (thereby stripping Article

Het Wetboek Internationaal Privaatrecht becommentarieerd – Le Code de Droit International Privé commenté, Antwerp – Oxford/Brussels: Intersentia/Bruylant 2006, p. 97.

41 Ibid., p. 99.

42 Erauw 2009, p. 283, no. 209 (see note 38).

43 Storme 2014, pp. 665-666 (see note 11).

44 Although Jang seems to see some room for the defence of the evasion of the law to apply as part of the general principles that stand in the background of the Convention in the event of an abuse of the jurisdictional filters: Jang 2020, p. 105 (see note 9).

45 Wautelet 2004, pp. 222-223 (see note 12).

25 §1, 4° CPIL of its significance) and to allow the granting of enforceability and consequently (fully-fledged and thus not 'provisional', as it is unclear how enforcement measures can only be provisional) enforcement to judgments open to an ordinary recourse and provisionally enforceable in the State of origin.[46]

The Hague Judgments Convention does not contain a refusal ground similar to Article 25 §1, 4° CPIL. Under the Convention a judgment shall be recognised only if it has effect in the State of origin and shall be enforced only if it is enforceable in the State of origin (Art. 4.3). The Convention thus does not require that the judgment be 'final and conclusive' because there is no uniform definition of this status across different nations.[47] However, if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, recognition or enforcement may be postponed or refused (Art. 4.4, first sentence).[48] Ordinary review is not defined in the Convention and does not seem to be left to the law of the court of origin as is the case under the CPIL. It includes any review that: (i) may result in a change to the judgment; (ii) is part of the normal course of an action and therefore a step any party must reasonably expect; and (iii) under the law of the State of origin, can only occur before the expiry of a certain period of time, which typically runs from either the date of the judgment or the date of the notification of the judgment to the judgment debtor.[49] It can be concluded that – in our opinion at least – the two instruments deal with judgments open to appeal in a comparable fashion. Under both the CPIL and Convention judgments against which ordinary review is still possible in the country of origin can be recognised and enforced.

4.5 Judgment irreconcilable with a Belgian decision or an earlier foreign decision amenable to recognition in Belgium

According to Article 25 §1, 5° CPIL a foreign judgment shall not be recognised or declared enforceable if it is irreconcilable with a Belgian decision or an earlier foreign decision that is amenable to recognition in Belgium. The provision uses the term 'decision' ('*beslissing*') instead of 'judgment' ('*rechterlijke beslissing*') as defined in Article 22 §3, 1° CPIL. The notion of a 'decision' is broader than a 'judgment' and encompasses arbitral awards.[50]

In order to block the recognition and enforcement of a foreign judgment the Belgian decision must no longer be open to an appeal. The date of the Belgian decision is irrelevant: the decision may be rendered after the foreign judgment. The recognition and enforcement of a foreign judgment can also be refused on the basis of another foreign decision if the latter is older and amenable to recognition in Belgium.[51]

Under the Convention recognition or enforcement may be refused if the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same

46 Storme 2014, pp. 667-668 (see note 11). The same conclusion is reached by Erauw, without delving into the interpretation problems: Erauw 2009, p. 285, no. 210 (see note 38).

47 Explanatory Report, p. 83, no. 129 (see note 7).

48 A refusal, however, does not prevent a subsequent application for recognition or enforcement of the judgment (Art. 4.4, second sentence).

49 Explanatory Report, p. 84, no. 130 (see note 7).

50 Storme 2014, p. 669 (see note 11).

51 Storme 2014, pp. 668-669 (see note 11).

parties (Art. 7.1, e)) or the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State (Art. 7.1, f)). Article 7.1, e) and f) refer to a local or foreign 'judgment'. As opposed to the CPIL, an arbitral award cannot form the basis to reject the circulation of a foreign judgment.[52] Furthermore, the Convention narrows the scope of the refusal ground by requiring that the local judgment was given in a dispute between the same parties. For a foreign judgment there are more requirements than under the CPIL. Besides being older than the other foreign judgment and fulfilling the conditions for recognition in the forum State, the foreign judgment also needs to be rendered between the same parties and on the same subject matter. The Convention attaches more qualifications to the decisions that are deemed capable of preventing the recognition and enforcement of foreign judgments and thereby restricts the ambit of the refusal grounds to a larger extent than the CPIL. In other words, the Convention is more tolerant on this point as it puts less obstacles in the way of the circulation of the judgments of other Contracting States. The Convention renders reliance on Article 25 §1, 5° CPIL futile.

4.6 Pending litigation in Belgium

The CPIL lays down that recognition and enforcement should be refused if the claim was brought abroad after a claim, which is still pending between the same parties and with the same subject matter, was brought in Belgium (Art. 25 §1, 6° CPIL). The judgment emanating from foreign proceedings brought after the commencement of pending Belgian proceedings between the same parties and with the same cause of action will not be recognised and enforced in Belgium. When the Belgian proceedings come to an end, Article 25 §1, 5° CPIL can then kick in.[53]

The Hague Judgments Convention employs an almost identical ground for refusal. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where (a) the court of the requested State was seised before the court of origin and (b) there is a close connection between the dispute and the requested State. A refusal, however, does not prevent a subsequent application for recognition or enforcement of the judgment (Art. 7.2). The Convention allows for a refusal but also for a postponement. The main difference with the CPIL lies in the fact that there must be a close connection between the pending procedure and the forum State. This condition prevents a potential defendant's pre-emptive strategy of commencing a lawsuit in the forum State on exorbitant jurisdictional grounds with a view to shielding itself from the future recognition and enforcement of a judgment flowing from proceedings that the claimant intends to commence abroad. The indirect grounds of jurisdiction under Article 5 satisfy the 'close connection' test but there may be others than those listed there. Mere nationality of or domicile in the requested State would not be sufficient.[54] Again, by imposing additional requirements, the Convention narrows the relevance of this refusal ground, thus paving the way for more judgments to enter the territory of the forum.

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52 Jovanovic 2019-2020, p. 325 (see note 19).

53 Storme 2014, p. 669 (see note 11).

54 Explanatory Report, p. 124, no. 275 (see note 7).

4.7 Exclusive jurisdiction of Belgian courts

Under Article 25 §1, 7° CPIL a foreign judgment shall not be recognised or declared enforceable if the Belgian courts had exclusive jurisdiction to hear the claim. On the basis of Article 24.1 of the Brussels I*bis* Regulation the Belgian courts have exclusive jurisdiction to rule on rights *in rem* in immovable property or tenancies of immovable property located in Belgium. The third country judgment deciding on these matters will therefore not be recognised or declared enforceable in the Belgian legal order.

In the Hague Judgments Convention there is no analogous refusal ground but respect for the exclusive jurisdiction of the requested court for rights *in rem* in local immovable property is achieved through the indirect jurisdictional grounds (the jurisdiction filters). According to Article 6, a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin. Recourse to national grounds of recognition and enforcement is forbidden in this particular case.

It should be noted that Article 6 only applies to disputes regarding rights *in rem*. For residential leases of immovable property, Article 5.3 provides that a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.[55] For other types of leases of immovable property, the exclusive jurisdiction of the courts of the State where the property is located is not protected. It follows from Article 5.1, h) that in disputes regarding non-residential leases a judgment rendered by the courts of the country in which the immovable property is situated is eligible for recognition and enforcement. The jurisdiction ground, however, does not have an exclusive effect: judgments rendered by other national courts are also eligible for recognition and enforcement (provided that the court's jurisdiction is based on one of the other indirect heads of jurisdiction of Art. 5). As a consequence, based on the text of the Convention, Belgian courts cannot refuse the circulation in Belgium of judgments from other non-EU Contracting States that rule on non-residential leases of Belgian immovable property. However, as stated before (see *supra* sect. 2), the European Union has declared under Article 18 of the Convention that the instrument will not be applied to non-residential leases (tenancies) of immovable property situated in the European Union. Belgian courts will therefore apply the CPIL to judgments on non-residential tenancies of Belgian immovables and, pursuant to Article 25 §1, 7° CPIL, will not give effect to such judgments coming from third States. Due to the EU's declaration, the unusual distinction between residential and other leases made in the Convention does not prejudice the Belgian courts' exclusive jurisdiction in the area of rights *in rem* in and leases of immovable property. The CPIL and the Convention both make allowances for the exclusive jurisdiction of the Belgian courts in these matters.

Article 25 of the Brussels I*bis* Regulation confers jurisdiction on the Belgian courts when the parties, regardless of their domicile, have validly agreed that the Belgian courts (or a Belgian court) are(is) to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship. Such jurisdiction shall be exclusive, unless the parties have agreed otherwise.[56] Under Article 25 §1, 7° CPIL a foreign judgment rendered

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55 Art. 5.3 also applies to the registration of immovable property.

56 Article 6 CPIL also grants exclusive jurisdiction to (a) Belgian court(s) designated in a jurisdiction agreement. The relevance of this provision is however limited due to the precedence of Art. 25 Brussel I*bis* Regulation.

in violation of this jurisdiction agreement will be declined recognition and enforcement in the territory of Belgium. The same result is accomplished in the Convention: Article 7.1, d) allows for a refusal if the proceedings in the court of origin were contrary to an agreement under which the dispute in question was to be determined in a court of a State other than the State of origin. The refusal ground applies irrespective of whether the chosen court was the court of a Contracting State or a third State and irrespective of whether the jurisdiction agreement is exclusive or non-exclusive.[57] The Convention's refusal ground is thus more extensive than its counterpart in the CPIL.

4.8 Excessive jurisdiction of the court of origin

On the basis of Article 25 §1, 8° CPIL recognition and enforcement are refused if the jurisdiction of the foreign court was based exclusively on the presence of the defendant or assets located in the State of the court, but without any direct relation with the dispute. This provision shields the Belgian territory from judgments rendered on exorbitant grounds of jurisdiction, but limited to the two mentioned: the presence of the defendant or assets in the State of origin without a direct link to the dispute.[58] A direct relation of the goods with the dispute exists, for example, when the claim seeks the revindication of the goods.[59] Here, the CPIL lays down two (negative) indirect jurisdiction filters.

The Hague Judgments Convention adopts this approach on a much larger scale. As explained, it lists in Article 5 (and 6) a number of (positive) jurisdiction filters that determine whether the judgment is eligible for recognition and enforcement in the other States bound by the Convention. The CPIL is more liberal towards foreign exorbitant jurisdiction. If the third State court has, for instance, accepted jurisdiction solely on the basis of the nationality of the claimant,[60] the judgment will not be refused recognition and enforcement under the CPIL since this type of exorbitant jurisdiction is not listed in Article 25 §1, 8° CPIL. Under the Convention, however, provided that none of the indirect jurisdiction grounds of Article 5 (and 6) are coincidentally fulfilled, this judgment shall not be eligible for recognition and enforcement.

4.9 Additional refusal grounds for various matters

The CPIL imposes specific regimes for recognition and enforcement, which are to be applied instead of or in addition to the refusal grounds of Article 25. This is the case for the determination or change of name or surnames (Art. 39), a foreign divorce based on the will of the husband (Art. 57), adoptions established abroad (Art. 72), intellectual property rights (Art. 95), the validity, the functioning, the dissolution or liquidation of a body with separate legal personality

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57 Explanatory Report, p. 122, no. 269 (see note 7).

58 Storme 2014, pp. 669-670 (see note 11).

59 Erauw 2009, p. 284, no. 209 (see note 38).

60 The foreign provision could be similar to Art. 14 of the French Code Civil which grants jurisdiction in civil cases to the French courts on the mere basis that the claimant is a French national: '*L'étranger, même non résidant en France, pourra être cité devant les tribunaux français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.*'

(Art. 115) and the opening, the conduct or the closure of insolvency proceedings (Art. 121). These are not further discussed as these matters all fall outside the scope of the Hague Judgments Convention (see Art. 2.1 of the Convention).

5. Recognition and enforcement procedure

In terms of the procedure to be followed for recognition, a declaration of enforceability and enforcement, the Hague Judgments Convention refers to the national law of the requested State, unless otherwise provided (Art. 13.1, first sentence). In Belgium the recognition of a foreign judgment does not require any procedure (Art. 22 §1, para. 2 CPIL). This is the so-called *de plano* recognition. For enforcement a declaration of enforceability needs to be obtained (Art. 22 §1, para. 1 CPIL). This *exequatur* procedure is described in Article 23 of the CPIL and takes place before the court of first instance (*tribunal de première instance/rechtbank van eerste aanleg*). The Convention only requires that the court of the requested State acts expeditiously (Art. 13.1, second sentence). The *ex parte* proceedings (initiated by a unilateral petition) in which the court decides within only a short delay are probably in conformity with this obligation.[61]

The Convention itself specifies which documents the party seeking recognition or applying for enforcement must produce: 1) a complete and certified copy of the judgment, 2) in the case of a default judgment, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party, and 3) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin (Art. 12.1). The differences with the documents that are necessary under the CPIL (Art. 24 §1) are negligible.

With regard to the costs of the proceedings, Article 14.1 of the Convention determines that a party who requests the enforcement of a foreign judgment shall not be required to provide security, a bond or a deposit on the sole ground that such party is a foreign national or is not domiciled or resident in the State of enforcement. Article 14.1 only prohibits requirements for security based exclusively on such grounds. A requirement for security is therefore permissible on other grounds.[62] A Contracting State can also declare that it will not apply this provision (Art. 14.3).

In Belgium Article 851 of the Judicial Code allows the defendant to compel the foreign claimant to provide security (*cautio iudicatum solvi*), except in the case of conventions by which States have stipulated that their nationals are to be exempt from this obligation. The Belgian Constitutional Court has ruled that this provision violates the principle of equality and non-discrimination.[63] It must now be interpreted as meaning that it applies to any claimant, irrespective of nationality, who is domiciled or lives abroad and does not have sufficient assets in Belgium to cover the financial consequences of an unfavourable judgment.[64] Under this interpretation, the provision of security can strictly speaking be demanded from the claimant under the framework of the Convention, since the requirements for security are no longer

61 L. Maistriaux, 'La Convention de la Haye sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale', *J.T.* 2022, p. 185, fn. 82.

62 Explanatory Report, pp. 143-144, no. 321 (see note 7).

63 Constitutional Court 11 October 2018, no. 135/2018.

64 Court of Cassation 10 March 2023, no. C.22.0126.N.

based exclusively on the foreign nationality of the claimant or its domicile or residence abroad but on its lack of assets in the forum in combination with its domicile or residence outside the requested State.

6. Conclusion

The recognition and enforcement of judgments that are not covered by the Brussels I*bis* Regulation are, in the absence of an applicable treaty, currently subject to a myriad of diverging national regimes. The costs and time associated with navigating sometimes burdensome and complicated domestic recognition and enforcement systems can be avoided through an overarching framework that facilitates the worldwide circulation of these judgments, thereby fostering cross-border trade. In such a fragmented legal landscape the adoption of the Hague Judgments Convention, which has the potential to become a global treaty, is thus a welcome step.

With regard to Belgium, the analysis in this contribution has shown that the Convention's framework is not miles ahead of the CPIL's regime in terms of leniency. The differences between both instruments are minimal with the Convention coming out ahead on some aspects and the CPIL on other points. Belgium's existing enforcement scheme for incoming judgments can indeed already be described as flexible.[65] Besides, the Convention's refusal grounds are discretionary, meaning that the requested court is not obliged to apply them. Furthermore, in the vast majority of cases, the Convention merely offers an additional avenue and does not replace more liberal national rules. Applicants can therefore invoke the Convention if its mechanism proves to be more favourable in the individual case.

Undoubtedly as important, if not even more crucial, to Belgian citizens and businesses is the Convention's impact on the recognition and enforcement of Belgian judgments in third countries. If the Convention is able to attract a large number of States with stringent national laws hampering recognition and enforcement of foreign judgments[66] (and only time will tell whether the Convention will in that regard effectively be the game changer in international dispute resolution that the Hague Conference announced it to be)[67] and the reservations and objections can be kept to a minimum, its more generous regime can effectively contribute to the prevailing Belgian party's access to justice. The potential improved pervasiveness of outgoing judgments is reason enough for Belgium to applaud the Convention's nascence.

65 Couwenberg 2008, p. 117 (see note 22). Surprisingly, the EU Commission classified Belgium as having a restrictive approach to third country judgments, stating that the Convention would result in a considerable increase in the acceptance of such judgments: Commission staff working document impact assessment report accompanying the document Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, SWD(2021) 192 final, 16 July 2021, p. 26. However, the methodology for this study is flawed: see Maistriaux 2022, p. 187, fn. 107 (see note 61).

66 India, Pakistan, Australia and China are given as examples: M. Wilderspin & L. Vysoka, 'The 2019 Hague Judgments Convention through European lenses', *NIPR* 2020/1, pp. 42-43.

67 https://www.hcch.net/en/news-archive/details/?varevent=687.