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Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project

Paul Beaumont and Lara Walker*

This article looks at the rules on the recognition and enforcement of civil and commercial judgments in the EU and internationally. It provides a detailed description of the procedure for recognition (if requested) and enforcement introduced by the new Brussels I in January 2015 and compares this with the previous procedure. The article then seeks to provide suitable recommendations for the procedure on recognition and enforcement in a future Hague Judgments Convention. In order to inform these recommendations, the article analyses the current procedures in Brussels I, the Hague Choice of Court Convention and the Hague Maintenance Convention 2007. The authors argue that the substantive grounds for non-recognition/enforcement (ie those unrelated to the jurisdictional basis of the original judgment) could be reduced to manifestly contrary to public policy and irreconcilable judgments. It would also be helpful if there were minimum harmonisation of the enforcement procedure so that national and international grounds for non-enforcement could be considered in the same set of proceedings.

Keywords: Brussels I Regulation; recognition and enforceability; Hague Judgments Project; notification of the defendant; procedural fraud; public policy; excessive damages; explanatory report; actual enforcement

A. Introduction

This paper is concerned with the recognition and enforcement of judgments in civil and commercial matters. It will give a brief history of the Brussels I Recast in the European Union and a description of its final provisions on

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recognition and enforcement of judgments from other Member States of the Union. An understanding of those provisions is of interest in its own right. The paper then utilises the provisions in the Brussels I Recast and in the two most recent Hague Conventions (Choice of Court from 2005 and Maintenance from 2007) as sources of inspiration to consider what provisions might be included in the non-jurisdictional aspects of recognition and enforcement of foreign judgments in a future Hague Judgments Convention, which has been the subject of early stage discussions in The Hague since 2010. The paper will not consider the earlier history of the Hague Judgments Project between 1992 and 2001 nor the history and significance of the Hague Choice of Court Convention 2005.¹

B. A brief history of the Brussels I Recast, from Tampere to Nicosia via Paris, Stockholm and Warsaw

In October 1999, the European Council adopted a conclusion on “intermediate measures” concerning the recognition and enforcement of judgments given in one EU Member State in another EU Member State.² Intermediate measures are also known as the “*exequatur*” or the “declaration of enforceability”. It is a procedural stage at which a foreign judgment will be turned into the equivalent of a domestic judgment for the purpose of proceeding to actual enforcement.

The Heads of Government of the Member States committed themselves “as a first step” to abolishing “intermediate proceedings” and “grounds for refusal of enforcement” in respect of “small consumer or commercial claims and for certain judgments in the field of family litigation (eg on maintenance claims and visiting rights).”

The first step has been delivered by the adoption of several instruments that remove the *exequatur* and the grounds for refusal of enforcement including public policy³ culminating in the Maintenance Regulation that was adopted in the last part of 2008 by the French Presidency (hence the allusion to Paris in the title of this section).⁴ The last instrument, however, kept in place the *exequatur*

¹These matters and the jurisdictional issues relating to recognition and enforcement are considered in P Beaumont, “The Revived Judgments Project in The Hague” (2014) *NederlandsInternationaalPrivaatrecht* 532.

²See P Beaumont and E Johnston, “Can *Exequatur* be Abolished in Brussels I Whilst Retaining a Public Policy Defence?” (2010) 6 *Journal of Private International Law* 249, nn 1, 5.

³See Regulation 805/2004, the European Enforcement Order [2004] OJ L143/15; Regulation 861/2007, the European Small Claims Procedure [2007] OJ L199/1; and the Brussels IIa Regulation, ie Regulation 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1. The last of these measures abolishes *exequatur* and the grounds for refusal of enforcement in relation to aspects of child abduction and access rights.

⁴The EC Maintenance Regulation, Regulation 4/2009, [2009] OJ L7/1. But one ground for non-enforcement of judgments coming from any EU Member State apart from Denmark

and the grounds for refusal of enforcement in relation to judgments from Denmark and the UK in other EU Member States because the abolition of *exequatur* and the removal of the grounds for non-enforcement were made conditional on the harmonisation of the applicable law rules by ratifying the Hague Protocol on the Law Applicable to Maintenance Obligations 2007.

In December 2009, the European Council adopted the Stockholm Programme.⁵ Significantly it no longer refers to abolition of the “grounds for refusal of enforcement” and paved the way to see the abolition of *exequatur* as eliminating the procedural stage while leaving intact the substantive grounds for refusal of enforcement. The Heads of Government were committed during the Stockholm Programme (2010–2014) to continuing the process of “abolishing all intermediate measures (the *exequatur*)”.

The Commission proposal for the recast of Brussels I was made in December 2010.⁶ The complete abolition of *exequatur* (the declaration of enforceability) was proposed for all subjects within the scope of the Regulation except for cases of defamation and other non-contractual obligations relating to privacy and personality rights, and for certain types of collective redress claims.⁷ In the areas where *exequatur* was to be abolished, the Commission proposed the deletion of the public policy defence in Article 34(1) of the original Brussels I. However, the Commission proposed to replace the public policy defence with a narrower defence in the country of enforcement based on the “fundamental principles underlying the right to a fair trial”. The Commission proposed the retention, in Article 43 of the Recast, of the defences relating to irreconcilable judgments in Article 34(3) and (4) of the original Brussels I. The Commission also proposed the deletion of the special defence in Article 34(2) of the original Brussels I where a judgment was given in default of appearance and the courts of enforcement could judge whether service on the defendant was done in such a way that he could not arrange for his defence and where he was unable to challenge the judgment in the country of origin. The Commission proposed that this ground cease to exist in the country of enforcement and be replaced by a new review mechanism in the country of origin that would have the same content as Article 34(2) of the original Brussels I.⁸

and the UK is retained, irreconcilability with another judgment, but moved to the actual enforcement stage, see Art 21(2). For further information see L Walker *Maintenance and Child Support in Private International Law* (Hart Publishing, 2015) ch 7, ss II–V; and I Viarengo, “The Enforcement of Maintenance Decisions in the EU: *Requiem* for Public Policy? Family Relationships and the (Partial) Abolition of *Exequatur*”, in P Beaumont, B Hess, L Walker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing, 2014) 473.

⁵The Stockholm Programme – *An open and secure Europe serving and protecting the citizens* [2010] OJ C115/1.

⁶COM(2010) 748 final (referred to as the “Commission Recast” in this paper).

⁷See Art 37(3) of the Commission Recast.

⁸See Art 45 of the Commission Recast. One additional ground for review was added by the Commission: where the defendant “was prevented from contesting the claim by reason of

At the Justice and Home Affairs Council of the EU meeting on 13 and 14 December 2011 under the Polish Presidency (hence the reference to Warsaw in the title), political guidelines were adopted on the abolition of *exequatur* in the recast of Brussels I.⁹ As anticipated earlier,¹⁰ the Council fulfilled the mandate set for it by the European Council of abolishing *exequatur* by seeing it as the abolition of a stage in the process rather than as a requirement to abolish the “grounds for refusal of enforcement”.¹¹ By doing so it has been able to agree to abolish the *exequatur* in all cases covered by Brussels I including those relating to privacy and personality rights and collective redress. No longer will there be a declaration of enforceability stage of proceedings at which only the Brussels I grounds for non-enforcement can be invoked but instead all grounds for non-enforcement (those in Brussels I and the national ones) can be heard together. This will have the effect of reversing the outcome of the decision of the Court of Justice of the European Union (CJEU) in *Prism Investments*.¹² In that case the defendant alleged that he had already paid the debt that he owed but the CJEU decided that this was not a defence under Brussels I and therefore could not be raised at the declaration of enforceability stage but only later at the actual enforcement stage. This seems to be a very impractical and unwise decision by the CJEU. In a case where the defendant is arguing full or partial payment of the debt but has an alternative EU ground for non-enforcement that he may wish to argue,¹³ the defendant under the old Brussels I had to make a tactical decision whether to invoke the EU grounds at the declaration of enforceability stage¹⁴ or only contest the judgment at the actual enforcement stage, relying on the prior payment of the debt and losing the EU defences. Dealing with all the relevant defences in one procedure is surely more economical in terms of time and costs for both parties and removes the need for difficult tactical decisions by the defendant.¹⁵

force majeure or due to extraordinary circumstances without any fault on his part”. It is wise to assume that this additional ground is covered in the final version of Brussels I by the public policy defence in the country of enforcement because the Member States in the Council wanted a wider basis for review than that offered by the Commission and wanted it to be concentrated in the country of enforcement to save the costs and time involved for a defendant in having to initiate a review in the country of origin and raise defences in the country of enforcement.

⁹See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126932.pdf, accessed 1 August 2012, at p 22 of the press release. Unfortunately, neither the press release nor the background note that was referred to in it give the reader any information about the nature and content of the political guidelines.

¹⁰See Beaumont and Johnston, *supra* n 2 at 250, 273 and 278–9.

¹¹*Ibid* at 249–50.

¹²Case C-139/10 [2011] ECR I-9511.

¹³Public policy, irreconcilable judgments, or unable to defend himself properly in a default judgment case.

¹⁴Possibly losing the argument and the costs associated with it.

¹⁵The German Government specifically asked the CJEU to allow for such procedural economy by dealing with the EU grounds and the national grounds for non-enforcement

Encouraging the possibility of EU and national defences being heard in the same procedure is one of the improvements achieved by the revised Brussels I.

In the political guidelines on Brussels I that were agreed by the Council in December 2011 it was clear that all of the grounds for refusal of enforcement contained in Article 34 of Brussels I would be retained in the revised Brussels I. In particular, substantive as well as procedural public policy would be retained as a defence.

The Council and European Parliament reached a deal on the conclusion of the recast of Brussels I which was finalised under the Cypriot Presidency in December 2012 (hence the reference to Nicosia in the title).¹⁶ This deal follows the political guidelines on the recognition and enforcement aspects of the Regulation agreed under the Polish Presidency in December 2011.

It seems likely that the abolition of the grounds for refusal of enforcement (in particular public policy) will not happen in the EU beyond the few areas that were specified at Tampere.

C. Recognition under the new Brussels I

1. *Automatic*

The system is very similar to that under the current Brussels I. The key point is identical in Article 36(1) (new) and Article 33(1) (old). Recognition is automatic and no special procedure is required to achieve it.

2. *Interested party invoking recognition*

Although recognition is automatic under both versions of Brussels I it is possible under the old Brussels I (Article 33(2)) and the new Brussels I (Article 36 (2)) for “any interested party” to get a judgment in the recognising State confirming that the judgment is recognised there. The procedure for doing so under the old Brussels I was similar to the *exequatur* procedure (declaration of enforceability) but under the new Brussels I it is the actual enforcement procedure (see Articles 46–51). Under the new Brussels I (Article 37) the party invoking recognition must submit to the court (designated under Article 75 in a communication from the Member State of enforcement to the Commission) an authentic copy of the judgment from the State of origin and a certificate from the court of origin (in the form set out in annex I). The court addressed will almost certainly at least require a translation of the certificate but it may instead require a translation of the judgment “if it is unable to proceed without such a translation.”

at the same time, Case C-139/10, *supra* n 12, para 41, but this was rejected by the Court, paras 42–3.

¹⁶See Regulation 1215/2012 [2012] OJ L351/1.

The only way for a party to oppose recognition when an interested party invokes recognition is if that party becomes aware of it and gets involved in the recognition proceedings (there is no guarantee that any party will become aware of the recognition proceedings). If a Member State wants to ensure that any particular party whose rights will be affected by the recognition of a judgment has the opportunity to oppose the recognition, in proceedings by an interested party to invoke recognition, then it will have to create procedures to achieve this under its own law relying on its power to do so under Article 47(2) of the new Brussels I. Member States also have discretion to decide whether there is only one or two levels of appeal in relation to decisions on recognition as the principal question (compare Articles 49 and 50 of the new Brussels I). It is only the court of first instance that has to decide “without delay” (Article 48).

3. Recognition arising as an incidental question

If the issue of recognition arises as an incidental question in proceedings designed to determine a different principal question then under the old Brussels I (Article 33 (3)) it was clear that the court dealing with the principal question had jurisdiction to determine the incidental question of recognition of the foreign judgment. Under the new Brussels I (Article 36(3)) such a court only has jurisdiction to decide on the refusal of recognition as an incidental question. The assumption probably is that if the court dealing with recognition of a foreign judgment as an incidental question decides that the judgment is to be recognised it is merely accepting the norm that judgments from one Member State are automatically recognised in any other Member State. Thus it should only “have jurisdiction over the question of recognition” if the incidental question is one of refusal of recognition. This is important in States where judges do not deal with issues *ex officio* (as in the UK). The judge cannot raise the issue of the recognition of a judgment from another EU Member State as an incidental question, nor can he adjudicate on it if it comes up from the party seeking to invoke the recognition as an incidental question and no other party to the proceedings seeks the refusal of the recognition. The recognition in such cases is automatic.

4. Grounds for refusal of recognition

The grounds for refusal of recognition remain largely the same under the new Brussels I (Article 45) as under the old Brussels I (Articles 34 and 35). There are a few subtle differences. An additional ground for non-recognition is added in the new Brussels I and that is where an employee is the defendant and the judgment conflicts with Section 5 of Chapter II laying down the jurisdiction rules in cases of individual employment contracts. This strengthens the protection of weaker parties. Although Article 72 is not expressly mentioned in the new Article 45, unlike the old Article 35, it is clear that if a judgment conflicts with one of the agreements referred to in that Article (ie agreements between the UK

and Canada and the UK and Australia) those agreements prevail (see Recital 29 last sentence). Furthermore the same is true of any judgment that conflicts with the other instruments that are given priority over the Regulation by Articles 67–73. It is also true of the situation outlined in the last sentence of the new Article 64 (old Article 61) – a civil judgment linked to a criminal offence where jurisdiction is based on Article 7(3) (old Article 5(4)) and the defendant does not have an opportunity to arrange for his defence – as stated in Recital 29 second last sentence.

Some key elements remain the same:

- (1) Public policy is a ground for non-recognition but it cannot be applied to the rules relating to jurisdiction.
- (2) A review of the jurisdiction rules is only permitted in relation to the exclusive jurisdictions in the new Article 24 (old Article 22) and to the protective jurisdictions on consumers, insured persons and employees in the new Articles 10–23 (old 8–21) (as noted above, the scrutiny of employee jurisdiction is new). Even here the reviewing court is bound by the findings of fact on which the court of origin based its jurisdiction.
- (3) The lack of review of the jurisdiction rules has been construed by the CJEU as meaning that a judgment in one Member State declining jurisdiction on the basis of a valid jurisdiction clause granting jurisdiction to a third State has to be recognised in all other Member States and that this extends to giving *res judicata* effect to the *ratio decidendi* of the foreign judgment (in this case the validity of the clause granting exclusive jurisdiction to the Icelandic courts).¹⁷
- (4) A review of the substance of a foreign judgment is not permissible (new Article 52, old Article 36).

D. Enforcement under the New Brussels I

1. *Abolition of the declaration of enforceability and the consequences for protective measures*

The declaration of enforceability is abolished in the new Brussels I (Article 39). This means that from the moment a person receives an enforceable judgment in the court of origin he is able to “proceed to any protective measures which exist under the law of the Member State” where he hopes to enforce the judgment (new Article 40). Thus he can take the local law measures to ensure that there

¹⁷See Case C-456/11 *GothaerAllgemeineVersicherung AG and others v Samskip GmbH*, judgment of 15 November 2012, ECLI:EU:C:2012:719, paras 39–41. See the analysis of this case by E Torralba-Mendiola and E Rodríguez-Pineau, “Two’s Company, Three’s a Crowd: Jurisdiction, Recognition and *Res Judicata* in the European Union” (2014) 10 *Journal of Private International Law* 403.

will be sufficient assets in the jurisdiction to enforce the judgment. At present, under the old Brussels I, this power to proceed to protective measures comes with the declaration of enforceability (Article 47(2)) but it must be noted that Article 47(1) of the old Brussels I was designed to ensure the availability of national law protective measures even before the declaration of enforceability on condition that the judgment must be recognised under the Regulation. Given that recognition was automatic under the old Regulation, unless contested, at least in countries where judges cannot raise issues *ex officio*, it would seem that in *ex parte* proceedings for protective measures Article 47(1) was sufficient legal basis for a party to get protective measures before the declaration of enforceability.

2. *Actual enforcement (substance)*

(a) *All existing EU grounds for refusal of enforcement plus any not incompatible national grounds*

The actual enforcement stage under the new Brussels I envisages the combination of the EU grounds for refusal of enforcement (new Article 45) with any national grounds for refusal or suspension of enforcement “in so far as they are not incompatible with the grounds referred to in Article 45” (new Article 41(2)). It is not yet clear which grounds of national non-enforcement would not be compatible with the EU grounds. The grounds that are envisaged as being compatible are where the person has already paid the amount required in the judgment (see *Prism Investment* discussed above) or the person is too poor to be able to satisfy the full amount of the judgment without him or his family being made destitute. National grounds for non-enforcement would have to be applied in a non-discriminatory way and would have to not be seen as a means of widening the public policy exception. Recital 30 to the Brussels I Recast does leave room for national law to decide but it strongly encourages being able to plead national grounds for non-enforcement in “the same procedure” as EU grounds.¹⁸

(b) *Adaptation*

Another new principle introduced by the new Brussels I is the concept of “adaptation”. This is explained in Recital 28 and given effect to in Article 54. The idea

¹⁸Unfortunately, there are countries where the national grounds of refusal are first dealt with by an enforcement agency rather than a court (eg in Sweden) and therefore the national and EU grounds for non-enforcement cannot necessarily be pleaded in the same procedure. We are grateful to Professor Hellner for pointing out that in Sweden the desirability of national and EU grounds being dealt with together was recognised by giving the jurisdiction to deal with EU grounds to the courts that hear appeals from the enforcement agency that deals with national grounds. It is hoped that the courts hearing EU grounds will wait to deal with them together with the national grounds if it looks as though an appeal will be forthcoming from the *enforcement* agency.

is that if a foreign judgment contains a measure or an order not known in the law of the State addressed it should be adapted by the competent authority chosen by the Member State addressed (provided there is at least a procedure for appeal or judicial review of the adaptation decision before a court in the Member State addressed) “to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests”. However the consequence of adaptation must not be to produce greater effects for the judgment than in the country of origin.

(c) *Priority of other instruments over the Regulation*

It is worth highlighting that the new Brussels I Regulation clarifies that in the event of a clash between the recognition and enforcement of a valid judgment from a Member State and a valid arbitration award under the New York Convention the latter should prevail (see Recital 12, para 3 last sentence, and Article 73(2)).

3. Actual enforcement (procedure)

(a) *The law of the State addressed applies in the absence of harmonisation*

The procedure for the enforcement of judgments given in another Member State is governed by the law of the Member State addressed subject to the procedural provisions set out in Section 2 of Chapter III of the Recast (Article 41(1)). The procedure for the refusal of enforcement is governed by the law of the Member State addressed in so far as it is not covered by the new Brussels I Regulation (Article 47(2)).

(b) *Harmonised rules on address for service and representative ad litem*

One small harmonisation of procedural requirements that represents a change from the old Brussels I is found in the new Article 41(3). Under the old Brussels I (Article 40(2)) the applicant had to give an address for service within the area of jurisdiction of the court applied to (this means that the applicant often had to get a lawyer even for the simplest case just to have an address for service) unless the local law does not provide for the furnishing of such an address, in which case the applicant has to appoint a representative *ad litem*. The new provision saves the applicant costs because he does not have to provide a postal address in the Member State addressed (his own postal address in another Member State is sufficient). He will only be required to have an authorised representative in the Member State addressed if such a representative is mandatory in that State “irrespective of the nationality or the domicile of the parties”. The party seeking refusal of enforcement is put in the same position by Article 47(4) of the new Brussels I.

(c) *No rule on local jurisdiction*

One useful reduction in harmonisation of procedure is the repeal of the rule in Article 39(2) of the old Brussels I that tried to give a uniform rule as to which

court in the Member State addressed had “local jurisdiction” to deal with an application for recognition or a declaration of enforceability. The uniform rule was not very clear as it referred to either the place of domicile of the party against whom enforcement is sought or to the place of enforcement. The matter is now left to the national law of the Member State addressed (a good example of subsidiarity). The main problem with using “domicile” as a connecting factor is that in relation to businesses it is not capable of providing a local jurisdiction within a country if the company concerned is domiciled in that country but has no local domicile there, eg because it has its statutory seat in that country.

(d) *The certificate*

Another significant change is in the nature of the certificate provided by the court of origin relating to the judgment (the new Article 53 and Annex I) that applicants for enforcement have to provide. It must be issued by the court of origin whereas under the old Brussels I it could be issued by a competent authority or a court. The new certificate has to be issued by a court because in a money judgment there has to be a short description of the subject matter of the case and the amount to be paid and to whom it is to be paid including any provisions on interest, in provisional and protective measures there has to be a short description of the subject matter of the case and the measure ordered, and in all other types of judgment there has to be a short description of the subject matter of the case and the ruling by the court. The idea is that the enforcement court should be able to enforce the judgment on the strength of the certificate (or at most a translation of the certificate) if enforcement is not opposed. If a translation of the judgment is needed, it should be because enforcement is being opposed and therefore the costs of the translation will be borne by the losing party. If translation is made routine, the costs of it will be borne by the applicant in cases where the party against whom enforcement is sought does not resist enforcement. However, the text of the Regulation could be clearer. Article 42(1)(b) of the new Regulation refers to the certificate “containing an extract of the judgment” but no such extract is expressly referred to in Annex I to the Regulation. Perhaps “extract” should be construed here as meaning the short description of the subject matter plus the amount ordered, or the measure ordered or the ruling of the court referred to in the Annex.¹⁹

(e) *Service on the person against whom enforcement is sought*

The certificate is more important under the new Brussels I because it forms the basis of the right to the defence of the person against whom enforcement is sought. This is clear from Recital 32 which states that:

¹⁹See Annex I, paras 4.6.1.1, 4.6.1.2, 4.6.2.1, 4.6.2.2 and 4.6.3.1.

“In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service.”

The intention in the Recital is given effect to by Article 43 of the new Regulation. The certificate will be served with the judgment unless the judgment has already been served on the person against whom enforcement is sought – but this can be an untranslated copy of the judgment. The onus is on the person against whom enforcement is sought to ask for a translation of the judgment (he cannot ask for it when it is in a language he understands or an official language in the place in the State where he is domiciled). Where the defendant asks for a translation of the judgment, only protective measures can be taken against him until the translation has been provided to him. No service of the certificate is required prior to taking protective measures or enforcing a protective measure in a foreign judgment because the element of surprise must be maintained to avoid the defendant removing himself and/or his assets from the jurisdiction.

(f) *Suspension or limitation of enforcement*

On an application of the person against whom enforcement is sought, the competent authority in the Member State addressed is required to suspend the enforcement proceedings when the enforceability of the judgment²⁰ is suspended in the Member State of origin (new Article 44(2)). This flows from the general proposition in Article 39 of the new Regulation that it is “enforceable” judgments from one Member State that are enforceable in another Member State without a declaration of enforceability.

On an application for refusal of enforcement of a judgment, the court in the Member State addressed (new Article 44(1)) has a discretion, on the application of the person against whom enforcement is sought, to:

- (1) Limit enforcement to protective measures;
- (2) Make enforcement conditional on the provision of such security as it shall determine; or
- (3) Suspend, either wholly or in part, the enforcement proceedings.

²⁰It is worth noting that the CJEU has recently given a very broad and uniform construction to the word “judgment” in the context of the old Brussels I (Art 32) and nothing in the new Brussels I would change that broad meaning even though the definition has been moved to Art 2(a), see Case C-456/11, *supra* n 17, particularly paras 22–32. It is also worth noting that “judgments” given in legal proceedings instituted before 10 January 2015 will be governed by the old Brussels I, see Art 66(2).

(g) *Courts hearing applications for refusal of enforcement*

The other aspect of procedural harmonisation of the enforcement process is that Member States are required by Article 75 of the new Brussels I Regulation to notify the Commission, which in turn has to make the information publicly available through any appropriate means, in particular through the European Judicial Network, about which courts hear applications for refusal of enforcement under Article 47(1), which courts hear appeals under Article 49(2) and finally which courts, if any, hear any further appeal under Article 50.

4. *Enforcement of authentic instruments and court settlements*

Finally, like its predecessor, the new Brussels I Regulation has rejected any notion of the recognition of foreign authentic instruments and court settlements. Instead, these instruments and settlements can be enforced throughout the EU subject only to the public policy exception (see Articles 58–60). However, it should be understood that a court faced with a conflict between an authentic instrument or court settlement and a court judgment is not obliged to give priority either to the instrument/settlement or to the judgment but is free to exercise its discretion on a case-by-case basis.

E. **What can be learned from the Brussels I Recast and the Hague Choice of Court and Maintenance Conventions for recognition and enforcement in the new Hague Judgments Project?**

The Hague Judgments Project has been ongoing for many years. The initial proposal was made back in 1992 and ended in a failed interim text of a Judgments Convention in 2001.²¹ The second phase of the project, between 2002 and 2005, resulted in a Convention on Choice of Court Agreements designed to protect party autonomy in business-to-business relationships and to provide a parallel for court-based adjudication to that provided for arbitration by the New York Convention.²² The latest phase of the Judgments Project began in

²¹See http://www.hcch.net/index_en.php?act=text.display&tid=149, accessed 15 August 2014. See also the definitive official materials on the first part of the Hague Judgments Project from 1992 to 2001 in *Proceedings of the Twentieth Session, Tome II, Judgments* (Intersentia, 2014). For a brief history see Beaumont, *supra* n 1 and P Beaumont, “Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status” (2009) 5 *Journal of Private International Law* 125, 127–33.

²²See http://www.hcch.net/index_en.php?act=text.display&tid=134 and http://www.hcch.net/index_en.php?act=text.display&tid=151, accessed 15 August 2014. See also the definitive official materials in *Proceedings of the Twentieth Session, Tome III, Choice of Court* (Intersentia, 2010). For analysis of the Convention see T Hartley and M Dogau-chi, *Explanatory Report on the Choice of Court Agreements Convention* (HCCH, 2013) available at http://www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=

2010.²³ There are currently two groups assigned to work on the project, an Experts' Group and a Working Group that were set up by the Hague Council. Four main options are being considered. The first is to work on a Convention that only contains provisions on recognition and enforcement (a single Convention). The second is to create a Convention that contains some rules on jurisdiction as well as recognition and enforcement (a mixed Convention). The third option is to add some optional elements to the single Convention which different States could pick and mix from (eg provisions prohibiting certain grounds of jurisdiction such as service of the defendant in the jurisdiction, nationality of the claimant, arrestment of property when that is not the subject of the dispute, and provisions on conflicts of jurisdiction creating a harmonious blend of *forum non conveniens* and *lis pendens* as in Articles 21 and 22 of the Hague Judgments Convention interim text 2001).²⁴ The fourth option is to agree a single Convention, and separately, for those States that want to do so, to agree another Convention that regulates some aspects of jurisdiction directly. At present the Working Group is pressing on with preparatory work for a single Convention while the work of the Experts' Group is temporarily suspended.²⁵

1. Jurisdiction

The grounds of jurisdiction (positive and negative) and conflicts of jurisdiction will not be analysed in this paper as the focus of the paper is on the recognition and enforcement of judgments. It may well be that even a single Convention will require indirect grounds of jurisdiction to be established in the system of recognition and enforcement and Beaumont is looking at that issue elsewhere.²⁶

3, visited August 2014 (Hartley and Dogauchi Report); Beaumont, "Hague Choice of Court Agreements Convention 2005" *supra* n 22; R Brand and P Herrup, *The Hague Convention on Choice of Court Agreements Commentary and Documents* (Cambridge University Press, 2008); A Schulz, "The Hague Convention of 30 June 2005 on Choice of Court Agreements" (2006) 2 *Journal of Private International Law* 243; R Garnett, "The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?" (2009) 5 *Journal of Private International Law* 161; T Hartley, *Choice of Court Agreements under the European and International Instruments* (Oxford University Press, 2013).

²³See http://www.hcch.net/index_en.php?act=text.display&tid=150, accessed 15 August 2014.

²⁴See http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf, accessed 14 August 2014.

²⁵See para 17 of the Permanent Bureau's *Process Paper on the Continuation of the Judgments Project* (August 2013) available at http://www.hcch.net/upload/wop/jdgm2013processpaper_e.pdf, accessed 18 August 2014. For the latest progress on the efforts of the Working Group see the Report of the Working Group Meeting of 3–6 February 2015, available at http://www.hcch.net/upload/wop/gap2015pd07b_en.pdf, accessed 11 May 2015.

²⁶See Beaumont, *supra* n 1.

2. *Grounds for non-recognition/enforcement*

As explained above the Brussels I Recast retains limited grounds for non-recognition/enforcement. This is in contrast to the two latest Hague Conventions, Maintenance²⁷ and Choice of Court,²⁸ which both contain a few more grounds for non-recognition/enforcement. The Choice of Court Convention contains exceptions based on notification of the defendant (this has two strands),²⁹ procedural fraud,³⁰ public policy,³¹ irreconcilable judgments³² and damages.³³ It also contains other grounds for non-recognition but these grounds appear to be specific to that Convention.³⁴ Some of these grounds also appear in the Maintenance Convention, such as notification of the defendant,³⁵ procedural fraud,³⁶ public policy³⁷ and irreconcilable judgments.³⁸ However, it is questioned whether all these grounds will be necessary in a new Hague Judgments Convention, particularly given that the Brussels I Recast contains fewer grounds for non-recognition. This paper will consider two grounds in some detail, notification of the defendant and procedural fraud, before giving briefer consideration to the issue of damages.

(a) *Notification of the defendant*

Each of the three instruments contains a provision on notification of the defendant but this is different in each instrument. Each of the articles is complicated and cumbersome. For example, the Brussels I Recast states that non-recognition is possible:

²⁷Convention of 23 November 2007 on the International Recovery of Child Support and other forms of Family Maintenance, see http://www.hcch.net/index_en.php?act=conventions.text&cid=131, accessed 18 August 2014. See also A Borrás and J Degeling, *Explanatory Report on the Maintenance Convention 2007* (HCCH, 2013), available at http://www.hcch.net/index_en.php?act=publications.details&pid=4909&dtid=3, accessed 17 August 2014. See also L Walker *supra* n 4; P Beaumont, B Hess, L Walker and S Spancken (eds) *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing, 2014); and P Beaumont, "International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity" (2009) 17 *Rabels-Zeitschrift* 509.

²⁸Convention of 30 June 2005 on Choice of Court Agreements, see *supra* n 22.

²⁹Art 9(c).

³⁰Art 9(d).

³¹Art 9(e).

³²Art 9(f) and (g).

³³Art 11.

³⁴For example Art 9(a) and (b) which refer specifically to the validity of the choice of court agreement.

³⁵Art 22(e).

³⁶Art 22(b).

³⁷Art 22(a).

³⁸Art 23(d).

“where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.”³⁹

The two most recent Hague Conventions contain a two part provision on this defence. The Choice of Court Convention has a provision that relates specifically to service on the defendant and another that caters specifically for the law of the State where the documents were served. The exception applies where:

“the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

- (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; 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.”⁴⁰

A future Judgments Convention should try to avoid a direct emulation of this provision from the Choice of Court Convention. Although the second part of the provision only applies to recognition and enforcement in the State in which service took place,⁴¹ from the perspective of protecting the rights of the defendant it is not necessary. As long as the defendant knew about the proceedings and had a chance to appear in court, then ultimately it makes no difference how the service was carried out. Therefore this provision could effectively result in a perfectly good order, where the defendant did appear at proceedings, being refused recognition. This is unsatisfactory. The reason given in the explanatory report is that in some States, unless a specific procedure is followed, this could be regarded “as an infringement on their sovereignty”.⁴² Technically, the provision is included in order to attempt to make the Convention as appealing to as many States as possible. However, it could be argued that this could also have the opposite effect if States feel recognition can be refused too easily. In fact there is no equivalent provision in the Maintenance Convention.⁴³ Despite the fact that the Choice of Court

³⁹Brussels I (Recast) Art 45(1)(b).

⁴⁰Art 9(c).

⁴¹This is confirmed in the Hartley and Dogauchi Report, *supra* n 22, para 187.

⁴²*Ibid.*

⁴³There are two tracks but this is to take account of the difference between court proceedings and administrative systems rather than specific procedures in one particular State.

Convention was concluded over two years before the Maintenance Convention, entered into force later than the Maintenance Convention.⁴⁴ It is suggested that this additional provision, which has no impact on the rights of individual parties, is not necessary in international Conventions, including the proposed Judgments Convention.

However, could this be taken further – is the default of appearance defence necessary at all? It is argued that in the European context this ground for non-recognition is not necessary. This is because there is a clear crossover between the public policy defence and the true aim of the default of appearance defence. The main basis for this is that any breach of fundamental rights will fall within the public policy exception, which would include the rights of the defence exception in Article 45(1)(b) of the Brussels I Recast. The exception covers only one aspect of the right to a fair trial as composed in Article 47 of the EU Charter of Fundamental Rights (Charter)⁴⁵ and Article 6 of the European Convention on Human Rights (ECHR).⁴⁶ The main concept being that you must have a fair trial. If you are not served the document warning you of the proceedings against you in sufficient time, then the State cannot argue that the proceedings were fair, as the defendant will unlikely be able to prepare a proper defence and gain sufficient advice. This will undoubtedly be in violation of the second State's public policy because all Member States are parties to the ECHR, which constitutes general principles of EU Law, and they also have to abide by the rules in the Charter.⁴⁷

⁴⁴See http://www.hcch.net/index_en.php?act=conventions.status&cid=98 and http://www.hcch.net/index_en.php?act=conventions.status&cid=131, accessed 23 August 2013. The Choice of Court Convention will enter into force in the course of 2015 for the EU and Mexico, see http://www.hcch.net/index_en.php?act=events.details&year=2014&varevent=389, accessed 11 May 2015.

⁴⁵“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. *Everyone shall have the possibility of being advised, defended and represented.* Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

⁴⁶“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

⁴⁷See Art 6(1) and (3) of the TEU. For the binding nature of the Charter of Fundamental Rights in all matters within the scope of EU law, see Case C-617/10, *ÅkerbergFransson*, judgment of 26 February 2013, ECLI:EU:C:2013:105, especially paras 17–21. For an example of Art 47 being successfully invoked in a consumer contract, see Case C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao*

The defence as worded is very limited anyway, so the added value is questionable.⁴⁸

A previous example of the right to a fair trial falling under the public policy exception is the famous case of *Krombach*.⁴⁹ When deciding whether recognition could be refused on the basis of public policy, the Court referred to the right to a fair trial:

“With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States.”⁵⁰

The Court goes on to say that, “a national court . . . is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right”.⁵¹ The Court concluded that:

“even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing . . . [therefore] recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR.”⁵²

From this it is clear that the right to a fair trial is covered by the public policy defence.⁵³ It is also a clear indication why the public policy defence is necessary in exceptional situations.

Although the issue in *Krombach* was not covered by the element of the right to a fair trial that is covered by the defence in Article 45(1)(b) of the Recast (Article

Vizcaya Argentaria SA, judgment of 17 July 2014, ECLI:EU:C:2014:2099. However, it should be acknowledged that not all provisions of the Charter have horizontal effects without being “given more specific expression in European Union or national law” and the Court has decided that Art 27 of the Charter is one of those provisions in Case C-176/12 *Association de Médiation Sociale*, judgment of 15 January 2014, [2014] 2 CMLR 41, paras 41–51 (although it is difficult to envisage how this problem could arise in relation to Art 47, which by its nature suggests it is only applicable in vertical situations).

⁴⁸See also, Walker, *supra* n 4, ch 7 s VIII.

⁴⁹Case C-7/98, *Krombach v Bamberski* [2000] ECR I-1395.

⁵⁰*Ibid*, para 38.

⁵¹*Ibid*, para 40.

⁵²*Ibid*, paras 43–44.

⁵³“In light of the importance given to Art 6 of the ECHR in *exequatur* proceedings, it is interesting to note that Art 47 of the Charter, which is now hierarchically higher than the EU regulations regarding the “free movement of judgments”, even broadens the procedural protection of individuals” (JK Škerl, “European Public Policy (with an Emphasis on *Exequatur* Proceedings)” (2011) 7 *Journal of Private International Law* 461, 466).

34(2) of the original Brussels I), it would be reasonable to conclude that all violations of the right to a fair trial would fall within the public policy defence for the reasons cited by the CJEU in *Krombach*.⁵⁴ Further evidence for this can be seen in the *Gambazzi* decision,⁵⁵ where the defendant entered an appearance but was precluded from appearing in the main proceedings because he had not complied with obligations imposed by an earlier order. The CJEU considered that the enforcing court could refuse to enforce the order based on the public policy defence if “following a comprehensive assessment of the proceedings and in light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant’s right to be heard”.⁵⁶ Again, the issue here is whether the rights of the defence were violated. The problem once again is outside the defence in Article 45(1)(b) of the revised Brussels I because the defendant knew about the proceedings and did in fact enter an appearance.

Therefore, the defence in Article 45(1)(b) will not in reality add any extra benefit because any violation of the rights of the defence would be caught by the public policy clause. In fact, one could go further and say that on the basis of the preliminary rulings of the CJEU, on the “default of appearance” exception as appearing in the Brussels Convention and developed in Brussels I, the precise meaning of the exception is unclear to Member States and adds unnecessary confusion. Hess, Pfeiffer and Schlosser note that the defence as it appears in Article 34 (2) of the Brussels I Regulation is “[i]n practice, the most important provision for objecting to the recognition of a foreign judgment”.⁵⁷ This would suggest that the defence is used more often than the other exceptions, and applicants think that they may be successful where they raise the defence. Default judgments occur frequently within the EU, and the problems mainly arise in relation to the service

⁵⁴“In *Krombach*, the CJEU borrowed not only Article 6 itself, but also the interpretations of the Strasbourg Court on the content of the right to a fair trial. So, if Article 6 was interpreted as requiring courts to give reasons, it seems that this law is borrowed and ought to be used to define the meaning of public policy in Article 34” (G Cuniberti, “Recognition of Foreign Judgments Lacking Reasons in Europe” (2008) 57 *International and Comparative Law Quarterly* 25, 33).

⁵⁵Case C-394/07, *Marco Gambazzi v Daimler Chrysler Canada Inc* [2009] ECR I-02563.

⁵⁶*Ibid*, para 48. The CJEU failed to take a decisive position in *Gambazzi*, but we can see that the Court left room to the national court to refuse to enforce the decision for reasons of public policy. In fact the Italian court subsequently decided that it would enforce the decision and that the public policy defence had not been met, because the sanctions were proportionate to the aim. (See Škerl, *supra* n 53 at 473 and B Hess, “The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission’s Proposed Recast” (2012) 49 *Common Market Law Review* 1075, 1097.) Further, the European Court of Human Rights (ECtHR) dismissed a subsequent application by *Gambazzi* before them as manifestly unfounded, meaning that “the CJEU has shown more sensibility regarding the possible human rights violations than the ECtHR” (Škerl, *supra* n 53). See also Beaumont and Johnston, *supra* n 2, 255–6.

⁵⁷B Hess, T Pfeiffer and P Schlosser, *The Brussels I Regulation 44/2001 Application and Enforcement in the EU (the Heidelberg Report)* (Munich, Verlag CH Beck, 2008) 138.

of the document instituting the proceedings.⁵⁸ However, this does not mean that defendants are likely to be successful when they raise the defence.⁵⁹

An example of how the default defence works can be seen in *ASML*.⁶⁰ In *ASML*, the CJEU was interpreting the defence as it appears in Article 34(2) of the old Brussels I. The aim was that “the rights of the defence are effectively respected”.⁶¹ The Court stated that even though the Regulation aims to secure simple and rapid procedures for recognition and enforcement, “that objective cannot be attained by undermining in any way the right to a fair hearing”.⁶² The questions referred were asking at what stage the defendant should have become aware of the proceedings against him.⁶³ The law suggests that the defendant needs to have sufficient notice in order to prepare a defence, so that his rights to a fair trial are not violated:

“[o]nly knowledge by the defendant of the contents of the default judgment guarantees, in accordance with the requirements of respect for the rights of defence and the effective exercise of those rights, that it is possible for the defendant, within the meaning of Article 34(2) of Regulation No 44/2001, to commence proceedings to challenge that judgment before the courts of the State in which the judgment was given.”⁶⁴

The Court concluded that “in order to justify the conclusion that it was possible for the defendant to challenge a default judgment against him, within the meaning of Article 34(2) Regulation No 44/2001, he must have been aware of the contents of that decision, which presupposes that it was served on him”.⁶⁵ This also supports the notion that any proceedings caught by this defence should also be caught by the public policy defence.⁶⁶

⁵⁸*Ibid.*

⁵⁹*Ibid.*, 138–9.

⁶⁰C-283/05, *ASML Netherlands BV v Semiconductor Industry Services GmbH* [2006] ECR I-12041.

⁶¹*Ibid.*, para 20.

⁶²*Ibid.*, para 24.

⁶³*Ibid.*, see para 15.

⁶⁴*Ibid.*, para 36.

⁶⁵*Ibid.*, para 40.

⁶⁶See also Hess, Pfeiffer and Schlosser when discussing the decision of the Oberlandesgericht Zweibrücken, on 05/10/2005 – 3 W 165/04, where the German court declared that the Belgian judgment was unenforceable on the basis of Art 34(2) of Brussels I. However, it was also stated that recognition of the judgment would also be in violation of Art 34(1) – public policy (Heidelberg Report, *supra* n 57 at 141, fn 715). See also the English Court of Appeal decision in *Maronier v Larmer* [2002] EWCA Civ 774 in which the Dutch proceedings were reactivated after 12 years and the defendant knew nothing about this until it was too late. However, apparently the Dutch procedure allowed the action to be reactivated without requiring a fresh service of documents and, because there was no requirement for the documents to be served afresh, the defence in Art 27(2) (later Art 34(2) of the original Brussels I) of the Brussels Convention could not apply. The English courts refused to enforce the judgment based on public policy even though the issue was

The more recent decision in *Trade Agency v Seramico Investments*⁶⁷ again shows the cross-over between the two defences but highlights the inadequacies of the default of appearance defence in covering all aspects of the right to a fair trial. The judgment concerned two issues, the first was the fact that the decision was taken in “default of appearance”, the second was that the written judgment lacked reasons. The facts suggest that the defendants were notified about the case against them, but because they did not respond a decision was taken, in line with the summary procedures of the High Court of England and Wales.⁶⁸ The questions referred to the CJEU by the Latvian court were whether recognition of the English judgment could be refused on the basis of the default of appearance defence because the applicants did not appear in court, or on the basis of the public policy defence because a failure to give reasons did not comply with Article 6 ECHR or Article 47 of the Charter.⁶⁹ As in *Gambazzi*, the CJEU did not give any definitive ruling on the particular case. Instead they left the position open to the Latvian authorities to decide what the outcome should be in the specific circumstances. In doing so, the CJEU confirmed that the right to a fair trial “requires that all judgments be reasoned to enable the defendant to see why judgment has been pronounced against him and to bring an appropriate and effective appeal against it”.⁷⁰ The CJEU then reminded the Latvian court that fundamental rights were not absolute and could be subject to restrictions.⁷¹ The CJEU gave a strong steer to the Latvian court that the particular procedural system of default judgments in England and Wales “is likely . . . to justify a restriction of the right to a fair trial in so far as that right requires that judgments be reasoned”.⁷² The Court concluded that Member States can only refuse to enforce a judgment where “it appears to the court, after an overall assessment of the proceedings in light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant’s right to a fair trial referred to in Article 47(2) of the Charter”.⁷³

The default of appearance defence is convoluted in an attempt to prevent it applying in situations where the defendant has just not bothered to turn up in

lack of knowledge of the proceedings. Although this is a national judgment and might not be entirely representative of the CJEU’s views, it once again shows the limited application of the default of appearance defence, and how the public policy defence is more effective in protecting the defendant’s right to a fair hearing.

⁶⁷Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd*, judgment of 6 September 2012, ECLI:EU:C:2012:531.

⁶⁸*Ibid*, paras 16 and 56–7.

⁶⁹*Ibid*, para 25.

⁷⁰*Ibid*, para 53.

⁷¹*Ibid*, para 55.

⁷²*Ibid*, para 58. The Court seems to have been impressed by the fact that the default judgment “impliedly refers” to the “detailed description of the pleas in law and the material facts” that have been served on the defendant, *ibid*, para 56.

⁷³*Ibid*, para 62.

court and as a result the provision is long and ends up being quite narrow. Therefore it does not effectively assist with a simplified procedure for recognition and enforcement. The crux of the defence is whether or not the defendant has a right to a fair hearing, but unfortunately, the defence is not in itself capable of ensuring that the defendant has a right to a fair hearing.⁷⁴ All true violations of the right to a fair hearing are clearly within the scope of the public policy defence. One argument for having two separate defences is that the “public policy clause ought to operate only in exceptional cases”.⁷⁵ Despite this, it has already been shown that public policy is sometimes used to protect the rights of the defendant, but in doing so it can still retain its “exceptional nature”. This has the benefit of ensuring that decisions given in default are only refused recognition when the right to a fair hearing is really undermined. Therefore, as the public policy defence is capable of capturing all the exceptional cases but the default of appearance defence cannot, the situation would be a lot clearer if the latter defence was eliminated.⁷⁶

However is the same true in the international context? It is argued that there is still an overlap but the situation is slightly different. This is because in the regional context the right to a fair trial is clearly protected at EU level and also separately by each of the Member States. That is not to say that the Member States always adequately protect this right, but both the ECtHR and CJEU can and do regulate this. The public policy safeguard is useful, where a Member State may not have complied with its European Human Rights obligations, when applying a European Union private international law Regulation as demonstrated above. Such a clear analogy cannot be found at the international level.⁷⁷ Although most States protect the right to a fair trial at the national, regional and/or international levels, not all States do. Not all States are party to the International Covenant on Civil and Political Rights (ICCPR) which contains a provision on the right to a fair trial.⁷⁸ For example, of the 77 Member States of the Hague Conference, two are not party to the ICCPR.⁷⁹ Further, being a Member of the Hague Conference is not a prerequisite to becoming a State party to one of the Hague Conventions.

⁷⁴See in particular, *Krombach* (*supra* n 49), *Gambazzi* (*supra* n 55) and *Trade Agency Ltd* (*supra* n 67).

⁷⁵See the Jenard Report [1979] OJ C59/44.

⁷⁶For an example of the defence causing problems in relation to Art 6 ECHR see *Avotiņš v Latvia* (App no 17502/07) 25 February 2014, and Walker, *supra* n 4, 112–4 for an analysis of the decision. This case is being decided by the Grand Chamber of the European Court of Human Rights.

⁷⁷See Walker, *supra* n 4, ch 8, s IV, B, v.

⁷⁸Art 14. For a list of Contracting States see http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-4&chapter=4&lang=en#Participants, accessed 26 February 2015.

⁷⁹China and Malaysia. For the list of Members see http://www.hcch.net/index_en.php?act=states.listing, accessed 26 February 2015.

Another potential difference here is whether the same concept of “public policy” is envisioned at the international level. At the European level the provision covers procedural as well as substantive public policy, and in fact a claim relating to procedural public policy is much more likely to succeed than a claim relating to substantive public policy.⁸⁰ However, the same version of public policy might not be envisioned in all jurisdictions.⁸¹ The concept of public policy has developed in US case law over the years and there are variances between states.⁸² However it has generally been interpreted very restrictively, with courts going as far as to say that in order for a judgment to be denied recognition on the ground of public policy it must be “inherently vicious, wicked or immoral, and shocking to the prevailing moral sense”.⁸³ In order to create consistency a majority of states enacted an influential model law: the Uniform Foreign Money-Judgments Act 1962.⁸⁴ This means that even though technically recognition and enforcement is governed by state law (where there is no international instrument) the grounds are generally the same in any court in the United States.⁸⁵ The Act only applies to judgments relating to money. The Act is problematic because it contains a public policy ground that has been interpreted as applying only to substantive public policy because it requires that the “cause of action” of the judgment is repugnant to the public policy of the state in which enforcement is sought. This interpretation may well be because the issues of procedural public policy are largely dealt with by separate grounds of non-recognition based on “due process” or “insufficient notice”.⁸⁶

However, the Act was revised in 2005 and is now known as the Uniform Foreign-Country Money Judgments Recognition Act (but this has not been enacted in all states).⁸⁷ The 2005 Act broadens the scope of the public policy

⁸⁰For example, see Beaumont and Johnston, *supra* n 2, 259–64 and the Heidelberg Report, *supra* n 57, paras 555–9.

⁸¹For information on public policy in Hong Kong, Macau and Mainland China see J Huang, “Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU Laws” (2010) 6 *Journal of Private International Law* 109.

⁸²For example, see *Ackermann v Levine*, 788 F2d 830 [2d Cir 1986], *Sung Hwan Co Ltd v Rite Aid Corporation*, 7 NY3d 78, [2006], *The Society of Lloyds v Webb*, 156 F. Supp. 2d 632 (2001), *Blacklink Transp Consultants Pty Ltd v Von Summer* 2008 NY Slip Op 50017 (U) [18 Misc 3d 1113(A)], W Heiser, “The Hague Convention on Choice of Court Agreements: the Impact on Forum non Conveniens, Transfer of Venue, Removal and Recognition of Judgments in United States Courts” (2010) 31 *University of Pennsylvania Journal of International Law*, 1013, 1024–32; D Stewart, “Recognition and Enforcement of Foreign Judgments in the US” (2010) 12 *Yearbook of Private International Law* 179; and L Silberman, “The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: the US Regime” (2003) 26 *Houston Journal of International Law* 327, 357–9.

⁸³*Sung Hwan Co v Rite Aid Corp*, 7 N.Y.3d 78, 82, [2006].

⁸⁴For more information see Heiser, *supra* n 82, 1024–32 and Stewart, *supra* n 82.

⁸⁵Heiser, *supra* n 82, 1025.

⁸⁶See Stewart, *supra* n 82, 184–7 and Heiser, *supra* n 82, 1027–9.

⁸⁷For further information see Heiser, *supra* n 82, 1024–32 and Stewart, *supra* n 82.

clause by providing that the foreign judgment need not be recognised if either the judgment or the cause of action on which the judgment is based is repugnant to the public policy of the state addressed or the United States.⁸⁸ Therefore the 2005 Act removed the perceived limitation of the public policy provision to substantive rights only and widened its scope to apply to procedural public policy also. Although the 2005 Act does not apply in all states, Heiser considers that the 2005 Choice of Court Convention will pre-empt state law and require the enforcing court in those states that have not adopted the 2005 Act to give a broader application to the public policy provision anyway,⁸⁹ as the focus on the cause of action only is not compatible with the 2005 Convention (nor the 2007 Convention). Further the decision of the New York County Supreme Court in *Blacklink* also indicates that the public policy exception is not limited to substantive public policy.⁹⁰ The Australian judgment is not refused recognition on the basis of public policy but the court does make references to procedural public policy. “Common law jurisdictions have different procedural rules, some of which reflect different public policy choices. Different does not mean repugnant”.⁹¹ This implies that if the procedural rules were repugnant then recognition could be refused on the basis of public policy. The court concludes that the Australian law “does not discourage access to the courthouse and, thus, does not offend the public policy of New York”.⁹²

Although the possibility of eliminating this defence is not quite as clear at the international level as at the European Union level since there might not always be a clear correlation between the right to a fair trial and the public policy defence, the defence still might not be strictly necessary. For example, in the Verwilghen Report, when discussing the public policy defence, it was stated that the “Commission felt this phrase [manifestly contrary to public policy] would necessarily cover cases in which the maintenance decision was rendered following proceedings that were incompatible with respect for the rule of ‘due process of law’ or the rights of the defence”.⁹³ Therefore, technically, the ground for non-recognition based on the rights of the defence may not be necessary at the international level either. It can be subsumed into the public policy defence in an international convention even though in the European Union and in the US Uniform legislation it is a separate ground for non-recognition at the moment. The case for doing so has been increased by the change in 2005 in the US Uniform Act allowing a monetary

⁸⁸S 4(c)(3).

⁸⁹Heiser, *supra* n 82, 1046.

⁹⁰*Blacklink Transp. Consultants Pty Ltd v Von Summer* 2008 NY Slip Op 50017(U) [18 Misc 3d 1113(A)].

⁹¹*Ibid*, s A.

⁹²*Ibid*, s B.

⁹³M Verwilghen, “Explanatory Report on the 1973 Hague Maintenance Conventions” (HCCH, 1975), para 63, available at http://www.hcch.net/index_en.php?act=publications.details&pid=2946&dtid=3, accessed 14 August 2014 .

judgment, not just the cause of action on which it was based, to be reviewed on public policy grounds. A clarification in the explanatory report to the new Judgments Convention that sufficiently serious breaches of the notification of the defendant/rights of the defence ground in the Choice of Court and Maintenance Conventions that are deemed to have undermined the right to a fair trial in the State of origin have been subsumed within public policy would avoid any *a contrario* implication from comparing the new Convention to the Hague Choice of Court and Maintenance Conventions.

(b) *Procedural fraud*

Both the Choice of Court Convention and the Maintenance Convention contain an exception based on procedural fraud. However, unlike default of appearance, this exception is the same in each instrument. The ground applies where “the decision was obtained by fraud in connection with a matter of procedure”.⁹⁴ Although the ground itself is much clearer than the default exception, it is still argued it is not necessary. Any successful examples of the procedural fraud defence could be subsumed into public policy, so the added value of the defence is questionable.⁹⁵ Further, the EU Regulations do not contain a similar exception. The Hartley and Dogauchi Report identifies some examples of what could be considered as procedural fraud. These are: “where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant the wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence”.⁹⁶ It is clear that the first two points could easily be covered by the right to a fair trial aspect of the public policy exception. The latter points which cover corruption and deception in relation to the trial itself would also be covered by the public policy exception.

Hartley and Dogauchi recognise the overlap between these exceptions which all relate to “procedural fairness”.⁹⁷ It is believed by some that there is a need to place so much emphasis on procedural fairness, because in some countries the

⁹⁴ Art 23(b) Maintenance Convention 2007 and Art 9(d) Choice of Court Convention 2005.

⁹⁵ See Walker, *supra* n 4, ch 8 s IV, B, *ii*.

⁹⁶ Hartley and Dogauchi Report, *supra* n 22, para 188. Kessedjian considers that procedural fraud can be split into four categories. These are: fraud as to the jurisdiction of the court of origin, fraud as to the applicable law, fraud concerning prior notification to the defendant in the original proceeding (which she recognises “will be caught and sanctioned at the same time as the review of the notification”) and fraud committed in the submission of evidence to the court of origin (C Kessedjian, “Synthesis of the work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters” paras 40–45; and see also the Nygh and Pocar Report, Preliminary Document no 11 of August 2000, 113).

⁹⁷ Hartley and Dogauchi Report, *supra* n 22, para 190.

principles of procedural justice are “constitutionally mandated”.⁹⁸ Presumably therefore, in order to comply with their national constitutions, State bodies prefer that the grounds are listed separately to provide coherence. However, if the fraudulent act was so obvious to the enforcing State without having to review the substantive part of the judgment, they would not have to enforce it anyway on grounds of public policy because no State agrees with a judgment based on fraud. Hartley and Dogauchi indicate that procedural fraud has to be distinguished from public policy because there are “some legal systems in which public policy cannot be used with regard to procedural fraud”.⁹⁹ Such a distinction seems somewhat artificial, because if the fraudulent behaviour creates such an adverse outcome surely it would have to be manifestly contrary to public policy to enforce such an order.

The Kessedjian report suggests that several experts did not want the original proposed Judgments Convention to be weighed down by a provision on procedural fraud. It also raised the issue of whether such a provision should contain a requirement that the defendant tried to contest the fraud in the State of origin if he was aware of the fraud during the proceedings. The analogy is that if one did try to contest the fraudulent evidence and this was unsuccessful, or one was barred from doing this, this would most likely be a violation of public policy in the enforcing State.¹⁰⁰ However, the experts that opposed an exception on the basis of fraud were unsuccessful and the exception made it into the Choice of Court Convention (following the 1971 Hague Enforcement Convention) and then also into the Maintenance Convention. None of the exceptions requires that the defendant challenged the fraud in the State of origin.¹⁰¹ Under the US Uniform Acts only extrinsic fraud is a suitable ground for non-recognition, intrinsic fraud is insufficient.¹⁰² Therefore it only concerns “non-litigated matters that deprive a defendant of the opportunity to fairly present his case”.¹⁰³ As such this also relates to a matter of procedure that prevents access to court and therefore by analogy is compatible with the examples of public policy discussed in *Blacklink*.¹⁰⁴

The explanatory report to the new Judgments Convention could specifically establish some clear examples of judgments based on procedural fraud that

⁹⁸*Ibid.*

⁹⁹*Ibid.*, fn 228.

¹⁰⁰See Kessedjian, *supra* n 96, para 45.

¹⁰¹In this respect consider the English case law at common law such as *Owens Bank v Bracco* [1992] 2 AC 443, 468 where the line of thought is that “a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court”.

¹⁰²See Stewart, *supra* n 82, 188.

¹⁰³*Ibid.* The distinction made in US law between extrinsic and intrinsic fraud requires the defendant to challenge the fraud in the State of origin if he has the opportunity to do so.

¹⁰⁴See *supra* at nn 90–92.

would be regarded as violations of public policy for the purpose of the Convention (thereby creating some minimum standards on what constitutes a violation of public policy and enhancing the potential for uniform interpretation of the new Judgments Convention). Although the explanatory reports which accompany the Conventions are non-binding and do not require formal adoption, they have proved to be authoritative in the past. For example the “most frequently cited supplementary source in relation to the Abduction Convention is the Explanatory Report”.¹⁰⁵ The courts in England and Wales regularly refer to the Explanatory Report to the Abduction Convention, and courts in other jurisdictions such as the USA, Germany, Sweden and Austria have also used the Report as an authoritative source in deciding how to interpret the Convention.¹⁰⁶ This Report was not even made available to Member States for their suggested comments in the way in which the twenty first century reports are (which the writers of the reports endeavour to take on board). Therefore a statement in the Explanatory Report about how fraud has been subsumed within public policy would influence the interpretation of the grounds for non-recognition in a future Judgments Convention.

It is clear that there is disagreement on whether a ground of non-recognition relating to procedural fraud is necessary. In relation to instruments that do not contain separate provisions on fraud, it has been argued that although “fraud cannot in itself constitute a ground of non-recognition . . . there may be situations in which a court would regard it as being contrary to its public policy to recognise a judgment obtained by fraud”.¹⁰⁷ This would appear to be the most sensible approach and it is what the text of a future Judgments Convention should aim for. It is hoped that differences in this area can be set aside so that a new instrument can have a more simplified procedure for recognition and enforceability that does not contain an exception based on procedural fraud. This is because the public policy exception is a necessary protection that should be capable of being applied to cover any serious abuses of procedure that affect one of the parties.

(c) *Grounds that should be included*

The grounds for non-recognition that must be included in a future Judgments Convention are public policy and irreconcilable judgments. Public policy is a necessary safeguard that should always be included in these instruments which can be used in exceptional circumstances. It is also important to maintain an irreconcilable judgments ground because it is impossible to prevent irreconcilable

¹⁰⁵R Schuz, *The Hague Child Abduction: A Critical Analysis* (Hart Publishing, 2013) 95.

¹⁰⁶Some examples can be found at <http://www.incadat.com/index.cfm?act=search.result&actie=prev&lng=1>, accessed 31 October 2014.

¹⁰⁷TC Hartley, “The Modern Approach to Private International Law International Litigation and Transactions from a Common Law Perspective” (2006) 319 *Hague Recueil des Cours* 9, 307. See the Schlosser Report on the Brussels Convention [1978] OJ C 59/71, para 192 (Schlosser Report).

judgments from occurring (even more so where there are no direct rules on jurisdiction) so the exception needs to be retained to have a rule determining which judgment has priority in order to uphold the proper administration of justice.

It may also be useful in a broad Judgments Convention that covers delictual as well as contractual claims to include an exception on damages like the Choice of Court Convention does.¹⁰⁸ This is to deal with the problem of enforcing exemplary or punitive damages in States that do not recognise such damages in the type of case in hand. Where exemplary or punitive damages have been awarded, the exception gives the court in the State of enforcement the discretion to refuse to recognise the part of the award that does not compensate for actual loss or harm suffered. This prevents the problem of the whole of a judgment being set aside where exemplary damages are awarded as part of the decision. The provision allows for part of the judgment to be enforced. Therefore a separate clause which is suitably clear, given the work that was put into it for the Choice of Court Convention,¹⁰⁹ would be better than using the public policy clause if that could result in the entire judgment being refused enforcement. However, given the subsuming of other grounds within public policy that we recommend here, it may be the apposite time to subsume the damages ground within public policy (as it is in Brussels I). Thus a clear statement in the explanatory report in relation to damages (practically identical to that contained in the explanatory report on Choice of Court) would be necessary to clarify the limited circumstances in which the non-compensatory part of a foreign damages award may be refused enforcement on grounds of public policy while ensuring that at the very least the compensatory part is enforced.

The grounds based on poor service and procedural fraud are not strictly necessary, as we have seen above, because they could be subsumed within public policy. This would have the advantage that merely technical breaches of service or technical procedural frauds that have not led to a judgment that is seriously compromised will not result in the non-recognition of the judgment. However, such a fundamental change in approach would require that the explanatory report is clear in order to help counteract any anticipated negative effects. For example, the report should state very clearly that what was previously covered by procedural fraud, lack of notice and lack of ability to contest the judgment should now all fall within public policy (where the violation is clear and serious enough to undermine confidence in the judgment). This would be in order to avoid any suggestion that these matters could not be held contrary to public policy as an *a contrario* interpretation of the new Convention compared with the previous two. Ultimately, this change should have the effect of making the grounds for non-recognition simpler and making sure that they are

¹⁰⁸Art 11.

¹⁰⁹See the Hartley and Dogauchi Report, *supra* n 22, at paras 203–5, for a clear explanation of the ground for non-recognition on the basis of damages which is also clear in the text of the Convention.

only used in appropriate situations. It would be best if the negotiators of the Convention were to agree a text on this issue to be included in the explanatory report.

3. *Enhancing recognition and enforcement through adaptation*

Article 54 of the Brussels I Recast is an excellent starting point for discussions in The Hague on how to deal with foreign judgments which contain an element or elements that are unknown in the law of the State addressed. It requires the courts of the State addressed to adapt, “to the extent possible”, the unknown foreign measure or order to a measure or order known to the law of the State addressed “which has equivalent effects attached to it and which pursues similar aims and interests”. The adaptation shall not result in effects going beyond those provided for in the law of the State of origin.

It is probably an ambitious goal to require courts in every State to take on this task of adaptation in a global Convention. Sufficient comfort may be drawn from the fact that the Brussels I Recast only requires adaptation to be done “to the extent possible” thereby permitting a court to say, eg, that it has tried to do it but failed because there is no satisfactory domestic equivalent that would not result in effects going beyond those provided for in the law of the State of origin. If this degree of flexibility is not sufficient to achieve consensus in The Hague then a sensible compromise may be for adaptation to be drafted as a “may” provision in the new Judgments Convention which would authorise but not require the State addressed to make the adaptation.

4. *Procedure for recognition and enforcement*

In regard to the procedure for recognition and enforcement in a new Hague Judgments Convention it would be suitable to aim towards some form of minimum harmonisation. The new system adopted in the Brussels I Recast (which is discussed above) which combines actual enforcement with enforceability has the potential to be procedurally efficient and aspects of it could be considered in a global context. The direct incorporation of the whole Brussels I procedure into an international Convention is not realistic since this procedure is based on the principle of “mutual trust” and on the harmonisation of jurisdiction rules within the European Union. It might be possible to reach agreement on the automatic recognition of foreign judgments, as achieved in the 1996 Convention,¹¹⁰ but unfortunately this was not achieved in either the 2005 or the 2007 Convention. In the context

¹¹⁰Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Art 23(1). “Recognition by operation of law means that it will not be necessary to resort to any proceeding to obtain such recognition, so long as the person who is relying on the measure does not take any step towards enforcement” (P Lagarde, *Explanatory Report to the 1996 Convention* (HCCH, 1998) para 119).

of recognition specifically, one issue that is only partially addressed in the Recast¹¹¹ that should be fully considered in the negotiations on the new Judgments Convention is how to deal with recognition of foreign judgments when the issue arises as an incidental question in litigation in another Contracting Party.

(a) *Procedures in the Hague Maintenance Convention 2007*

The Maintenance Convention contains two procedures for recognition and enforcement. The procedure in Article 23 represents a three-stage procedure including separation of the *exequatur* (enforceability) and actual enforcement stage, whereas the procedure in Article 24 only has two stages. Article 24 was necessary as it appears that not all States have an *exequatur* stage in relation to foreign maintenance judgments. Certain systems currently have “a single-stage procedure, not involving a separate registration or declaration of enforceability, but rather a single application to the court for enforcement of a foreign decision”.¹¹² The procedure is similar in some respects to the one in the Brussels I Recast that abolished the *exequatur*.¹¹³

Although having one procedure that covers both recognition and enforceability as well as actual enforcement would appear to create a more simplified procedure than that provided for in Article 23 of the Maintenance Convention, the latter procedure has the advantage of easy enforcement at the first stage. This is because the procedure in Article 23 only allows for *ex officio* review at the first stage and this is limited to public policy. However, the procedure under Article 24 allows *ex officio* review of the public policy ground, of whether or not proceedings having the same purpose are ongoing in another State, and of whether an incompatible decision exists.¹¹⁴ Not only are there additional grounds on which the competent authority may review the decision, but the parties can also challenge at the first stage. This provision has been included to protect the parties’ right to be heard.¹¹⁵

¹¹¹It is not addressed in the Hague Choice of Court and Maintenance Conventions.

¹¹²Borrás and Degeling Explanatory Report, *supra* n 27 at para 516.

¹¹³See above at section A. For a diagram indicating the difference between the two procedures in the Maintenance Convention see L Walker, “From Brussels I and the Maintenance Convention to the Maintenance Regulation: Is the Resulting Maintenance Regulation Consistent with the Other EU PIL Instruments?” (2013) 6 *Nederlands Internationaal Privaatrecht* 167, 169.

¹¹⁴See Art 24(4).

¹¹⁵“At the first stage of recognition and enforcement proceedings, Ms . . . Ferreira emphasised that a debtor had no right to be heard and that it was an automatic process of recognition and enforcement. She believed that this went against the fundamental rights of a debtor because from a procedural view there was a need to enable people to make their submissions and respond to an application. She observed that perhaps it could be acceptable not to hear from the debtor at all at the first stage of proceedings as long as that person had the opportunity to challenge any recognition of a decision made against him and then to be

Although there are fewer stages in the Article 24 procedure, there are additional methods for reviewing the decision. Therefore, just because the procedure has fewer stages does not necessarily suggest that the decision will be enforced more expeditiously.

“For these States it is likely that the first stage will be more protracted than under the Art. 23 system and therefore in the vast majority of cases it may mean that it takes a longer time for the maintenance creditor to get his money. On the other hand, in the difficult cases that go to appeal the Art. 24 system has advantages over the Art. 23 procedure that there is only one appeal and that during that appeal the enforcement of the decision will only be stayed in exceptional circumstances.”¹¹⁶

The decision on recognition and enforcement under Article 24 can only be given after the respondent has been informed of the proceedings and both parties have been given an adequate opportunity to be heard.¹¹⁷ However the benefit of having one full hearing at which national and international grounds for non-enforcement can be heard together, like Article 24 facilitates, is that it helps to solve the problem in *Prism Investments*, where a judgment has to be granted recognition and enforceability even though it will not be enforced. This is a waste of time and resources so it would be more efficient for all those involved if these situations do not arise.

(b) *Article 14 Choice of Court*

Unlike the Maintenance Convention, the Choice of Court Convention says very little on the procedure for recognition and enforcement.¹¹⁸ The provision simply states that the procedure shall be governed by the law of the State addressed.¹¹⁹ However, it is emphasised that the court should act “expeditiously” when carrying out this procedure. The Hartley and Dogauchi report suggests that the court must use the most expeditious procedures available to them.¹²⁰

heard as to his arguments. She considered it strange that whilst the meeting suggested that the needs of a child must be protected, the needs of a debtor are not also considered. If no balance were struck then Ms . . . Ferreira stated that the Chinese delegation would support the entire deletion of all of Article 20” [what is now Art 23] (Proceedings to the Maintenance Convention, Procès verbal no 5, 20).

¹¹⁶Beaumont, “Reverse Subsidiarity”, *supra* n 27 at 573.

¹¹⁷Art 24(3).

¹¹⁸It is noted that the substantive rules in Arts 8 and 15 are more detailed but this article will not address this point.

¹¹⁹The Hartley and Dogauchi Report, *supra* n 22, at para 215, emphasises that this does not include the grounds for which recognition and enforcement can be refused, as specified in Art 8(1).

¹²⁰*Ibid*, para 216.

(c) *Possible solutions*

For the new Judgments Convention it would be helpful if some form of minimum harmonisation of the procedure for recognition and enforcement is reached: the minimum standard achievable by consensus. Therefore, the benefits of the procedure in Article 24 of the Maintenance Convention should be highlighted, in particular, the fact that Convention grounds for non-enforcement can be dealt with at the same time as national grounds for non-enforcement, as is also the case with the Brussels I Recast.¹²¹ However, the benefits of the procedure in Article 23 of the Maintenance Convention and Article 14 of the Choice of Court Convention should also be considered in order to try to make the procedure as tight as possible. When attempting to reach minimum harmonisation, delegates could take account of provisions in the Brussels I Recast that relate to the actual enforcement procedure.¹²²

(i) *The law of the State addressed applies in the absence of harmonisation.* This would appear to be the most sensible approach. As that State has to enforce the order, the simplest and most efficient method is to do this by applying its own law unless the Convention gives a specific alternative rule. It would be useful for the Judgments Convention to contain a provision like those in the Hague Maintenance Convention which confirm that enforcement should be carried out in accordance with the law of the State addressed where the Convention has not created a harmonised rule.¹²³

(ii) *Harmonised rules on address for service and representative ad litem.* If a single stage procedure is agreed, it would be useful to have harmonised rules on the address of the defendant for service. The rules in the Brussels I Recast (Articles 41(3) and 47(4)) are very useful in this respect because they make things simpler for the parties and should reduce the costs of the process.

(iii) *No rule on local jurisdiction.* The elimination of the old local jurisdiction rule in Article 39(2) of the original Brussels I by its repeal in the Recast solves a problem that was inherent in the old Brussels I. There is no equivalent rule in the Hague Choice of Court Convention, therefore it is argued that the status quo should be maintained in this area and no local jurisdiction rule for enforcement actions should be introduced in the new Hague Judgments Convention.

¹²¹However, as the Brussels I recast has only recently entered into force it is not clear how the system will work. Therefore, changes in line with this instrument may be met with scepticism. For example, see L Timmer, "Abolition of *exequatur* under the Brussels I Regulation: ill conceived and premature?" (2013) 9 *Journal of Private International Law* 129.

¹²²See section D3 above.

¹²³See Arts 23(1), 24(1) and 32(1) of the Maintenance Convention 2007.

(iv) *The certificate.* It would be useful to consider the benefits of including a certificate in the new Hague Judgments Convention to be provided by the court issuing the judgment, as the Brussels I Recast does in Article 53 and Annex I, particularly if the procedure for recognition and enforcement is combined with the actual enforcement stage. However, any provision needs to be clearer than that contained in the Regulation and it should also be clear which party should bear the costs of translation.

(v) *Service on the person against whom enforcement is sought.* A similar provision to that found in Article 43 of the Brussels I Recast will be necessary if the procedure for recognition and declaration of enforceability and enforcement is combined in the new Judgments Convention. If such a provision is necessary in the Convention, the service should be after the holder of the judgment has been able to take provisional and protective measures, to maintain the surprise effect at the provisional stage so that the defendant cannot hide or remove his assets, but before actual enforcement takes place.

(vi) *Suspension or limitation of enforcement.* A State should not enforce a judgment that is no longer enforceable in the State of origin. This is a general proposition in private international law and can be seen in Article 8(3) of the Choice of Court Convention and Article 20(6) of the Maintenance Convention.

(vii) *Courts hearing applications for refusal of enforcement.* The Convention should include a provision requiring Contracting States to notify the Permanent Bureau which courts can hear applications for refusal of enforcement and any appeals against such decisions. This information should be made public through the Hague Conference website and be regularly kept up to date.

F. Conclusion

A future Hague Judgments Convention that may emerge from the current negotiations in the Hague Conference on Private International Law on the Judgments Project will, at least, deal with the recognition and enforcement of judgments in civil and commercial matters. This paper argues that some lessons can be learned from recent developments in the European Union, and from case law and other analysis, which would safely enable the substantive grounds for non-recognition/enforcement (ie, those unrelated to the jurisdictional basis of the original judgment) to be reduced to manifestly contrary to public policy and irreconcilable judgments. This goes further than the recast of Brussels I because the above analysis demonstrates that the special defence relating to default judgments is unnecessary (as all such successful cases would also be a violation of the right to a fair trial and therefore come within the public policy exception). The analysis demonstrates that the extra defence contained in the two most recent Hague Conventions, on Choice of Court and Maintenance, of procedural fraud could also be subsumed

in the public policy defence. The special defence relating to excessive damages found in the Choice of Court Convention is also a candidate for being included within the public policy defence, which is the case under Brussels I. It would be important for the explanatory report to the new Judgments Convention to record that the drafters intended that violations of a fair trial, including those caused by procedural fraud or by irremediable failings in the process of serving the defendant, fall within the public policy defence. The explanatory report should also record, in similar language to that used in the Choice of Court Convention, the limited circumstances in which a court could strike down part of a foreign judgment's damages award as being excessive, but link the basis for excluding enforcement of some or all of the non-compensatory part of the judgment to the public policy exception.

On a positive note, the Brussels I Recast (Article 54) points the way to trying to recognise and enforce foreign judgments that do not fit easily into the host's legal system by enshrining the principle of adaptation and this could usefully be adopted in a new Hague Judgments Convention.

There is no doubt that reaching agreement on any significant procedural harmonisation will be difficult. The minimum starting point is that already agreed in the Choice of Court Convention which is that the court addressed shall act "expeditiously" (Article 14), interpreted by the explanatory report to mean the "most expeditious available". The Brussels I Recast shows us the value of trying to ensure that all grounds for non-enforcement of a judgment (national and EU/international) are dealt with in the same procedure to avoid the procedural complexities and extra costs implied by dealing with them separately as required under the old Brussels I by the CJEU in *Prism Investments*. The best that can be hoped for in the new Judgments Convention seems to be some minimum harmonisation of the procedure for enforcement along the following lines: a requirement to use the most expeditious procedure available with a strong steer in favour of hearing national and international grounds for non-enforcement in one hearing. Minimum standards on notifying the defendant of the foreign judgment should be created (perhaps through the use of a certificate); prohibiting any requirement for the claimant to have an address for service in the State of enforcement; and limiting the need for a representative *ad litem*. Finally, contracting parties should be required to notify to the Permanent Bureau which courts are competent to hear applications for enforcement and which courts can be appealed to.