ПРИВРЕДНИ УГОВОРИ И СПОРОВИ – СУДСКИ И АРБИТРАЖНИ

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Some comments on recent developments in Serbia and other West Balkan countries from the perspective of European and comparative private international law

Summary

Private international law, in the EU and beyond finds itself in a period of change. This contribution deals with recent developments in the field of PIL, with the focus on recognition and enforcement of judgments, namely in Serbia, before the background of the Acquis. New developments concerning the improvement of cross border enforcement with regard to West Balkan countries are also discussed.

Key words: *private international law, recognition and enforcement, European Union, Lugano Convention, West Balkan countries, Serbia, reform.*

I Introduction

In times of continuous and all-embracing changes, private international law has been one of very few areas of the law which so far in Serbia has hardly been affected by reforms. It is true that the recognition and enforcement of foreign arbitral awards are since 2006 regulated in another context, but apart from this, the Yugoslav Law on Resolution of Conflict of Laws with Regulations of Other Countries from 1982 (in the following: YugPILAct) is the same as in the year of its adoption[1]. The Yugoslav codification is also in force practically unchanged in Bosnia and Herzegovina, Croatia and Montenegro. The Slovenian Private international Law and Procedure Act of 1999[2] is based on the Yugoslav Code, with some modifications. Macedonia has adopted a new Private International Law Act in 2007[3] which has taken many elements from the Yugoslav resp. Slovenian model and has been somewhat reformed in 2010[4]. In other words, the situation appears conspicuously stable not only in Serbia but in the region (with the difference that in Slovenia as an EU Member State, the *acquis communautaire* has in certain matters pushed aside the national regime).

An explanation for this may be found in the exceptional quality of the Yugoslav codification which, at the time of its creation, has received universal praise and has *inter alia* been recommended by an eminent German professor as a model for future codifications in other states[5]. However, in private international law, 30 years constitute an eternity and stability in the region has by and by turned into stagnation. Already in the mid–1980ies, Germany started a series of far-reaching reforms[6]. Switzerland adopted a Federal Act on Private International Law in 1987 which has become famous for its path-breaking concept and innovative solutions. In the 1990ies, new Acts on private international law were adopted in Romania and in Italy. In recent years, namely the rapid development of the European private international law has triggered extensive reforms not only in Member States but also beyond. Many European countries have in past years adopted modern codifications or made substantial reforms of their private international law. Recent examples for

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1 For an English translation see Stanivuković/Živković, "Private International Law in Serbia", in: *International Encyclopedia of Laws*, Kluwer Law International (2008).

2 Original text and English translation in: Babić/Jessel Holst, *Međunarodno privatno pravo. Zbirka unutarnjih, europskih i međunarodnih propisa*, Zagreb, 2011, p. 118 et seq.

3 Original text and English translation in: Babić/Jessel Holst, p. 50 et seq.

4 See Gavroska/Deskoski, *Meģunarodno privatno pravo*, Skopje, 2011.

5 See Firsching, "Das neue jugoslawische IPR-Gesetz: Praxis des Internationalen Privat– und Verfahrensrechts", *IPRax*, 1983, pp. 1–5.

6 For the actual version of the German Introductory Act to the Civil Code in English translation see *http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0007*.

comprehensive reforms are the Czech Private International Law (PIL) Act of 2012, the PIL Acts of Poland[7], Albania and the Netherlands (as the new 10th book of the Civil Code) of 2011, the Romanian Civil Code which includes a new codification of the private international law and has entered into force in 2011, the Turkish PIL Act of 2007, the Bulgarian PIL Code of 2005, the Belgian PIL Act of 2004, the Estonian PIL Act of 2002 and the Civil Code of Lithuania of 2000 (which also includes PIL). Other countries have introduced more or less substantial changes in their pertinent legislation. Thus, the picture that presents itself in Europe today is in no way comparable to the situation in the 1980ies.

Before this background it is easy to understand why the Republic of Serbia as well as Montenegro have meanwhile prepared their own new Draft Acts on Private International Law. A public discussion on the Proposal for a new Montenegrin PIL Act has been held in Podgorica on 6 March 2012[8]. It may be interesting to know that the Montenegrin draft has been prepared in intensive cooperation with experts from the region (and beyond).

In Serbia, a public discussion on the draft *Zakon o međunarodnom privatnom pravu* has been held on 22 November 2011[9]. The two drafts from Serbia and from Montenegro are not identical but in both cases, intensive use has been made of legal comparison, and the influence of the European private international law is obvious even at first sight. It should be mentioned that a reform is also on the way in Croatia.

All three reform projects have been supported by the *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH*, within the framework of the Open Regional Fund for South East Europe – Legal Reform[10]. In recent years, GIZ has also supported a series of annual international meetings of experts in private international law as a forum for discussion and exchange of experience in different countries of the region. Like the First International Conference of September 2003 (which had as a motto: „Twenty Years of the

7 This includes a comprehensive reform of the law of international civil procedure in the Polish Civil Procedure Code of 2008.

8 See program_okruglog_stola_MPP[1][1].pdf. For the draft version of February 2012 see *http://www.pravda.gov.me/biblioteka/nacrti-zakona*. In this context see Kostić-Mandić, *O novim konceptima u Međunarodnom privatnom pravu Crne Gore/New Concepts in Montenegrin Private International Law*, Podgorica, 2010.
De lege lata see Kostić-Mandić/Stanivuković/Živković, "Private International Law in Montenegro", in: *International Encyclopedia of Laws*, Kluwer Law International, 2010.

9 For details see *http://www.mpravde.gov.rs/lt/news/vesti/zakon-o-medjunarodnom-privatnom-pravu-radna-verzija.html*.

10 For more details see Jessel-Holst, *Regionale Zusammenarbeit im internationalen Privat– und Verfahrensrecht in den Ländern des Westbalkans: Wirtschaft und Recht in Osteuropa*, 2012, pp. 72–75.

PIL Code")[11], the Tenth Jubilee Conference shall be held at the Law Faculty in Niš, in October 2012.

II The Serbian Draft Act on Private International Law of 2012

1. Short overview

The Serbian PIL Draft is interesting in several respects. *Inter alia*, it is a very long document which comprises almost 200 provisions (nearly twice the number of the Yugoslav PIL Act of 1982). The extraordinary length of the Draft is only partially due to the new structure, namely – regulating in context international jurisdiction and conflict of law rules (and in some cases even the recognition of foreign decisions) for each issue, in order to make the law more user-friendly. In this, the Draft basically follows the example of Switzerland and of Belgium. The main reason is that many issues are dealt with in the Draft in much more detail than before and that a number of important issues are even regulated for the first time. For these new matters, the authors of the draft have not confined themselves to intensive research in foreign laws and copying from foreign sources, but have in a number of cases developed solutions of their own which appear well-founded and suitable for enriching the international discussion in the field of private international law.

In the following, a short overview shall be provided with special regard to those parts of the Draft which are of special interest for business lawyers. It is legitimate to ask to what extent private international law should concern them? In a former, socialist environment that was more protected from the outside world, matters of private international law might have appeared a topic, reserved mainly for discussion among specialists. However, under current conditions, with the ever growing importance of the cross-border relations, the practical significance of private international law for a broad target group has become obvious. The modern developments in private international law have a considerable impact also on the business sector.

Thus, the Draft establishes a whole new regime for the international jurisdiction which for lack of space cannot be examined at this point. The recognition and enforcement of foreign judgments shall be dealt with in detail below (see below III). Far reaching changes are also to be found in the conflict of law rules, some of which shall be at least outlined in the following.

11 See Živković (ed.), *Zbornik radova. Dvadeset godina zakona o međunarodnom privatnom pravu/collection of papers. Twenty Years of the private international law code*, Niš, 2004.

2. Conflict of laws rules of the General part of the Draft

It is not possible at this point to enter into a discussion on provisions of the general part; all that can be given is a description of the main features. A guiding principle of the Draft, although it is not mentioned expressly, is to leave as many issues as reasonably possible to the decision of the parties. Apart from the classical field of application, that is: the contract law, the concept of party autonomy is extended, in varying degrees, namely to matters of non-contractual obligations, the personal name, and especially of the family and inheritance law. In this respect, the development is similar in the Serbia as in the Montenegrin draft.

Under the Yugoslav law, the nationality constituted the main connecting factor for persons, family and inheritance relations. One of the most striking features of the introductory provisions of the current Draft is the new concept of habitual residence (*uobičajeno boravište*) which dominates not only the European private international law, but also the pertinent Conventions of the Hague Conference on Private International Law and has found its way into all the recent national PIL codifications. To a limited extent, the habitual residence concept is also applied for legal persons so that there is a legal definition in the Draft also for them (see Arts. 5 and 6).

As regards referral (*uzvraćanje*), it has been provided in the Yugoslav Act of 1982 that if referral is made to the law of another country, the private international law of that country shall also be applied (see Art. 6 YugPILAct). This concept is reversed in Art. 34 of the Draft which says: „The law of a foreign state is applied with the exception of its rules on determining the applicable law, unless this Act provides differently". In fact, the Draft admits referral in only very few case groups.

As in the Slovenian and in the Macedonia PIL Act, the Draft contains a general escape clause (*opšta klausula odstupanja*)[12]. This clause says that the law referred to in the provisions of the PIL Act shall not apply in exceptional cases when it is evident from all circumstances that the relationship is in no significant connection with that law but is manifestly more closely connected with some other law (for details see Art. 36[13]). Here again, the Montenegrin draft follows a similar strategy.

The application of so-called overriding mandatory provisions (*norme neposredne primene*) is regulated for the first time in Art. 40 of the Draft[14].

12 For escape clauses in general see Kostić-Mandić, *Opšta klauzula odstupanja od mjerodavnog prava – u savremenom međunarodnom privatnom pravu*, Podgorica, in the process of printing.

13 See also Art. 161 of the Draft (specific escape clause for non-conctractual obligations).

14 See also Art. 144 of the Draft with a special provision for contractual obligations.

The domestic overriding mandatory provisions (that is: provisions, the respect of which is regarded as crucial for safeguarding the public interests of the Republic of Serbia, such as its political, social or economic organization) shall always be applied, irrespective of the otherwise applicable law. The court may give effect to the overriding mandatory provisions of a foreign country in case of a close connection of the legal relationship to that country.

3. Conflict of laws rules in the Special part of the Draft

The special part of the Draft also contains many remarkable innovations. One of them concerns the personal law of companies. The traditional concept in continental Europe has been that companies shall be governed by the law of the state where the company's centre of administration is established (so-called company seat principle). Therefore, in case a company transfers its centre of administration from the state of incorporation to another state, the applicable law will change accordingly. The alternative to this concept is the incorporation principle which has been developed in the Anglo-Saxon countries. It means that a company will (forever) live under the law under which it has been incorporated, independently of the place from which it actually conducts business. The Yugoslav PIL-Code 1982 starts from the incorporation principle ("*The nationality of a legal person shall be determined pursuant to the law of the State under whose law it was established*"), but in case of a transfer of the centre of administration to another state, switches over to the company seat principle („*If a legal person has its real seat in another State than the one in which it was established, and pursuant to the law of that other State it has the nationality of that State, it shall be considered to be a legal entity of that State*")[15].

However, in continental Europe, the established case law of the Court of Justice of the European Union (*Centros*, *Überseering*, *Inspire Art*) has deeply influenced views on the personal law of companies. Today, within the Union the company seat principle is seen as a restriction on freedom of establishment. As a consequence, the company seat principle can no longer be applied with respect to corporations which were established in another Member State. For this reason, the Member States have to adapt their national law and practice accordingly, either by applying the incorporation principle in relation to companies from other Member States only, or by applying it in general to all foreign companies.

Germany has never had an express provision on the law applicable to companies; in the practice, the courts have traditionally applied the law of the seat. In response to the ECJ judgments quoted above, the German Federal

15 See Art. 17 para. (1) and (2) Yugoslav PIL-Code 1982.

Ministry of Justice has presented a draft Act on the international private law of companies, associations and legal persons in 2008[16] which stipulates the principle of incorporation on a general basis. It must, however be said that this draft has not made substantial progress since then. One side-effect of the German reform discussion has been an intensive comparative research project the publication of which includes proposals for reform on the German national as well as on the European level[17].

In harmony with the European developments, the Serbian draft provides that the law governing legal persons, as well as organizations without legal personality, shall be the law of the country where they are registered (meaning: where they have been established)[18]. The same solution is inter alia to be found in the Bulgarian PIL Code of 2005 (Art. 56(1)).

Business lawyers may also take an interest in the proposed new provisions on international *property* law. The relevant chapter covers all relevant issues. In contrast to this, only the most basic aspects are covered by Art. 18 of the Yugoslav PIL-Code 1982 (especially *lex rei sitae* as the guiding principle). The Articles 113 et seq. of the Draft may well be considered as extraordinary in quality. This holds true especially for the provisions on the highly complex matter of real rights in movables which *inter alia* demonstrate a deep knowledge of comparative law[19].

A separate chapter deals with intellectual property (Art. 128 et seq.).

The Draft also contains provisions on the law applicable to securities held with an intermediary in Art. 124 et seq.[20]

The law applicable to *contracts* has in the Draft been shaped after the model of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [Rome I-Regulation] which has set international standards not only for

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16 See Referentenentwurf für ein Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen, available at *http://www.meyer-koering.de/downloads/61-574-30/RefE%20Gesetz%20zum%20Internationalen%20Privatrecht%20der%20Gesellschaften%20Vereine%20und%20juristischen%20Personen.pdf.*

17 See Sonnenberger (ed.), *Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts*, Tübingen, 2007.

18 See Art. 9, 57 et seq. of the Draft.

19 See Articles 117 and 118 of the Draft. By the way, Germany regulates the international property law relations in Articles 43–46 of the Introductory Act to the Civil Code. The Serbian Draft is based on similar principles, but – it must be said – much better formulated.

For comparison see also Articles 64–70 of the Bulgarian Private international Law Code of 2005.

20 In this context, the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary should be mentioned (for a Croatian translation see *http://www.hcch.net/upload/text36_hr.pdf*).

the EU Member States, but much beyond. The set of provisions is supplemented by a provision on the law applicable to voluntary agency (Art. 152)[21]. Although of great practical significance, the issue of voluntary agency has so far not been dealt with by many legislators[22]. Because of its complexity, it has also not been included in the final version of the Rome I Regulation.

For non-contractual liability, the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [Rome II-Regulation] has been used as a model.

III Recognition and enforcement of foreign judgments

1. General remarks

Effective legal protection requires not only a fair trial but also that the judgment, by which the dispute is finally decided, can be implemented without undue efforts. This poses additional challenges in cases where the country from which the judgment originates is not identical with the country of enforcement.

The European Community has considered the matter of cross border recognition and enforcement of judgments a priority at a very early stage. Since at the time the Community had no direct legislative competence, a Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) was in 1968 adopted by the Member States. The numerous instruments of the actual acquis communautaire concerning recognition and enforcement will be presented below (2.).

Recently, a regional initiative has been taken for establishing a link between the countries of the West Balkan and the EU regarding the mutual recognition and enforcement of judgments, or if that should not be possible, for copying from the *acquis* for the purpose of at least improving the regional cooperation with regard to cross border enforcement (for details see below 3).

In the Serbian national law, recognition and enforcement of foreign judgments are for the time being regulated in Articles 86 et seq. of the Yugo-

21 For this matter, international models exist. One of them is the Hague Convention of 14 March 1978 on the Law Applicable to Agency. Another possible model is to be found in the preparatory materials for the Rome I Regulation; in this context see Max Planck Institute for Comparative and International Private Law, "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2007, pp. 225–344 (298 et seq.).

22 The matter is, however, regulated in Art. 62 of the Bulgarian PIL code. The Montenegrin draft contains a special provision on voluntary agency which has been shaped after the model of the Hague Convention of 1978.

slav Act of 1982. It goes without saying that these provisions follow traditional patterns. The Serbian PIL Draft differs considerably from the Act of 1982. A set of modern provisions is contained in Articles 178–189 (recognition) and 190–192 (enforcement) of the Draft. Besides this, there are some special provisions on recognition regarding change of the personal name (Art. 45), marriages concluded abroad (Art. 62) and adoptions performed abroad (Art. 93). This part of the Draft will be examined at least briefly below (4.).

2. Recognition and enforcement in the European law of civil procedure

Through the Treaty of Amsterdam, the Community has received competence for regulating the judicial cooperation in civil matters, including namely the adoption of conflict of laws rules and for regulating the international civil procedure (*de lege lata* see Art. 81 of the Treaty on the Functioning of the European Union on judicial cooperation in civil matters).

Corresponding instruments are contained in several regulations etc., *de lege lata* namely the following[23]:

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Brussels I Regulation][24];
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [Brussels II bis Regulation];
- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims;
- Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure;

23 For the English text and the Croatian translation of the acquis in the area of private international law and procedure see: Babić/Jessel Holst, pp. 188 et seq.

24 For a future reform see Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14.12.2010 (COM(2010) 748 final), *http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf.*

– Council Decision 2007/712/EC of 15 October 2007 on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Lugano Convention of 30 October 2007];

and *de lege ferenda* the following:

– Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, consolidated text of 24 February, 2012[25]
– Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes of 16 March 2011[26];
– Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships of 16 March 2011[27].

The EU-Regulations have in common that they not only comprise simplified regimes for recognition and enforcement but also establish uniform rules governing the jurisdiction of courts.

In this contribution, the focus shall be on the recognition and enforcement of judgments in civil and commercial matters. For these matters, in relations between the Member States the Brussels I Regulation applies. Generally speaking, in the Brussels I Regulation, the European legislator follows the concept of the "free movement of judgments" (Recital 6 Brussels I Regulation). Judicial cooperation in the form of rapid and simple recognition of judgments from other Member States is considered essential for the sound operation of the internal market.

In the European law of civil procedure, the principle of automatic recognition applies. The declaration of enforceability is also issued virtually automatically (see Recitals 16 and 17 Brussels I Regulation). Nevertheless, the treatment for judgments from other Member States remains different from that for domestic judgments[28]. It is self-evident that with regard to foreign judgments certain formalities have to be observed. When they are fulfilled,

25 See *http://register.consilium.europa.eu/pdf/en/12/st06/st06925.en12.pdf.*

26 COM(2011) 126 final, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF.*

27 COM(2011) 127 final, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0127:FIN:EN:PDF.*

28 For details see Magnus/Mankowski/Wautelet, *Brussels I Regulation*, 2nd ed., Munich, 2012, Art. 33 note 15 et seq.

a judgment rendered in one Member State is to be recognized in all others without special proceedings, unless the recognition is contested by the other party. The main grounds for refusal are to be found in Art. 34 Brussels I Regulation (violation of the *ordre public* of the state in which recognition is sought; protection of the defaulting defendant; irreconcilability with a conflicting judgment). The declaration of enforceability is granted after a purely formal check of the documents supplied, with a possibility of appeal for the party concerned (Art. 43 et seq. Brussels I Regulation).

Needless to say, in the European law of civil procedure there is no space for any kind of reciprocity requirement.

The regime of the Brussels I Regulation is extended to Iceland, Norway and Switzerland by way of the above mentioned Lugano Convention of 2007[29].

3. Recent initiative for improvement of cross-border enforcement with regard to West Balkan countries

a) Initiative for accession of West Balkan countries to the Lugano Convention of 2007

On initiative of Slovenia, a regional initiative has been started in Brdo pri Kranju at the beginning of 2011 for collective accession of the West Balkan countries to the Lugano Convention of 2007. The target countries are: Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia. For them, an accession to the Convention would have far reaching effects. Thus, the cross border enforcement of judgments originating from Serbia in any other participating West Balkan country would follow the same regime as under the Brussels I Regulation, and vice versa.

What is more, cross-border enforcement would be equally facilitated in relation between the West Balkan countries and the (so far) 27 EU-Member States as well as Iceland, Norway and Switzerland. The consequences of a possible accession of Serbia to the Lugano Convention shall in the following be shown at the example of the German speaking countries.

The most dramatic improvement would occur in relation to Austria. For the recognition and enforcement of foreign judgments in Austria, with the exception of decisions on civil and family status, sec. 79 of the *Exekutionsordnung*[30] stipulates a very strict reciprocity requirement. Mere *de facto*

29 The Lugano Convention of 2007 (*Official Journal* 2009 L 147, p. 5) has entered into force for the EU, Denmark and Norway on 1.1.2010, for Switzerland on 1.1.2011 and for Iceland on 1.5.2011 (*O.J.* 2011 L 138, p. 1).

30 For details see Angst (ed.), *Kommentar zur Exekutionsordnung*, 2nd ed., Vienna, 2008, sec. 79.

reciprocity does not suffice; rather, reciprocity must be formally warranted by a (bilateral or multilateral) international treaty or through an ordinance (sec. 79(2) EO). Since apparently no such instrument exists with Serbia, currently sec. 79 EO constitutes a general obstacle for the recognition of Serbian judgments in Austria.

In relation to Germany, the situation is somewhat better but on no account perfect. The German national law also requires reciprocity, but sec. 328 of the German Civil Procedure Code[31] does not stipulate contractual reciprocity so that it is sufficient if German judgments are *de facto* recognized in the respective other country. The German courts usually interpret the reciprocity requirement in a very liberal way. Therefore, no justified reasons seem apparent for denying reciprocity in relation to Serbia, which is also under a liberal regime of de facto reciprocity. Yet, the matter is not that easy. First of all, older commentaries could only discuss the existence of reciprocity with the SFR Yugoslavia, or with the FR Yugoslavia, or with "Serbia and Montenegro". New commentaries address reciprocity with the Republic of Serbia, but unfortunately, there is still no established court practice in this respect. The German standard commentary on civil procedure law, which gives a resume of German practice for almost each and every country in the world, therefore considers itself unable to give a clear-cut statement on the existence of reciprocity with Serbia. It simply refers to a judgment from the early 90ies and confines itself to a remark that formerly, reciprocity has been guaranteed[32]. For a party intending to enforce a Serbian judgment in Germany this uncertainty in the legal literature may, in the absence of case law, cause a considerable delay, and probably additional costs, namely when the German judge insists on an expert opinion on the existence of reciprocity between Germany and Serbia.

Swiss law provides yet a third system for recognition and enforcement. Namely, the former reciprocity requirement has been deleted by the Swiss legislator without replacement decades ago[33]. Still, Serbian membership to the Lugano Convention of 2007 would facilitate the recognition of Serbian judgments in all three countries. Even in Switzerland, the simplified regime of the Convention would lead to substantial facilitation of the procedure.

The results of the Slovenian initiative remain to be seen. The procedure for accession is rather cumbersome and the accession itself depends on the consent of the existing Member States (for details see Art. 72 Lugano Convention of 2007). Countries ready to join may find the Polish example encouraging. Poland has become an EU Member State in 2004. But even well before

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31 For an English translation see *http://www.gesetze-im-internet.de/englisch_zpo/code_of_civil_procedure.pdf*.

32 See Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozessordnung*, 69th ed., Munich, 2011, Anh § 328 note 18.

33 See Honsell et al. (eds.), *Basler Kommentar, Internationales Privatrecht-Berti/Däppen*, 2nd ed., Basel, 2007, Art. 25 N. 28.

that date, Poland was granted access to the Lugano Convention of 16 September 1988[34] (as the antecessor of the actual Lugano Convention of 2007).

b) Conclusion of a new regional convention parallel to the Lugano Convention of 2007

In case the first option is deemed unrealistic at the present time, it has been proposed as an alternative to elaborate a purely regional convention on jurisdiction and on the enforcement and recognition of judgments, based more or less on the principles and instruments of the Lugano Convention of 2007, between the countries specified above (see III. 3. a). It is true that for them, the effects of such a new parallel convention (let us call it "Lugano II") would fall somewhat short of the effects of a membership to the Lugano Convention of 2007 itself. But even the proposed alternative could bring substantial advantages for the West Balkan countries. The mutual recognition and enforcement of judgments in the region would be considerably facilitated. By introducing a mechanism similar to that used in the Brussels I Regulation for their mutual relations, these countries would also move closer to the European Union.

Such regional convention would at the same time replace the existing network of bilateral agreements on mutual legal assistance. Such agreements do not exist between all the countries. Where agreements exist, they apparently do not to facilitate the cross border enforcement in comparison to the statutory regime; in some cases they are even stricter. Therefore, the envisaged new convention would provide better legal protection for the countries of the West Balkan in their mutual relations.

c) Outlook

The Slovenian initiative has from the start been actively supported by Serbia. The proposal has been confirmed by the representatives of the countries concerned in a follow-up conference in Belgrade in November 2011[35].

It should be mentioned that so far, two preparatory workshops on the topic have been held in Sarajevo and Belgrade. In 2012, cooperation on the issue shall be continued. Many issues will have to be clarified[36].

The initiative for improvement of cross border enforcement with regard to West Balkan countries is actively supported by the *Deutsche Gesells-*

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34 The Lugano Convention of 1988 entered into force for Poland on 1.2.2000.

35 For details see *http://www.mpravde.gov.rs/lt/news/vesti/regionalne-inicijative.html.*

36 See also Strategiepapier Cross Border Enforcement (preceding fn.).

chaft für Internationale Zusammenarbeit (GIZ) GmbH and the Open Regional fund for South East Europe – Legal Reform.

4. Recognition and enforcement of foreign judgments according to the Serbian Draft

a) No automatic recognition under the Draft

It has already been mentioned that the European international civil procedure law follows the concept of automatic recognition. In fact, this principle is considered one of the cornerstones of the European judicial area.[37] Many national codifications have also given preference to *ipso iure* recognition. One example for this is Germany, which (with the exception of foreign divorce decrees)[38] has no special procedure for the recognition of foreign judgments but only for the enforcement. A similar concept is *inter alia* to be found in Art. 1145 of the Polish Civil procedure Code as revised in 2008[39], as well as in Art. 22 sec. 1(2) of the Belgian PIL Code of 2004.

The present Serbian Draft[40] follows a strategy of its own. The standard procedure provides that the interested person must file a petition for recognition of the foreign judgment by the competent domestic court (Art. 182 et seq.). A recognized foreign judgment shall be enforceable in Serbia without further ado (Art. 190, 191 of the Draft). But there is also a possibility for the execution creditor to take proceedings for enforcement, without prior recognition. In that case, recognition of the foreign judgment shall be dealt with as a preliminary question (Art. 192 of the Draft). This appears to be a pragmatic solution because under the one and the other option, only one single procedure will be required for the recognition and enforcement of foreign judgments.

b) Pre-conditions for recognition

It is not necessary at this point to repeat the usual list of grounds for the refusal of recognition of foreign judgments, like violation of the domestic *ordre public* etc., which are already to be found in the Yugoslav Act of 1982 and can be taken for granted in any modern codification. Instead, the focus shall be on two elements which appear for the first time in Art. 181 of the Draft.

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37 See Magnus/Mankowski/Wautelet, Art. 33 note 15.

38 For details see sections 107 and 108 of the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (*FamFG*) of 2008.

39 According to this provision, the decisions of foreign courts in civil matters shall be recognized in Poland *ex lege*, unless impediments determined in Art. 1146 exist.

40 For this paper, the version of 14.3.2012 has been used.

(1) In comparison to the Yugoslav Act of 1982, one pre-condition for recognition has been abandoned, namely: that the foreign judgment shall not be recognized if there is no reciprocity (see Art. 92(1) YugPILAct). From the standpoint of comparative law, this hardly comes as a surprise. Thus, the Macedonian PIL Act of 2007 also goes without reciprocity requirement. The same holds true for other codifications in the region (Albania, Bulgaria). The Montenegrin draft has also abandoned reciprocity as a requirement for the recognition. Other recent codifications, as in Poland and Belgium, follow the same strategy. It has already been mentioned previously that Switzerland has deleted the reciprocity requirement decades ago.

(2) As before, a foreign judgment shall not be recognized if the court of the Republic of Serbia has exclusive jurisdiction in the respective matter. But the scope of this provision shall be different under the Draft than under today´s regime, because the number of cases of exclusive Serbian jurisdiction has in the Draft been reduced dramatically. Therefore, the authors of the Draft have seen the necessity of introducing an additional safeguard against cases in which a foreign country claims for itself a jurisdiction which from the domestic standpoint would appear exorbitant. *Sedes materiae* of this new additional safeguard is Art. 181 Lit.c) of the Draft. According to this provision, the foreign judgment shall only be recognized if the foreign court has based its jurisdiction on facts which the Serbian law would consider as a basis for the jurisdiction of Serbian courts for the decision of that kind of dispute. This provision may be seen as a protection against judgments from countries like the USA which claim for themselves an exceptionally broad international jurisdiction which is regarded as exorbitant and unacceptable in continental Europe. Interestingly enough, a similar solution is to be found in the Montenegrin draft[41].

A possible alternative defense against cases of foreign exorbitant jurisdiction would have been to introduce some kind of general clause preventing the recognition if the case does not show any real-and-substantial connection to the country of origin of the judgment. Such approach is to be found e.g. in France and England[42] and recently also in Turkey. Under this concept, much depends on the way the general clause is interpreted.

c) *Effects of the recognition*

The Yugoslav Act of 1982 provides that a recognized foreign judgment is equated with a judgment of a domestic court (Art. 86). This concept (according of equal status) appears problematic, because the effects of judgments are not the same in all countries. In the extreme case it may lead to the awk-

41 For comparison see also sec. 328 No. 1 of the German Civil Procedure Code.

42 See Schärtl, *Das Spiegelbildprinzip im Rechtsverkehr mit ausländischen Staatenverbindungen*, Tübingen, 2005, p. 32 et seq.

ward consequence that in the country of enforcement, the judgment shall have further-reaching effects than in the country of origin.

European law is based on the opposite assumption, namely that "recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they have been given"[43]. In other words, after the recognition, the foreign judgment shall in the country of enforcement continue to have the effects as in the country of origin[44]. This concept prevails in modern national codifications in Europe.

The authors of the Serbian draft have in this respect followed the European example: According to Art. 179(1) of the Draft, recognizing a foreign judgment shall mean that it shall have the same effects in Serbia as in the country where it has been rendered.

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ПРИЗНАЊЕ И ИЗВРШЕЊЕ СТРАНИХ ОДЛУКА

Коментари најновијег развоја у Србији и осталим земљама Западног Балкана из перспективе европског и упоредног међународног приватног права

Резиме

Међународно приватно право у ЕУ и шире се налази у периоду промена. Овај рад се бави најновијим развојем у области међународног приватног права, а пре свега признањем и извршењем одлука у Србији, имајући у виду комунитарно право. Поред тога, анализиран је и нови развој, који се односи на побољшање прекограничног извршења одлука у земљама Западног Балкана.

Кључне речи: *међународно приватно право, признање и извршење, Европска унија, Лугано конвенција, земље Западног Балкано, Србија, реформа.*

43 Jenard, "Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters", *OF* 1979 C 59/1, p. 43.

44 For details concerning the concept of "*Wirkungserstreckung*" see Kropholler, *Internationales Privatrecht*, 6th ed., Tübingen, 2006, p. 678 et seq.