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The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?

KAREN E. MINEHAN

I. INTRODUCTION

The Hague Conference on Private International Law (Hague Conference) will likely negotiate a multilateral judgments convention at its October 1996 meeting. The inclusion of a public policy exception as a defense against the enforcement of a foreign judgment will be an important issue in this negotiation. Under the public policy exception, a court may refuse to enforce a foreign judgment because enforcement would violate a public policy of the court. Such an exception greatly concerns both the practicing and academic communities. One commentator described the controversy surrounding the adoption of the public policy exception at the European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) as follows:

The public policy exception to Convention recognition and enforcement has been criticised as having no place in a Conven-

* J.D., University of Pittsburgh Law School, 1996.
2. For critical analyses of the public policy exception, see JAN KROPHOLLER, EUROPISCHES ZIVILPROZEBRECHT, art. 28, § 2 (3d ed. 1991); Berthold Goldman, Un traité fédérateur: La Convention entre les Etats membres de la C.E.E. sur la reconnaissance et l'exécution des décisions en matière civile et commerciale, 7 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 1, 34 (1971); BÜLOW & BOCKSTIEGEL, INTERNATIONALER RECHTSVERKEHR IN ZIVIL-UND HANDELSSACHEN 606 (1983) (regarding the public policy exception as an anachronism).
tion whose scope is limited to civil and commercial matters to the exclusion of those relating to personal status and as being contrary to the principle of free circulation of judgments within the European Economic Community.4

Critics fear that enforcing states will abuse the public policy exception, thereby eliminating any potential benefits of the underlying convention. Empirical data reveal, however, that concerns over the public policy exception are exaggerated.

In Part II, this Article discusses the historical background of the Hague Conference and analyzes the current status of international judgments law. Parts III and IV examine the public policy exception as applied to the two most prominent voices at the Hague Conference: the United States and the European Community. Part V demonstrates that neither the United States nor the European Community have abused the public policy exception. In Part VI, this Article concludes that the public policy exception is necessary to ensure the eventual adoption of a multilateral judgments convention because it allays the concerns of states that are reluctant to join a multilateral convention without such a "safety valve." Thus, despite concerns over possible abuse, a public policy exception should be included in the upcoming Hague Conference.

II. HISTORICAL BACKGROUND AND CURRENT STATUS OF INTERNATIONAL JUDGMENTS LAW

Examining the current status of the law is the best method to understand the problems inherent in the negotiation of a comprehensive multilateral judgments convention.5 The laws governing jurisdiction and judgments derive from a diverse combination of international, regional and domestic laws. Thus, "the interrelation between these three sources is often complex, whereby all three may concurrently be relevant to one particular legal issue."6 This

6. John Fitzpatrick, Comment, The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the
combination of laws has resulted in a mixture of sometimes conflicting and unpredictable rules that generally increase the cost of commercial activity outside one’s own borders.

In addition to the inconsistent enforcement of foreign judgments, no multilateral judgments conventions extend beyond any one regional market, except for the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Some international rules, however, simplify the procedures related to recognition and enforcement of foreign judgments. The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service of Process Convention), for example, provides a multilateral framework for effective service of process. Likewise, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) facilitates the “transmission and execution of Letters of Request and ... further[s] the accommodation of the different methods which they use for this purpose.” These two conventions are examples of international cooperation in areas that, though relevant, only slightly aid the efficient recognition and enforcement of judgments across international borders.

Within several geographical regions, however, regional agreements facilitate the mobility of judgments against foreign judgment debtors. The two predominant regional conventions are the 1968 Brussels Convention, which governs the European


11. Brussels Convention, supra note 3. The Brussels Convention originated in article 220 of the Treaty of Rome in which the EU member states agreed to negotiate “the simplification of formalities governing the reciprocal recognition and enforcement of
Union (EU), and the 1988 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention),\textsuperscript{12} which governs the EU and the European Free Trade Area (EFTA). The success of these conventions resulted from the continued pressure on the communities to unite economically, monetarily and legally.\textsuperscript{13}

Unlike the EU and EFTA communities, the United States is not a party to any international judgments conventions. To remedy this apparent void, Edwin D. Williamson, the Legal Advisor for the U.S. Department of State, wrote to Georges Droz, the Secretary General of the Hague Conference, suggesting that the Hague Conference negotiate a multilateral judgments convention to include both existing Hague Conference members and other countries.\textsuperscript{14} In November 1992, a Hague Conference Working Group “unanimously agreed on the desirability of attempting to negotiate through the Hague Conference a new general convention on jurisdiction and recognition and enforcement of judgments.”\textsuperscript{15}

A subsequent Special Commission decided to place the question of the recognition and enforcement of foreign judgments on the agenda of the Hague Conference’s Eighteenth Session in October 1996.\textsuperscript{16}

Although this proposal to negotiate a multilateral judgments convention through the Hague Conference has generated considerable support, member states disagree over how to draft the convention.\textsuperscript{17} Accordingly, this Article analyzes the ramifications of judgments of courts or tribunals and of arbitration awards.” TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 220.


\textsuperscript{13} The implementation of both the European Economic Area and the Maastrict Treaty markedly demonstrate this pressure. Fitzpatrick, \textit{supra} note 6, at 699.


\textsuperscript{17} The entire range of potential disputes, though worthy of much academic examination, are beyond the scope of this Article. For a summary of the areas of potential disagreement, see Arthur T. von Mehren, Recognition Convention Study: Final Report (on file with the Loyola of Los Angeles International and Comparative Law
excluding a public policy exception from the upcoming Hague Convention by examining the crucial role of such an exception in two jurisdictions, the United States and Europe.

III. U.S. APPLICATION OF THE PUBLIC POLICY EXCEPTION

A. Foundation of the Public Policy Exception

In 1895, the U.S. Supreme Court asserted in dicta that a court may refuse to enforce any foreign judgment that violates a public policy of the court.\(^ {18} \) Theoretically, this exception may be easily abused. A defendant may claim a public policy exception any time a foreign court rules differently from how a U.S. court may have ruled.\(^ {19} \) Recognizing this potential for abuse, U.S. courts have narrowly construed the public policy exception and exercised it on rare occasions.\(^ {20} \)

U.S. courts may refuse recognition of a foreign judgment on public policy grounds only if recognition "injure[s] the public health, the public morals, the public confidence in the purity of the administration of law, or . . . undermine[s] the sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."\(^ {21} \) A court may not decline enforcement merely because a foreign judgment differs from local public policy.\(^ {22} \) To justify its refusal to enforce a foreign judgment, a U.S. court must find that the judgment not only affirmatively acts on matters as to which local law is silent, but also contravenes a crucial stated public policy affecting a fundamental

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20. See Ackerman v. Levine, 788 F.2d 830, 841-42 (2d Cir. 1986) (noting the "narrowness of the public policy exception," under which "the standard is high, and infrequently met"); Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) (asserting that "[w]e are not so provincial as to say that every solution to a problem is wrong because we deal with it otherwise at home"); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) (proffering that "[t]he standard for refusing to enforce judgments on public policy grounds is strict").
22. Ackerman, 788 F.2d at 842.
interest of the forum. 23

B. U.S. Enforcement of Foreign Awards Consistent with Its Public Policy24

To date, no U.S. court has enunciated a clear standard for using the public policy exception. In specific types of cases, however, U.S. courts have consistently refused to apply the public policy exception and have enforced foreign judgments.

1. Loss of Goodwill and Attorney’s Fees

U.S. courts have consistently enforced foreign judgments for loss of goodwill and attorney’s fees awards, even though U.S. law generally does not allow these awards. In Somportex Ltd. v. Philadelphia Chewing Gum Corp.,25 the court upheld a $94,000 British judgment against a U.S. defendant consisting partly of loss of goodwill and attorney’s fees.26 The court stated:

[T]he variance with Pennsylvania law is not such that the enforcement “tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of law, or . . . undermine[s] the sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel . . . .”27

In addition, in Compania Mexicana Rediodifusora Franteriza v. Spann,28 the Fifth Circuit affirmed a district court decision enforcing a Mexican judgment, which awarded $6000 in attorney’s fees, against a U.S. plaintiff.29

26. Id. at 439, 444.
27. Id. at 443.
28. 41 F. Supp. 907 (N.D. Tex. 1941), aff’d 131 F.2d 609 (5th Cir. 1942).
29. 131 F.2d at 609; see also Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987) (awarding a debtor in a Swedish bankruptcy proceeding legal fees for wrongful attachment by creditor); Browne v. Prentice Dry Goods, Inc., No. 84 CIV. 8081(PKL), 1986 WL 6496 (S.D.N.Y. 1986) (enforcing an Argentinean judgment for
2. Court Costs

U.S. courts have also enforced foreign judgments awarding reasonable court costs. In *Desjardins Ducharme v. Hunnewell*, the Massachusetts Supreme Court upheld a finding of defendant's liability and enforced a Canadian judgment including court costs. In *Desjardins*, the court stated that "[t]here is no real difference . . . between the judgment of the Quebec Superior Court and our own contingency fee agreements which are recognized as valid measures of legal services rendered." The court concluded that the Canadian award of court costs was remedial, not penal, in nature, and thus, enforced the Canadian judgment.

3. Repayment of Gambling Debts

U.S. courts have enforced orders to repay gambling debts incurred in countries where such orders are enforceable. In *Intercontinental Hotels Corp. (Puerto Rico) v. Golden*, the New York Court of Appeals rejected the defendant's claim that suits to recoup gambling debts were contrary to New York's public policy. The defendant argued that, because New York law proscribed gambling, all gambling contracts were illegal and therefore unenforceable. In rejecting the defendant's seemingly sound argument, the court reasoned that the "legalization of pari-mutuel betting and the operation of bingo games, as well as a strong movement for legalized off-track betting, indicate that the New York public does not consider authorized gambling a violation of . . . some deep-rooted tradition of the common weal." Thus, though gambling obligations were unenforceable in a domestic action, New York's permission of some forms of gambling...
suggested that the enforcement of foreign judgments for gambling debts was appropriate. The New York Appellate Division and the California Second District Court of Appeal have echoed this willingness to enforce foreign judgments on gambling debts.38

4. Prejudgment Interest

U.S. courts have enforced awards of prejudgment interest, even where local law prohibits such awards. In *Ingersoll Milling Machine Co. v. Granger*,39 the Seventh Circuit enforced a Belgian judgment that included prejudgment interest.40 The court found that "the mere fact that Belgian law permits prejudgment interest while Illinois law might not is not fatal to the Belgian award."41 The *Ingersoll* court relied on *Hunt v. BP Exploration Co. (Libya)*,42 where a Texas district court enforced an English judgment including prejudgment interest.43 Although Texas law prohibited prejudgment interest, the court found that this distinction did not violate "good morals and natural justice" as to fall within the public policy exception.44

5. Default Judgments

U.S. courts have also enforced foreign default judgments. In *Tahan v. Hodgson*,45 the D.C. Circuit enforced an Israeli default judgment that would not have been awarded in the United States for two reasons.46 First, the Israeli court entered a default judgment based on notice requirements inconsistent with U.S. notice

38. *See* Aspinall's Club Ltd. v. Aryeh, 250 Cal. Rptr. 728, 730, (Ct. App. 1988) ("In view of the expanded acceptance of gambling in this state as manifested by the introduction of the California lottery and other innovations, it cannot seriously be maintained that enforcement of said judgment 'is so antagonistic to California public policy interests as to preclude the extension of comity in the present case.'") (citation omitted); Crockford's Club Ltd. v. Si-Ahmed, 450 N.Y.S. 2d 199, 203 (App. Div. 1982) ("Gambling in legalized and appropriately supervised forms is not against this State's public policy.").

39. 833 F.2d 680 (7th Cir. 1987).

40. *Id.* at 692.

41. *Id.* at 691 (footnote omitted).

42. 492 F. Supp. 885 (N.D. Tex. 1980).

43. *Id.*

44. *Id.* at 901; *see also* Waterside Ocean Navigation Co. v. Int'l Navigation Ltd., 737 F.2d 150, 153 (2d Cir. 1984) (holding that "[a]bsent persuasive reasons to the contrary, we do not see why pre-judgment interest should not be available in actions brought under the [Convention on Recognition and Enforcement of Foreign Arbitral Awards]").

45. 662 F.2d 862 (D.C. Cir. 1981).

46. *Id.* at 868.
Second, the Israeli court pierced the corporate veil and entered a judgment against the defendant in violation of U.S. public policy. The Tahan court, however, found that Israeli notice requirements are not "so 'repugnant to fundamental notions of what is decent and just' that [U.S.] public policy requires non-enforcement of the [Israeli] judgment." In addition, the court rationalized that the defendant could have appeared in the Israeli court and presented a viable defense, so he could not "fail to contest the Israeli plaintiff and then declare that he would have won." The court held that the "Israeli court’s decision to pierce the corporate veil is not 'repugnant' . . . , particularly when it is borne in mind that defendant did not present a case [in the Israeli action]."

6. Actions in Seduction and Damages for Moral Reparations

U.S. courts have even enforced foreign judgments based on causes of action that do not exist in the United States. For example, in Neporany v. Kir, the New York Appellate Division upheld the enforcement of a Canadian judgment for seduction because "our public policy is not contravened by the enforcement of a money judgment arising from causes of action proscribed by Article 2-A, but which are recognized in the jurisdiction where the acts took place." In addition, in Gutierrez v. Collins, the Texas Supreme Court enforced a Mexican judgment in a negligence action that included damages for moral reparations (i.e. injuries to plaintiff’s "reputation, dignity or honor"), even though such a cause of action did not exist under Texas law. The court reasoned that the "mere fact that these aspects of the law differ from ours does not render them violative of public policy" and that "there is nothing in the substance of these laws inimical to good morals, natural justice, or the general interests of the citizens of

47. Id. at 866.
48. Id. at 867.
49. Id. at 866.
50. Id. at 867.
51. Id. (footnote omitted).
53. Id. at 148.
54. 583 S.W.2d 312 (Tex. 1979).
55. Id. at 321-22.
this state."  

7. Injuries Incurred During Deportation

Moreover, U.S. courts have enforced foreign awards even though the judgments are "in some conflict with . . . obligations of the United States."  

In Ricart v. Pan American World Airways, Inc., a D.C. Circuit district court upheld a Dominican Republic judgment for damages incurred when the defendant airline deported the plaintiff. The court did concede, however, that the judgment "may put the defendant in somewhat of a predicament if it must choose obedience to the immigration authorities of any particular country at some risk of civil liability to a deported passenger."  

By narrowly interpreting the public policy exception, the court essentially required a potential defendant to choose between sanctions by the immigration authorities or potential civil liability.

8. Summary

In sum, U.S. courts have enforced foreign judgments based on causes of action that either do not exist under or vary from U.S. law. U.S. courts have enforced foreign damage awards that would not be granted in the United States. U.S. courts have thus exhibited a profound tendency towards the liberal enforcement of foreign judgments that would not normally be awarded in U.S. courts.

C. U.S. Denial of Enforcement of Foreign Awards Contrary to Its Public Policy

U.S. courts have also consistently applied the public policy exception in other types of cases and denied enforcement of foreign judgments.

56. Id. at 322.
58. Id. at *1.
59. Id. at *3.
60. Id.
1. Awards Related to Wrongdoer’s Malfeasance

U.S. courts have consistently refused to enforce foreign judgments where the wrongdoer, most often a fugitive from justice, seeks to enforce a judgment for damages related to his wrongdoing. For example, in *Jaffe v. Snow*, the Florida District Court of Appeals refused to enforce a Canadian judgment awarding damages to a plaintiff who disregarded bail terms and was subsequently kidnapped and injured when a bondsman forcibly returned him to Florida. The court found that “‘a fugitive from justice is not entitled to call upon the resources of court for determination of his case.’” In other words, “a fugitive from justice ‘cannot eat his cake and have it too.’”

In *United States v. $45,940 in Currency*, the Second Circuit denied enforcement of a Canadian judgment in a forfeiture proceeding brought by the defendant, another fugitive from justice. The court concluded that the defendant “waived his right to due process in the civil forfeiture proceeding by remaining a fugitive.”

In these cases, U.S. courts relied on the public policy exception to deny enforcement of foreign judgments that would reward a wrongdoer for his or her malfeasance. To hold otherwise would result in the court’s effective approval of the claimant’s initial wrongdoing, a practice that would defy the very core of the U.S. justice system.

2. Libel Judgments

U.S. courts have also invoked the public policy exception and rejected foreign libel judgments where the foreign standards are repugnant to both local public policy and the U.S. Constitution. In

63. Id. at 484-85.
64. Id. at 486 (quoting Garcia v. Metro-Dade Police Dep't, 576 So. 2d 751, 752 (Fla. Dist. Ct. App. 1991); United States v. One Lot of U.S. Currency Totalling $506,537, 628 F. Supp. 1473, 1475 (S.D. Fla. 1986)).
65. Id. (quoting United States v. Eng., 951 F.2d 461, 462 (2d Cir. 1991)).
66. 739 F.2d 792 (2d Cir. 1984).
67. Id. at 798; see also United States v. 7707 S.W. 74th Lane, 868 F.2d 1214 (11th Cir. 1989); United States v. 760 S.W. 1st St., 702 F. Supp. 575 (W.D.N.C. 1989) (both denying enforcement of a Colombian judgment in a forfeiture proceeding because the defendant was a fugitive from justice in a drug prosecution).
68. *$45,940 in Currency*, 739 F.2d at 798.
Matusevitch v. Telnikoff, a D.C. Circuit district court held that the recognition and enforcement of a British libel judgment would violate Maryland’s public policy, as well as deprive the plaintiff of his constitutional rights. In England, a defendant in a libel action may be held liable for statements that the defendant honestly believed to be true and that were published without any negligence. By contrast, U.S. law requires the plaintiff to prove that the statements were false and that the defendant had the requisite intent to commit libel. In Matusevitch, the court found no proof that the defendant’s statements were made with actual malice and held that the defendant was entitled to the protection of his right to free speech. Thus, the court refused to enforce the foreign judgment.

In Bachchan v. India Abroad Publications Inc., a New York state court refused to recognize a English libel judgment against a New York news service operator because the judgment had been imposed without any safeguards for freedom of speech and press, as mandated by the First Amendment of the U.S. Constitution. The court reasoned that

if, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the [U.S.] Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, 'constitutionally mandatory.'

These cases suggest that where the judgment violates the U.S. Constitution, the judgment works as “'a direct violation of the policy of our laws, and do violence to what we deem the rights of our citizens.'” Thus, according to the Bachchan court, refusal

70. Id. at 2.
71. Id. at 4.
72. Id.
73. Id. at 4, 6; see also Abdullah v. Sheridan Square Press, Inc., No. 93 CIV.2525 (-LLS), 1994 WL 419847, at *4 (S.D.N.Y. May 4, 1994) (refusing to enforce British libel judgment because the “establishment of a claim for libel under the British law of defamation would be antithetical to the First Amendment protection accorded to defendants”).
75. Id.
76. Id. at 662.
77. Matusevitch, 877 F. Supp. at 3 (quoting Hilton v. Guyot, 159 U.S. 113, 193 (1805)).
of recognition is "constitutionally mandatory." 78

3. Penal Sanctions

Finally, U.S. courts have refused to enforce judgments that are penal in nature. If a judgment serves to "punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act" of the defendant, U.S. courts will invoke the public policy exception. 79

In the Republic of the Philippines v. Westinghouse Electric Corp., 80 for example, the New Jersey District Court refused to enforce a judgment that included sanctions, which the Republic of the Philippines brought against the defendant corporation. 81 Because the defendant's actions affected the whole community, the Philippine court imposed these penalties to deter wanton acts "by way of example or correction for the public good," not to compensate the plaintiff. 82 Thus, the court refused to enforce the penal sanctions of the Philippine judgment. 83

There is little concern that U.S. courts will abuse the "penal sanction" exception because they have tended to narrowly define the exception. The Westinghouse Electric Corp. court noted that although New Jersey has adopted Chief Justice John Marshall's admonition that "the Courts of no country execute the penal laws of another," 84 New Jersey has found non-penal purposes in laws that appear to impose penalties. 85 For example, in an enforcement action between state courts, the New Jersey Supreme Court compelled the defendants to pay the fees of relatives, who were receiving services at a state facility, by interpreting Pennsylvania statute's purpose as providing familial obligations, rather than imposing penalties. 86

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78. Bachchan, 585 N.Y.S.2d at 662.
81. Id. The Philippine court imposed sanctions in tort and contract claims against the defendant, who allegedly bribed President Marcos to obtain state contracts.
82. Id. at 298 (citation omitted).
83. Id. at 292.
4. Summary

In sum, although U.S. courts have applied the public policy exception and refused to enforce judgments in specific types of cases, U.S. courts have narrowly interpreted the public policy exception and applied it on rare occasions.

IV. THE EUROPEAN COMMUNITY'S INTERPRETATION OF THE PUBLIC POLICY EXCEPTION UNDER THE 1968 BRUSSELS CONVENTION

A. Foundation of the Public Policy Exception

In 1968, the European Community negotiated the Brussels Convention to "implement the provisions of Article 220 of [the Treaty of Rome] by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals." The Brussels Convention, supra note 3, pmbl. Under article 27 of the Brussels Convention, each contracting state has the right to refuse recognition of a judgment "if such recognition is contrary to public policy in the State in which recognition is sought." The Lugano Convention contains an identical public policy exception, which serves as a defense to recognition for EU and EFTA states. Therefore, like the United States, both the EU and the EFTA states have adopted a public policy exception to the recognition of judgments from other member states.

The adoption of Protocol 3 on June 3, 1971 bestowed upon the Court of Justice of the European Communities (ECJ) the power to interpret the Brussels Convention. Like U.S. Courts the ECJ

87. Brussels Convention, supra note 3, pmbl.
88. Id. art. 27.
89. Lugano Convention, supra note 12, art. 27.
90. According to a report on the Brussels Convention by P. Jenard, the Director of the Belgian Ministry of Foreign Affairs and External Trade, "[i]t is not the judgment itself which must be against public policy for recognition thereof to the required to be refused, but recognition itself." Jenard Report, 1979 O.J. (C 58/1) 44.
91. Protocol on the Interpretation of the 1968 Convention by the European Court, June 3, 1971, amended by the Accession Convention, 1971 O.J. (L 304) 97. Subsequent ECJ decisions interpreting the Brussels Convention public policy exception are also relevant to the EFTA states. Protocol 2 of the Lugano Convention provides that the "courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of the Convention." Lugano Convention, supra note 12, Protocol 2.
Public Policy Exception to Enforcement

has narrowly interpreted the public policy exception and invoked it on rare occasions. In fact, "it is commonly understood that [the public policy exception] should be invoked only in extreme cases." 

B. European Community Enforcement of Foreign Awards Consistent With Its Public Policy

Like U.S. courts, the ECJ has consistently refused to apply the public policy exception and enforced foreign judgments in specific types of cases.

1. Original Court’s Lack of Jurisdiction

In accordance with article 28, paragraph 3 of the Brussels Convention, the ECJ has refused to apply the public policy exception in cases where the only objection to the enforcement of a foreign judgment is founded upon the original court’s exercise of jurisdiction. Article 28 expressly states that article 27(1)’s test of public policy may not be applied to the rules relating to jurisdiction. One commentator describes the justification for Article 28 as follows: "The automatic application of recognition is consistent with the principle of direct jurisdiction, where the rendering court judge is required to verify his competency. Therefore, limiting the discretion of the recognizing judge prevents time-consuming

92. See Case 220/83, Commission v. France, 1986 E.C.R. 3663, 3672 [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,340, at 17,172 (Dec. 4, 1986) ("[C]ourts of the State of the insurance company's domicile could rarely, if at all, refuse recognition of a judgment delivered in France pursuant to Article 9 or Article 10 on the grounds that the French requirements as to third party insurance were contrary to public policy."); Case 145/86, Hoffman v. Krieg, 1988 E.C.R. 645, 656, [1989] 2 CEC (CCH) 494, 507 (1988) ("[W]ithin the scheme of the Convention [the public policy exception] is intended to apply only in exceptional cases, which will be all the rarer in that from a statistical point of view judgments in property matters are unlikely to raise issues of public policy."); Case C-414/92, Solo Kleinmotoren GmbH v. Boch, 1994 E.C.R. I-2237, I-2238 ("Article 27 of the Convention must be interpreted strictly, inasmuch as it constitutes an obstacle to the achievement of one of its fundamental objectives, which is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure."); Case C-123/91, Minalmet GmbH Brandeis, Ltd. (Nov. 12, 1992) ("L'article 27 constitue une exception à la regle generale enoncee au premier alinea de l'article 26 et, en tant que tel, doit etre interprete restrictivement.")

93. Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J.L. & COM. 211, 224 (1994).

94. Brussels Convention, supra note 3, art. 28, para. 3.

95. Id. The Brussels Convention is a double treaty that provides rules governing jurisdiction.
‘double review,’ and thus assures a speedy flow of judgment recognition.”

In essence, the aim of article 28 is to prevent the enforcing state from reviewing the original court’s jurisdiction based on article 27(1)’s public policy exception.

Because this prohibition against jurisdictional review on public policy grounds is an integral part of the Brussels Convention, it has rarely been directly challenged. For example, in *Bavaria Fluggesellschaft Schwabe & Co., KG v. Eurocontrol,* which involved a Belgian judgment for air traffic control charges, the Bundesgerichtshof asked the ECJ to compare the Brussels Convention with a prior bilateral convention between Belgium and Germany. In dicta, the ECJ explored the Brussels Convention’s public policy exception to compare the obstacles to enforcement. The ECJ, however, suggested that the Brussels Convention denied an enforcing court the right to review the original court’s jurisdiction because, as mandated by article 28, “the jurisdiction of the court of the State in which the judgment was given may not be reviewed [and] the test of public policy referred to in [a]rticle 27(1) may not be applied to the rules relating to jurisdiction.” Thus, the ECJ applied the bilateral treaty because the dispute involved a matter of public international law, rather than a civil and commercial matter.

In *Rohr v. Ossberger,* the ECJ interpreted article 27(1)’s public policy exception and required a French court to refuse enforcement of a German judgment. German procedural law entitled the German court to adjudicate the substance of the dispute, even though the defendant had restricted himself to contesting the German court’s jurisdiction. The defendant argued

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that the public policy exception was applicable because German procedure compelled the defendant to either submit a defense to the substance of the claim or to limit his objection to jurisdiction, which, if dismissed, would allow the court to enter a default judgment against him. The court rejected the defendant’s public policy defense and ruled that Article 18, which governs establishment of jurisdiction through a defendant’s appearance, allowed the defendant not only to contest the original court’s jurisdiction, but also to submit an alternative defense to the substance of the claim, without losing his right to object to the lack of jurisdiction.

2. Original Court’s Application of International Choice of Law

In addition, the ECJ has followed articles 29 and 34 of the Brussels Convention and not applied the public policy exception to cases where the original court has applied a law that differs from the law that the enforcing court would have applied. Articles 29 and 34 proscribe an enforcing court from objecting to the original court’s application of its private international law rules.

In \textit{Elefanten Schuh GmbH v. Jacqmain}, for example, the defendant opposed an English court’s enforcement of a Belgian judgment based on public policy grounds. The defendant argued that Belgium and England would interpret the disputed contract clause differently, and thus, public policy required the court to deny enforcement of the judgment. The court rejected the defendant’s argument. According to the ECJ, where the contract in which the jurisdiction clause is embedded is valid or the jurisdiction agreement considered separately is a valid one, it may be disregarded only in exceptional circumstances, where its operation would manifestly be incompatible with the public policy of the forum. The fact that the jurisdiction clause, or the agreement of which it forms a part, would be

\begin{itemize}
  \item 105. Brussels Convention, \textit{supra} note 3, arts. 29, 34.
\end{itemize}
void under a rule of the national law of the court seized of the matter which that court has to apply of its own motion is not a sufficient ground for invalidation.\textsuperscript{109}

Like the cases involving the enforcing court’s review of the original court’s jurisdiction, the ECJ has been reluctant to apply article 27(1)’s public policy exception where the original and enforcing courts would apply a different choice of law rule. This pattern is consistent with the Brussels Convention’s emphasis on limiting the enforcing court’s ability to review the original court’s judgment.\textsuperscript{110}

3. Defects in the Substance of the Original Court’s Judgment

Furthermore, in accordance with articles 29 and 34, the ECJ has refused to apply the public policy exception to cases where the foreign judgment has arguable substantive defects. Both article 29, which deals with recognition, and article 34, paragraph 3, which deals with enforcement, prohibit review of the substance of the original decision.\textsuperscript{111} The limited scope of the public policy exception “ensure[s] that [the enforcing court] cannot invoke its public policy on the ground that it considers the judgment to be erroneous on the merits, whether the error is in the ascertainment of facts or in the determination or application of law.”\textsuperscript{112}

4. Summary

In sum, the ECJ has consistently refused to apply the public policy exception in cases involving objections to the original court’s exercise of jurisdiction or the substance of the original court’s judgment. The ECJ has thus limited the scope of the public policy exception, in accordance with provisions of the Brussels Convention.


\textsuperscript{110} Bartlett, \textit{supra} note 96, at 9176-67.

\textsuperscript{111} Brussels Convention, \textit{supra} note 3, arts. 29, 34. “Under no circumstances may a foreign judgment be reviewed as to its substance.” \textit{Id.} art. 34, para. 3.

\textsuperscript{112} D. LASOK & P.A. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 299 (1987). \textit{But see KAYE, supra} note 4, at 1442 (“Whether, on the other hand, Articles 29, and 34, para. 3 also bar recognition- and enforcement-courts from examining the content of the law applied by the judgment-court and the nature of its decision on substance, is quite a different matter; and the effect of such a finding would be that operation of Article 27(1) would be limited to procedural irregularities in the judgment-court — as to which, doubts might also even be felt to exist — and effects of judgment in recognition- or enforcement-State.”).
C. European Community Denial of Enforcement of Foreign Awards Contrary to Its Public Policy

The ECJ has also consistently applied the public policy exception and denied enforcement of other types of foreign judgments.

1. Maintenance Order Ancillary to a Divorce Decree

The ECJ has applied the public policy exception to deny the enforcement of a maintenance order that was ancillary to a divorce decree. In *Hoffman v. Krieg*, the ECJ attempted to reconcile a German maintenance order with a Netherlands divorce judgment under Article 27(1)’s public policy exception. The ECJ held that a “foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable within the meaning of Article 27(3) of the Convention with a national judgment pronouncing the divorce of the spouses.” In effect, the German order compelling the husband to pay maintenance to his wife was unenforceable in Belgium because it implicitly required the Belgian court to enforce the German divorce order, a result contrary to Article 1 of the Brussels Convention.

2. Default Judgment

The ECJ has also denied enforcement of a foreign judgment where the original court entered a default judgment against the defendant. In *Pendy Plastic Products B.V. v. Pluspunkt Handelsgesellschaft*, the ECJ decided whether a Netherlands default judgment was valid, and therefore, precluded a German court from refusing recognition of the judgment. The ECJ held that the Netherlands summons to the defendant did not constitute adequate notice under its laws and allowed the German court to deny enforcement of the Netherlands judgment.

making its decision, the ECJ accepted the argument that “it would be objectionable to oblige the court in the State in which enforcement is sought to recognize a judgment in circumstances where the defendant had been denied the right to a fair hearing in the State in which the judgment was given.” In addition, the ECJ stated that “even where service has been duly effected, recognition can be refused if the court in which recognition is sought considers that the document was not served in sufficient time to enable the defendant to arrange his defense.” This exception to enforcement, like the exception for a divorce maintenance order, reveals the limited application of article 27(1), which is often cited in conjunction with another convention provision, in this case, article 27(2).

3. Lease of Real Property

The ECJ, however, has interpreted the public policy exception to deny enforcement of a foreign judgment without explicit reference to another provision in the Brussels Convention. In Scherrens v. Maenhout, for example, the ECJ examined the issue of exclusive jurisdiction in a dispute over a lease of real property situated in Belgium and the Netherlands. Article 16(1) of the Brussels Convention gives exclusive jurisdiction to the country where immovable property is located. The ECJ held that “[a]rticle 16(1) . . . must therefore be interpreted as meaning that, in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the immovable property situated in each contracting state is held by the courts of that State.” The court accepted the

121. Case C-123/91, Minalmet GmbH Brandeis, Ltd. (Nov. 12, 1992) (“La Commission observe également que compte tenu du rapport entre les points 1 et 2 de l'article 27, ni les éléments constitutifs, ni les conséquences juridiques de l'article 27, point 2 ne sont à la disposition des parties. En effet, l'article 27, point 2 énonce un cas d'application particulier de l'ordre public.”).
123. 1988 E.C.R. at 3804, [1990] 2 CEC (CCH) at 27.
124. Brussels Convention, supra note 3, art. 16, para. 1.
written observation submitted to the court that "it seems contrary to public policy to export Belgian law on agricultural holdings to the Netherlands." The ECJ effectively granted exclusive jurisdiction to each member state for the portion of immovable property located within its geographic borders. The court supported this conclusion by arguing that the law of immovable property was closely bound up with the law of tenancies and that the court in the jurisdiction in which the property is located is in a better position to obtain first-hand knowledge over the creation of the tenancy and the performance of its terms.

4. Summary

In sum, the ECJ has relied on the Brussels Convention's public policy exception to deny the enforcement of foreign judgments in a few limited situations. With one minor exception, the public policy exception has served as a defense only in conjunction with another valid provision of the Brussels Convention. For example, article 1 proscribed the enforcement of a maintenance order that was ancillary to a divorce decree. Likewise, article 27(2) prohibited the enforcement of a default judgment that was entered against a defendant without proper service of process. The ECJ interpreted the public policy exception in isolation only in Scherrens and denied enforcement of a real property lease judgment. This exception, however, is too-fact driven to lead to public policy exception abuse. Therefore, the EU and EFTA states, through the actions of the ECJ, are not likely to abuse the public policy exception.

V. Analysis

Implicit in this examination of the scope of the public policy exception is recognizing that the adoption of a multilateral Hague Convention on the Recognition and Enforcement of Foreign Judgments is a necessary step to optimize the benefits of the recently increased economic and legal integration in the international community. This integration is clearly displayed in the creation of the European Economic Community, the North American Free Trade Agreement, and the World Trade Organiza-

tion. According to some scholars, in order for an economic union to function efficiently, a legal judgment—like any other property interest—must not have its value impaired merely by crossing a geographic border within the union, and both the property interest represented by the judgment, and the legal mechanism for enforcing rights in that property interest must be respected throughout the union.\(^\text{128}\)

The existing framework for multilateral enforcement of foreign judgments is not broad enough to accommodate the recent growth in international economic cooperation. As a result, the upcoming Hague Conference will facilitate international recognition and enforcement of foreign judgments.

A. The Contracting States Are Likely to Narrowly Interpret the Public Policy Exception

The Hague Conference is unlikely to broadly construe a public policy exception. Both the United States and the European Community have narrowly applied the exception. In addition, the United States, the European Community and European Free Trade Area states comprise 47.3% of the Hague Conference members.\(^\text{129}\) Furthermore, they control approximately 75% of the GDP, as well as 72% of the exports from, and 75% of the imports into, Hague Conference member states.\(^\text{130}\) Because little more than international comity compelled these states and regions to narrowly apply the public policy exception, a multilateral Hague Conference will likely continue to narrowly apply the exception.

Most Hague Conference member states presently utilize a public policy exception in their respective domestic judgments law.\(^\text{131}\) "All European jurisdictions deny enforcement where the enforcement of the foreign judgment would contravene domestic public policy."\(^\text{132}\) Thus, the United States, the individual Europe-


\(^\text{130}\) \textit{Id.}

\(^\text{131}\) Behr, \textit{supra} note 93, at 221.

\(^\text{132}\) \textit{Id.}
an states, and the EU and EFTA states already apply some form of public policy exception in their respective judgments law. An extension of the exception through the Hague Convention will do little more than formalize these existing practices on a multilateral level.

Moreover, the common law interpreting the public policy exception of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a multilateral convention including many international signatories, suggests that the Hague Conference will not abuse the public policy exception even though the member states vary drastically in the areas of financial wealth, influence and international independence. In fact, courts interpreting the New York Convention may have even erred on the side of overly restricting its public policy exception. Scholar Håkan Berglin noted: “it has been said by some that ‘the courts have given the public policy defense so narrow a construction that it now must be characterized as a defense without meaningful definition [and consequently leaves] the defense pragmatically useless if not altogether nonexistent.’” In 1984, Giorgio Gaja, editor of International Commercial Arbitration: New York Convention, found that 190 cases around the world applied the New York Convention and noted that only six of these cases dealt directly with the public policy defense. The public policy exception has not been a significant problem in the existing and heterogenous New York Convention. Therefore, member states of the Hague Conference should not be concerned that the heterogenous states will broaden the public policy exception as to render the convention moot.

B. The Public Policy Exception as Political Tool

The public policy exception is an essential political tool to


encourage reluctant member states to join the Hague Convention because it serves as a "safety valve" for unforeseeable changes in the law. As Professor Behr suggests, "[i]n the short term, the public policy requirement is indispensable. Moreover, in the long run, it is sensible to preserve an ultimate safeguard against unforeseen and unforeseeable divergences between domestic law and the laws of different jurisdictions." 136 In fact, the inclusion of the public policy exception in the Brussels Convention was "excused, on the ground that it was seen to be an essential 'safety-valve', which would facilitate ratification of the Convention by Member States, jealous of preserving existing fundamental controls on recognition and enforcement of foreign judgments." 137 It may be better to include a mechanism where a member state may "base refusal of [enforcement and recognition of a foreign judgment] upon a Convention provision, however vague, [rather] than 'deliberately . . . violate the text of an international treaty.' " 138 Consequently, the public policy exception is an absolutely necessary political measure to the adoption of the Hague Convention because it counters the fears of recalcitrant countries.

VI. CONCLUSION

The inclusion of a public policy exception in the multilateral Hague Conference requires a "political" leap of faith by the member states, which some believe will result in the demise of a convention that is important to the increased mobility of international judgments. The dilemma may be described as follows:

Strict resort to public policy, especially at the start of the Convention's life, will probably seem excessive. Hopefully, it will quickly come to be appreciated by judicial authorities of Contracting States that it is preferable to play the game of free circulation of judgments frankly than to attempt to place obstacles in the path thereof in the guise of public policy. The view here is that the best protection for litigants (and their advisers) is to gain experience in presenting their case before foreign courts, rather than to rely on vague delaying tactics. As for Contracting State judges, they will quickly discover that the best method for securing authority for their own judgments is to

136. Behr, supra note 93, at 224.
137. KAYE, supra note 4, at 1437.
138. Id.
accord the maximum respect to those of their foreign colleagues.\textsuperscript{139}

The empirical data, however, suggest that the United States, EU and EFTA states, and New York Convention member states have not exhibited the rampant denial of enforcement that doubters of the public policy exception fear. Furthermore, the benefits of increased enforcement of foreign judgments, which most agree is a laudable goal, may not be realized unless precisely such a "safety valve" is included in the convention. Many countries will refuse to ratify a convention based upon political rather than strictly theoretical grounds.

[I]t can be appreciated that the exceptional provision for refusal made under Article 27 . . . as a whole is an essential Convention mechanism for enabling Contracting States otherwise to accept the general principal [sic] of automatic enforcement and that an essential component part of that mechanism, broad in its potential scope, yet restrained in its actual operation, is the public policy refusal ground in Article 27(1).\textsuperscript{140}

Therefore, the public policy exception should be included in the upcoming Hague Conference on the Enforcement and Recognition of Foreign Judgments in October 1996. It is the only method to ensure the continuation of the long awaited integration of the international community.

\textsuperscript{139} Id. at 1442.
\textsuperscript{140} Id. at 1444.