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2019**

***Abuse of the Law and "Abnormal" Law
Versus Rule of Law***

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IURIDICA PRIMA

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OHRID SCHOOL OF LAW

2019

*Abuse of the Law and “Abnormal” Law
Versus Rule of Law*

*Dedicated in Honor of
Acad. Prof. Slobodan Perović
Founder of the
Kopaonik School of Natural Law*

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наспроти владеење на правото***

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THE NEW 2019 HAGUE CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS – BRIDGING THE GAP BETWEEN THE WEST AND THE EAST

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Original research paper

***Abstract:** The diplomatic session of the Hague Conference on Private International Law (Hague Conference) regarding the “Judgments Project” was held from 18 June – 02 July 2019 in the Hague where the long awaited Hague Convention on Recognition and Enforcement of Foreign Judgments (new 2019 Hague Convention) was adopted. This Convention comes as a result of 27 years of work that has been done in the course of this project of the Hague Conference and it can be said that is one of the most awaited developments in Private International Law. The success of the convention cannot be predicted at this point because large number of factors impact the outcome of the convention. However benefits from having an international agreement dealing with cross border recognition and enforcement of foreign judgments is self-evident. More than ever there is a need of a single instrument that will contain unified conditions for recognition and enforcement and ease the cross border circulation of judgments. Only a brief look at the New York Convention on recognition and enforcement of foreign arbitral awards (New York Convention) provides for glimpse of the benefits from having such instrument.*

This article will provide for overview of the main aspects of the Convention. It will give an outline of the structure, mechanism and the rules provided in the Convention. This convention in contrast of its predecessors provides for more “soft” approach in bridging the differences between the legal systems of the west and the east. However, new 2019 Hague Convention is very important, because the transnational cooperation influenced by the globalization and the interconnection of the economic systems, asks for faster responsiveness of the legal systems and predictability of the legal outcome manifested by the

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judicial decisions.

Key words: *Hague Convention on Recognition and Enforcement of Foreign Judgments; Recognition and Enforcement; civil and commercial matters; indirect jurisdiction; right of defense; public policy, irreconcilable judgments.*

1. Recognition and enforcement of foreign judgments according to the new 2019 Hague Convention

Recognition and enforcement of foreign judgments represents one of three basic components of private international law¹ and therefore it is a very important part of the Hague Conference.² However if we compare the international conventions adopted by the Hague Conference we can see the dominance of those which cover the conflict of laws aspects³ and those regarding cross border cooperation⁴ over the other aspects of private international law (jurisdiction and *exequatur*).⁵ Such position is not a coincidence, because countries are more found in adopting rules which refer to the substantive law issues and are more resistant in adopting rules regarding procedural law issues. Moreover, in the case of recognition and enforcement this aspect goes further, because the *exequatur* represents last “defense” that legal systems possess regarding the incorporation of foreign judicial decisions in their domestic legal order.

On the other hand, transnational cooperation influenced by the globalization and the interconnection of the economic systems, asks for faster

¹ Together with conflict of law and international jurisdiction. See Fawcett J and Carruthers J., Cheshire, North & Fawcett, *Private International Law*, Oxford University Press 14th ed. (2008) pg.7

² On the structure of the Hague Conference see Droz L.A.G., *A Comment On The Role Of the Hague Conference On Private International Law, Law and Contemporary Problems*, (1994), Dyer A, *The Hague Convention: Its Successes and Failures - Parts I and II*; *Australian Family Lawyer*, June 1994, Vol. 9, and September (1994), Dyer A. *To Celebrate a Score of Years!*; *New York University Journal of International Law and Politics*, Vol. 33, Issue 1, (2000), Lipstein K., *One Hundred Years of Hague Conferences on Private International Law, International and Comparative Law Quarterly*, (1993), J.J.H.A. van Loon, ‘The Hague conference on private international law: an introduction’, in P.J. van Krieken, and D. McKay, eds, *The Hague: Legal Capital of the World (The Hague, TMC Asser Press, 2005)*, Hans van Loon and Andrea Schulz, ‘The European Community and the Hague Conference on Private International Law’, in Bernd Martenczuk and Servaas van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations (Brussels University Press, 2008)*.

³ 17 Conventions.

⁴ 10 Conventions.

⁵ 10 Conventions.

responsiveness of the legal systems and predictability of the legal outcome manifested by the judicial decisions. In other words there is a bias between sovereignty of the countries manifested in the rules for recognition and enforcement of judgments and the need for prompt cross border cooperation. Such antagonistic position had influenced the increased popularity of arbitration as an adjudicative system of “distribution of justice”. The success that the New York Convention, created a “rivalry” between these two segments of the distribution of justice. The response of the judicial distribution of justice is the new 2019 Hague Convention of recognition and enforcement of foreign judgments. The answer to the question whether this international convention will be a success is complex and ambiguous, having in mind all of the economic and political developments in the world and the pace of the dynamics in today’s economic environment. Moreover if this convention tends to be a success it must learn from the mistakes of the 1971 Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.⁶In other words, the future of the new 2019 Hague Convention depends on the practicality of the adopted solutions and whether such rules are of interests to the countries.

1.1 Scope of application of the new 2019 Hague Convention

The scope of application of the new 2019 Hague Convention goes from general to specific, firstly determining the larger legal field of civil and commercial matters and then going to specific areas which are excluded from the scope of application. Article 1 of the new 2019 Hague Convention states that it applies to civil and commercial matters and then excludes the more specific areas such as tax, custom and administrative decisions from the scope of application. Article 2 goes into further specifics, containing list of the other areas which are excluded from the scope of application.⁷Moreover, Article 2

⁶ On the reasons why this Convention failed see, van Loon, H., Towards a Global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters, *Зборник радова Правног Факултета у Нишу*, бр. 82/2019.

⁷ The matters excluded from the new 2019 Hague Convention are: (a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters; (f) the carriage of passengers and goods; (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; (h) liability for nuclear damage; (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers; (k) defamation; [(l) privacy], except where the proceedings were brought for breach of contract between the parties;] [(m) intellectual

of the new 2019 Hague Convention excludes the arbitral and other alternative dispute resolution decisions from the scope of application. Very important aspect of the new 2019 Hague Convention is that the convention is applicable towards civil and commercial judicial decisions in which one of the parties is a state, government, governmental institution or a person acting in the name of the state, but excluding the aspects regarding the immunity and the privileges of the states and international organizations.

1.2 Recognition and enforcement of foreign judgments according to the new 2019 Hague Convention

The new 2019 Hague Convention is intended to provide an effective system for recognition and enforcement of foreign judgments in civil and commercial matters and provide for circulation of judgments in circumstances that are largely considered to be uncontroversial.⁸ The mechanism established with the new 2019 Hague Convention provides that a judgment given by a court of a contracting state, shall be recognized and enforced in other Contracting state in accordance with the provisions provided in Chapter II of the new 2019 Hague Convention.⁹ Also this convention provides for the general principles according to which the for recognition and enforcement will be conducted, that there will be no revision *au fond*¹⁰ and the condition that the judgment has effect and is enforceable in the country of origin.¹¹

The system created by this convention is a simple one: if the judgment regarding civil and commercial matters is rendered in a country which satisfies the indirect jurisdictional grounds provided in Article 5 and if the grounds for refusal of recognition in Article 7 are not met, then the judgment can be recognized and enforced in a requested country. However, foreign judgments can be recognized and enforced under national law or other international convention, but with consideration to the exclusive base given in Article 6 (which refer to exclusive base of jurisdiction for rights *in rem* over immoveable property).

The first criteria for circulation of judgments are provided in Article 5,

property [and analogous matters];] [(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;] [(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties;] [(p) anti-trust (competition) matters].

⁸ Garciamartin F, Saumier G., Preliminary document No 10 of May 2018 Judgments Convention: Revised Preliminary Explanatory Report, December, 2018, par. 16

⁹ Article 4 of the new 2019 Hague Convention.

¹⁰ Article 4(2) of the new 2019 Hague Convention.

¹¹ Article 4(3) of the new 2019 Hague Convention.

which sets out the bases for recognition and enforcement of a judgment in the form of indirect jurisdictional grounds against which the judgment from the state of origin is to be assessed by the State where recognition and enforcement is sought.¹² These grounds can be divided in three traditional jurisdictional categories: jurisdiction based on connection with the defendant, jurisdiction based on consent and jurisdiction based on connections between the claim and the state of origin.¹³ More specifically, this list contains jurisdictional bases such as: persons habitual residence is in the state of origin,¹⁴ natural persons had their principal place of business in the state of origin,¹⁵ person against whom recognition is sought is the person that brought the claim,¹⁶ defendant maintained a branch, agency or other establishment without separate legal personality in the state of origin and the claim arose out of the activities of these entities,¹⁷ defendant expressly¹⁸ or tacitly¹⁹ consented to the jurisdiction of the court of origin, the judgment was given on contractual obligations and it was given in the State in which performance of that obligation took place according to the law that the parties choose or it was determined according to the conflict of law rules in that state (in absence of an agreed place of performance),²⁰ the judgment is regarding a tenancy of immovable property and it was given by a state where the property is situated,²¹ the judgment is regarding contractual obligation secured by a right *in rem* in immovable property located in the state of origin,²² the act or omission directly causing harm occurred in the state of origin and a judgment on a non-contractual obligation was rendered in the state of origin,²³ bases concerning trusts,²⁴ counterclaims²⁵ and choice of court agreements.²⁶ Most of these grounds can be found in the national legal systems, but they are formulated more precisely or narrowly in the new 2019 Hague Convention.²⁷ Moreover, there is no hierarchy between these grounds

¹² Garciamartin F, Saumier G., (n 7), pg.5, par 17.

¹³ Garciamartin F, Saumier G., (n 7), pg. 34, par. 146

¹⁴ Article 5(1)(a) of the new 2019 Hague Convention.

¹⁵ Article 5(1)(b) of the new 2019 Hague Convention.

¹⁶ Article 5(1)(c) of the new 2019 Hague Convention.

¹⁷ Article 5(1)(d) of the new 2019 Hague Convention.

¹⁸ Article 5(1)(e) of the new 2019 Hague Convention.

¹⁹ Article 5(1)(f) of the new 2019 Hague Convention.

²⁰ Article 5(1)(g) of the new 2019 Hague Convention.

²¹ Article 5(1)(h) of the new 2019 Hague Convention.

²² Article 5(1)(i) of the new 2019 Hague Convention.

²³ Article 5(1)(j) of the new 2019 Hague Convention.

²⁴ Article 5(1)(k)(i) and (ii) of the new 2019 Hague Convention.

²⁵ Article 5(1)(l) of the new 2019 Hague Convention.

²⁶ Article 5(1)(m) of the new 2019 Hague Convention.

²⁷ Garciamartin F, Saumier G., (n 7) pg. 34, par. 146

and satisfaction of a single ground can fulfill this condition.²⁸

These grounds are limited by the exclusive jurisdictional rule given in Article 6 (rights *in rem* over immovable property). In the cases where the judgments fulfill the requirements provided in Article 4, 5 and 6 the only grounds for refusal to recognize and enforce the decision are provided in Article 7. This list refers to grounds as: right of defense,²⁹ the judgment was obtained by fraud,³⁰ public policy,³¹ violation of choice of court agreement,³² inconsistency with a judgment given in the requested state³³ and inconsistency with a judgment given in another state.^{34,35}

Another rule provided in this article is given in Article 7(2) of the new 2019 Hague Convention, which establishes priority of the decisions which need to be recognized and enforced. In private international law legal theory³⁶ in situation where there are conflicting proceedings the *lis pendens* rule applies. However, in the new 2019 Hague Convention there are no rules for direct jurisdiction and thus does not include a rule on *lis pendens*.³⁷ The system developed in the new 2019 Hague Convention regarding parallel proceedings relies on Article 7(1)(e) and Article 7(1)(f) which deal with situations of inconsistency of the judgments given in the requested or given in another state and Article 7(2) which refers to situations when proceedings are still pending in the requested state and when recognition and enforcement of a judgment given in another state is sought.³⁸ However, refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.³⁹ With such position it can be said that the intention of the new 2019 Hague Convention is to set out minimum standard for mutual recognition or enforcement of judgments.⁴⁰

²⁸ *ibid.*

²⁹ Article 7 (1)(a) of the new 2019 Hague Convention.

³⁰ Article 7 (1)(b) of the new 2019 Hague Convention.

³¹ Article 7 (1)(c) of the new 2019 Hague Convention.

³² Article 7 (1)(d) of the new 2019 Hague Convention.

³³ Article 7 (1)(e) of the new 2019 Hague Convention.

³⁴ Article 7 (1)(f) of the new 2019 Hague Convention.

³⁵ Another optional ground was given in Article 7 (1)(g) in the draft of the Convention - the examination of the law applied by the court of origin in intellectual property matters is provided. See more Garciamartin F, Saumier G., (n 7), pg. 67-69, par. 303-312

³⁶ MarongiuBuonaiuti, F., *Lis Alibi Pendens and Related Actions in Civil and Commercial Matters within the European Judicial Area*, Yearbook of Private International Law, vol.11(2009) 513

³⁷ Garciamartin F, Saumier G., (n 7), pg. 68, par. 309

³⁸ *ibid*

³⁹ Article 7(2) of the new 2019 Hague Convention.

⁴⁰ Garciamartin F, Saumier G., (n 7), pg. 82, par. 367

1.3 Other provisions in the proposal of the Hague Convention on recognition and enforcement of foreign judgments

The new 2019 Hague Convention contains other provisions that are in context of the system for recognition and enforcement. These aspects refer to questions such as: recognition and enforcement of preliminary questions,⁴¹ recognition and enforcement of a severable part of a judgment,⁴² recognition and enforcement of damages including punitive damages⁴³ and judicial settlements.⁴⁴ Moreover the new 2019 Hague Convention contains rules that address procedural matters that facilitate access to the mechanism of new 2019 Hague Conventions such as: documents that need to be produced,⁴⁵ procedure⁴⁶ and cost of proceedings.⁴⁷

3. Conclusion

The new 2019 Hague Convention will represent an important step forward in the circulation of judgments between countries. The cautious approach taken by this latest instrument deployed by the Hague Conference, can have short and long term impact on the countries. On short term it will attract them to sign this international instrument because of the ‘minimum standard’ approach taken by the new 2019 Hague Convention. More importantly, this Convention can produce long lasting consequences with the possible approximation of the national legal systems with the principles provided in the convention. The fact that the person seeking recognition can opt whether to use the procedure laid down in the convention, or the national legal rules for recognition and enforcement (or both) provides for more “*exequatur friendly*” legal environment and existence of minimum standards in the countries. This can bring together different legal cultures and have transnational (transcontinental) consequences. Such approach is more than welcomed.

The system presented in the new 2019 Hague Convention is a simple one with several steps which need to be taken. First the scope of the application of the convention is ‘sketched’ in details and predicted to cover the most crucial aspects of civil and commercial matters which can be viewed as uncontroversial.

⁴¹ Article 8 of the new 2019 Hague Convention.

⁴² Article 9 of the new 2019 Hague Convention.

⁴³ Article 10 of the new 2019 Hague Convention.

⁴⁴ Article 12 of the new 2019 Hague Convention.

⁴⁵ Article 13 of the new 2019 Hague Convention.

⁴⁶ Article 14 of the new 2019 Hague Convention.

⁴⁷ Article 15 of the new 2019 Hague Convention.