



## ARTICLES

### SPECIAL SECTION – MUTUAL RECOGNITION AND MUTUAL TRUST: REINFORCING EU INTEGRATION? (SECOND PART)

# THE INTERACTION BETWEEN MUTUAL TRUST, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS IN PRIVATE INTERNATIONAL LAW IN RELATION TO THE EU'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

JESSY EMAUS\*

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ABSTRACT: This contribution aims to provide an analysis of the interrelationship between the principles of mutual trust, mutual recognition and fundamental rights in the field of private international law and to consider the interaction between these principles in relation to the European Union's aspirations with regard to contractual relations. These aspirations involve both harmonization and unification of substantive private-law rules and far-reaching private international law measures, e.g. of mutual recognition of foreign judgments. After an introduction of the rule of mutual recognition under Brussels I Recast and its underlying mutual trust principle, first the role of fundamental rights will be discussed, which may be an important reason for limiting the rule. Secondly, it will be argued that the development of this rule should not only be seen in the light of the aspirations to build an area of freedom, security and justice, but also in the light of the aspirations to harmonize and unify substantive contract-law rules.

\* Research Fellow, Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), Utrecht University, [j.m.emaus@uu.nl](mailto:j.m.emaus@uu.nl).

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## I. INTRODUCTION

This contribution aims to provide an analysis of the interrelationship between the principles of mutual trust, mutual recognition and fundamental rights in the field of private international law and to consider the interaction between these principles in relation to the European Union's aspirations with regard to contractual relations.

The aspirations relating to contractual relations find expression in several initiatives of a diverse nature. They did not only spark from the introduction of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in 1968 (1968 Brussels Convention) and other initiatives aimed at promoting the area of freedom, security and justice, but also led to the recent and much-discussed Draft Common Frame of Reference, containing substantive private-law provisions.<sup>1</sup> A European civil code, however, seems to be a long way off these days – not least for a lack of competence of the European Commission to enact a civil code.<sup>2</sup>

Today, EU law governing contractual relations<sup>3</sup> is therefore anchored in a diverse range of substantive "civil law provisions of EU law"<sup>4</sup> and private international law instruments (Rome I<sup>5</sup> and Brussels I Recast<sup>6</sup>). These measures, taken at the level of the European Union, strongly affect relationships at a cross-border micro-level in the everyday life of individuals. As a consequence of initiatives in the field of private international law contracting parties may, for example, see themselves confronted with judgments by courts of other EU Member States that in principle should be recognized without substantive review by a court of their home country. The recent case of *Avotiņš v. Latvia* may well illustrate the impact the European principle of mutual recognition has at micro-level.<sup>7</sup>

<sup>1</sup> C. VON BAR, E. CLIVE, H. SCHULTE-NÖLKE (eds), *Principles, Definitions and Model Rules of European Private Law*, Munich: Sellier, 2009.

<sup>2</sup> N. REICH, *General Principles of EU Civil Law*, Cambridge: Intersentia, 2014, p. 14.

<sup>3</sup> See: D. LECZYKIEWICZ, S. WEATHERILL, *Private Law Relationship and EU Law*, in D. LECZYKIEWICZ, S. WEATHERILL (eds), *Involvement of EU Law in Private Law Relationships*, Oxford: Hart Publishing 2013.

<sup>4</sup> N. REICH, *General Principles of EU Civil Law*, cit., p. 13.

<sup>5</sup> Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter Rome I).

<sup>6</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter Brussels I Recast).

<sup>7</sup> European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia*. An analysis of the case was published in *European Papers* recently: G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights*, in *European Papers*, 2016, Vol. 1, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 579 *et seq.*

The applicant, Mr Avotiņš, a Latvian citizen, had signed a debt deed stating that he had borrowed 100.000 US Dollars from the Cypriot company F.H. Ltd. and that he agreed to repay with interest no later than 30 June 1999. According to F.H. Ltd., Avotiņš had not fulfilled his payment obligations, which is why F.H. Ltd., in conformity with the choice of law and jurisdiction in the deed, in 2003 initiated legal proceedings before a Cypriot court. The Cypriot court, in the absence of Avotiņš, ordered him to pay F.H. Ltd. 100.000 US Dollars plus 10 per cent interest from 30 June 1999. The court also stated that Avotiņš had been “duly informed of the hearing”. The court’s judgment, however, gave no information on the final status of the judgment or about remedies available against the judgment. In 2005 F.H. Ltd. was still awaiting repayment of the debt and therefore decided to apply to the Latvian court for recognition and enforcement of the Cypriot court’s judgment. The Latvian Supreme Court, finally, allowed the application. Avotiņš, before the European Court of Human Rights, complained about the proceedings in Latvia and stated that his right to a fair hearing as guaranteed in Art. 6 of the European Convention on Human Right (ECHR) had been violated.<sup>8</sup> Avotiņš argued that the Latvian Supreme Court had wrongly allowed the application, because his rights of defence had not been respected during the proceedings in Cyprus. According to Avotiņš he had not been correctly informed about the proceedings, and had therefore not had any opportunity to build a defence against the claim. This should have resulted in a refusal by the Latvian courts to recognize the Cypriot judgment. It is the principle of mutual recognition, based on supposed mutual trust in another Member State’s judicial system, that is at stake here. It is to be tested by the European Court of Human Rights against fundamental rights aimed at protecting fair hearings in civil matters.

The case of *Avotiņš v. Latvia*, the outcome of which will be revealed in the last section, was the immediate trigger for this contribution. The matter that is the focus here, i.e. the balancing of fundamental rights and the principle of mutual recognition of civil judgments in the European Union and under the supervision of both the Court of Justice and the European Court of Human Rights, will be analysed here in the light of the wider context of the aspirations that the European Union has relating to contractual relations. The reason for the reflection in this wider context is that the measures regulating contractual relationships taken in one field can hardly be developed without taking into account the measures taken or rejected in another field that affect the same kind of relationship.

Lastly, it is important to note in this introduction that both the Brussels I Regulation<sup>9</sup> and the Brussels I Regulation Recast play an important role in this paper. These regulations, as will be further explained in section III, provide rules on the jurisdiction of

<sup>8</sup> Avotiņš also complained about the legal proceedings in Cyprus, but the complaint against Cyprus was ruled out of time. See *Avotiņš v. Latvia*, cit., para. 4.

<sup>9</sup> Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Brussels I).

courts and on the recognition and enforcement of judgments in civil and commercial matters. Brussels I Regulation Recast came into force on 10 January 2015 and replaces Brussels I. Brussels I still applies to all proceedings that were initiated before 10 January 2015. It is also Brussels I that is applicable in *Avotiņš v. Latvia*. Given this context, Brussels I Recast will be used in this paper to explain the current legal framework for recognition and enforcement. For the interpretation of the provisions the decisions by the Court of Justice on the interpretation of Brussels I will be taken into account. These decisions are useful since the provisions in Brussels I Recast that are relevant in this paper are similar to those in Brussels I and there is no indication that Brussels I Recast is to be interpreted completely different.

## II. THE EUROPEAN UNION'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

### II.1. CONTEXT: COMPETENCES TO REGULATE CIVIL MATTERS

The European Union's aspirations relating to contractual relations must be interpreted in light of the competences that the EU has to regulate civil matters, since these competences provide the context in which the European Union is able to turn aspirations into reality. As a starting point, it is important to note that these competences do not include, as stated by, *inter alii*, Reich, a general competence.<sup>10</sup> Different provisions in the TFEU have been used over the years as a legal basis for the introduction of various instruments by the European Union in the field of private law.

Art. 114 TFEU has turned out to be an important provision, giving the European Parliament and the Council the power to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."<sup>11</sup> Art. 114 TFEU is the legal basis for many measures in the field of European consumer law, like the Consumer Law Directive<sup>12</sup> and the Package Travel Directive.<sup>13</sup> Another provision that is of significant influence is Art. 81 TFEU, which gives the European Parliament and the Council the power to adopt measures in light of the Union's goal to "develop judicial cooperation in civil matters having cross-border implications, based on the principle of

<sup>10</sup> N. REICH, *General Principles of EU Civil Law*, cit., p. 14.

<sup>11</sup> Art. 114 TFEU.

<sup>12</sup> Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

<sup>13</sup> Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

mutual recognition of judgments and of decisions in extrajudicial cases” and “particularly when necessary for the proper functioning of the internal market”. When translated to the individual contractual relationship, this means that individuals who enter into an agreement with a citizen from another EU Member State have easy access to a legal remedy within a reasonable period.<sup>14</sup>

Arts 114 and 81 TFEU therefore provide the legal basis for the European Union to adopt substantive and procedural measures respectively that may contribute to the fulfilment of aspirations relating to contractual relations. These aspirations will be clarified below, taking the Treaty of Maastricht and the pillar structure it introduced as a starting point.

## II.2. FIRST-PILLAR ASPIRATIONS: CONTRACTUAL RELATIONS AND THE INTERNAL MARKET

The aspirations with regard to the contractual relations under the first pillar relate to the EU's ambition to have an internal market that runs smoothly. In 2001 the European Commission published a document that was the starting point for an extensive debate amongst practitioners (of all kinds) and legal scholars, on the desirability of a civil code, on the competence of the European Union to enact such a code and on less far-reaching alternatives for a European Civil Code.<sup>15</sup> The Commission in the 2001 communication described four scenarios to solve the problems “resulting from the co-existence of different national contract laws” and also the EU's “piecemeal’ approach to harmonisation”.<sup>16</sup> These possible solutions were: “I. no EC action; II. promote the development of common contract law principles leading to more convergence of national laws; III. improve the quality of legislation already in place; IV. adopt new comprehensive legislation at EC level”.<sup>17</sup>

This communication was followed by a report of the European Parliament in which the Parliament urged for action, considering amongst other things that “international private law is no longer a suitable instrument for the European single market which has already reached an advanced state of integration”.<sup>18</sup> The Council adopted a report in which it reacted to the Commission's communication and asked the Commission to publish its findings, if necessary in a green or white paper.<sup>19</sup> Two years later the Euro-

<sup>14</sup> M. WELLER, *Mutual trust: in Search of the Future of European Union Private International Law*, in *Journal of Private International Law*, 2015, p. 70.

<sup>15</sup> Communication COM(2001) 398 final of 11 July 2001 from the Commission to the Council and the European Parliament and the Council on European contract law.

<sup>16</sup> Communication COM(2001) 398 final, p. 8, 10.

<sup>17</sup> Communication COM(2001) 398 fina, pp. 12-13.

<sup>18</sup> European Parliament Report A5-0384/2001 of 6 November 2001 on the approximation of the civil and commercial law of the Member States (COM(2001) 398 – C5-0471/2001 – 2001/2187(COS)).

<sup>19</sup> Council meeting 13758/01 (Presse 409) of 16 November 2001, Justice, Home Affairs and Civil Protection.

pean Commission introduced an action plan in which it presented a plan to elaborate a common frame of reference that, first, “should provide for best solutions in terms of common terminology and rules” and, second, “form the basis for further reflection on an optional instrument in the area of European contract law”.<sup>20</sup>

A draft common frame of reference was ready in 2008.<sup>21</sup> The draft was prepared by two groups of legal academics: the Study Group on a European Civil Code (the Study Group) and the Research Group on Existing EC Private Law (the *Acquis* Group). This Draft Common Frame of Reference was widely discussed from all sorts of perspectives.<sup>22</sup> The European Commission in 2010 in a green paper set out seven options as to the nature of an instrument of European contract law ranging from the mere “Publication of the results of the Expert Group” (least far-reaching) to a “Regulation establishing a European Civil Code” (most far-reaching).<sup>23</sup>

The European Commission held a public consultation on the options, resulting in a response of 320 submissions. The consultation prompted the Commission to present a proposal for a Regulation for a Common European Sales Law.<sup>24</sup> This proposal was, however, withdrawn by the next European Commission in 2015, because the proposal should be modified “in order to fully unleash the potential of e-commerce in the Digital Single Market”.<sup>25</sup> A further convergence of the substantive contract laws by means of a common European Civil, Contract or Sales Law is therefore on hold at this moment. European contract law, i.e., all of the European Union’s rules regulating contractual relations, currently consists of provisions in various legal acts, including several consumer law directives.

### 11.3. THIRD-PILLAR ASPIRATIONS: CONTRACTUAL RELATIONS AND THE AREA OF FREEDOM, SECURITY AND JUSTICE

In addition to the aspirations that saw light under the first pillar, the European Union also took initiatives that affect contractual relations under the third pillar, covering co-

<sup>20</sup> Communication COM(2003) 68 final of 12 February 2003 from the Commission to the European Parliament and the Council – *A more coherent European Contract Law – An Action Plan*, p. 2.

<sup>21</sup> C. VON BAR, E. CLIVE, H. SCHULTE-NÖLKE, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition*, Munich: Sellier; European Law Publishers, 2009.

<sup>22</sup> See e.g. the special section of the European Review of Private Law on the Draft Common Frame of Reference: *European Review of Private Law*, 2009, p. 483 *et seq.*; the special section of the *European Review of Contract Law. European Review of Contract Law*, 2008, p. 223 *et seq.*; S. WHITTAKER, *A Framework of Principle for European Contract Law?*, in *Law Quarterly Review*, 2009, p. 616 *et seq.*

<sup>23</sup> Commission, *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses*, COM(2010) 348 final, pp. 7-11.

<sup>24</sup> Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European sales law, COM(2011)635 final.

<sup>25</sup> Annex II to the Communication COM(2014) 910 final of 16 December 2014 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2015 A New Start*, p. 12.

operation in the field of justice and home affairs. Article K.1 of Title VI of the Treaty of Maastricht stated that “judicial cooperation in civil matters” is a “matter of common interest”. This mere recognition of judicial cooperation as a policy matter became a more concrete task for the Council to “adopt measures in the field of judicial cooperation in civil matters” in the Treaty of Amsterdam.<sup>26</sup> According to Art. 73m of the Treaty of Amsterdam, these measures include, amongst others, “improving and simplifying [...] the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases”.

The entry into force of the Treaty of Amsterdam was followed by a special meeting of the European Council in Tampere, dedicated to “the creation of an area of freedom, security and justice in the European Union”.<sup>27</sup> From the text of the Conclusions of the Presidency it is clear that the creation of the area of freedom, security and justice was a clear priority and “at the very top of the political agenda”. With regard to the protection of individual rights, the Conclusions referred to enhanced mutual recognition of judicial decisions and judgments and to the approximation of legislation. In this regard, the European Council ordered the Commission to come up with a proposal aimed at further reducing “intermediate measures” in civil matters that were still necessary under the then applicable Brussels Convention 1968 for the recognition and enforcement of judgments in the Member State in which enforcement is sought.<sup>28</sup> Also, the Council instructed itself to report, by 2001, on “the need to approximate Member States’ legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings”.<sup>29</sup>

The Council in 2001 fulfilled its task by publishing a Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.<sup>30</sup> Taking as a starting point that mutual recognition on the basis of the 1968 Brussels Convention already took place automatically unless contested, the Council in the plan explained for cases covered by this convention that further progress must be made by “limiting the reasons which can be given for challenging recognition or enforcement of a foreign judgment”, and also, “in some areas”, the abolition of the *exequatur* procedure. The Council referred to the principle of mutual trust, considering that at the same time mutual trust should be strengthened by guaranteeing minimum standards by laying down procedural rules at a European level. Where the *exequatur*

<sup>26</sup> Art. 73i of the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts.

<sup>27</sup> European Council Conclusions of 15-16 October 1999, p. 1.

<sup>28</sup> *Ibid.*, p. 6.

<sup>29</sup> *Ibid.*

<sup>30</sup> Council Draft programme 2001/C 12/01 of 15 January 2001 of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.

would be removed, guaranteeing minimum standards by introducing rules at a European level would even be necessary, the Council stated.<sup>31</sup>

In 2010, the European Commission published a proposal for a new regulation that came into force in 2015: Brussels I Recast, which will be further explained in the next section. In the new convention the *exequatur* had indeed been abolished, but the reasons for challenging recognition and enforcement had been maintained. Furthermore, it should be noted that the European Parliament is concerned with “common minimum standards for civil procedure in the European Union”.<sup>32</sup> In 2015, an analysis was published in which the three following options were presented to help build mutual trust: 1) “Optional unification by way of regulations”, 2) “Sector-specific harmonization by way of directives”, 3) “Horizontal harmonization of selected areas of civil procedure”.<sup>33</sup> In the same year, the European Parliament’s Committee for Legal Affairs published a working document on the EU’s competence to enact legislation for the introduction of common minimum standards. And last year it published a so-called “added value assessment” that, in short, concluded that all three aforementioned options help to achieve effective “codification of civil procedure standards across Europe”.<sup>34</sup> However, these three options also create additional costs, the costs of option three being “very significant”.<sup>35</sup>

The above shows that the European Union’s activity in the field of judicial cooperation originates from the open character of the European Union that at the same time should be a secure Union; “the enjoyment of freedom requires a genuine area of justice”.<sup>36</sup> The aspirations of the European Union under this pillar therefore focus on the smooth and just functioning of the internal market. Opening the borders not only brings prosperity but also creates challenges for security and justice. The European Union responded to these challenges under the third pillar, and with regard to contractual

<sup>31</sup> Draft programme 2001/C 12/01, p. C 12/6.

<sup>32</sup> See European Parliamentary Research Service’s in-depth analysis PE 559.499 of June 2015 *Europeanisation of civil procedure. Towards common minimum standards?*, Committee of Legal Affairs Working document DT\1079599EN.doc of 21 December 2015 on establishing common minimum standards for civil procedure in the European Union – the legal basis; European Parliamentary Research Service Study PE 581.385 of June 2016, *Common minimum standards of civil procedure. European Added Value Assessment Annex I*.

<sup>33</sup> European Parliamentary Research Service’s in-depth analysis PE 559.499 of June 2015. The document refers to a joint initiative by the European Law Institute (ELI) and the International Institute of the Unification of Private Law (UNIDROIT) on “transnational civil procedure”, see: ELI-UNIDROIT Project from Transnational Principles to European Rules of Civil Procedure of 18-19 October 2013; ELI-UNIDROIT Transnational Civil Procedure – Formulation of Regional Rules: ELI-UNIDROIT Rules of Transnational Civil Procedure of 12-13 May 2014; ELI-UNIDROIT Transnational Civil Procedure – Formulation of Regional Rules: ELI-UNIDROIT Rules of Transnational Civil Procedure of 27-28 November 2014; ELI-UNIDROIT Joint Meeting and JURI Committee Presentation, [www.unidroit.org](http://www.unidroit.org) (for reports of the aforementioned meetings).

<sup>34</sup> European Parliamentary Research Service Study PE 581.385 of June 2016, p. 92.

<sup>35</sup> *Ibid.*

<sup>36</sup> European Council Conclusions of 15-16 October 1999, p. 2.



relations in particular especially by furthering mutual recognition and examining the need to approximate substantive laws, thereby aiming to grant its citizens better access to justice in civil matters. In other words and to speak with the Council of the European Union: to secure fair settlement of cross-border cases, irrespective of nationality, parties and place of trial.<sup>37</sup>

### III. MUTUAL RECOGNITION OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

#### III.1. ART. 36 BRUSSELS I RECAST

The automatic mutual recognition of judgments in civil and commercial matters by a Member State in which enforcement is sought, is laid down in Art. 36 Brussels I Recast. Since the entry into force of this regulation on 10 January 2015, an *exequatur* procedure is no longer necessary to give effect to a judgment rendered by a court in another Member State. Art. 37 Brussels I Recast only requires a copy of the judgment and a certificate to be handed over by the party who wishes to invoke the judgment. According to the European Commission the abolition of *exequatur* was necessary, as it remained “an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market”.<sup>38</sup>

The recognition of a judgment must therefore take place automatically, without any special procedure. The term “recognition” in this regard should, in short, be understood as “[having] the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given”, said the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereafter: Jenard report) in explanation of the principle of mutual recognition in the Brussels Convention 1968.<sup>39</sup> It is therefore the adjudicating State’s law that is decisive as to the consequences of the recognition of the judgment by the court of the Member State in which recognition is sought. The Court of Justice in *Hofmann v. Krieg*, citing the aforementioned paragraphs in the Jenard report, confirmed this explanation, and added in *Apostolides v. Orams and Orams*, again referring to the Jenard report, that “there is however no reason for granting to a judgment, when it is enforced, rights which it

<sup>37</sup> Council of the European Union, *Living in an Area of Freedom, Security and Justice*, 2005, p. 6.

<sup>38</sup> Commission 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), COM(2010) 748 final.

<sup>39</sup> Council Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968) by Mr P. Jenard of 5 March 1979, p. 43.

does not have in the Member State of origin [...] or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have".<sup>40</sup>

Art. 45 Brussels I Recast provides for the refusal of the recognition of a judgment in five situations including the situation where "recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed" (hereafter: the public policy exception) and "where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so" (hereafter: the rights of defence exception). Although the Commission initially intended to narrow the grounds for the Member States to refuse recognition by replacing the public policy exception by a more limited "fair trial" exception, in the end the grounds for refusal in Art. 34 Brussels I returned in Art. 45 Brussels I Recast.<sup>41</sup>

### III.2. THE COURT OF JUSTICE ON THE REFUSAL OF RECOGNITION

The scope of the rule on mutual recognition of judgments is defined in the Court's case law on the refusal of recognition. Since Brussels I Recast only came into force last year, there is no case law yet on the interpretation of Art. 45 Brussels I Recast. For this reason, this section will discuss the case law of the Court of Justice on the refusal of recognition that is based on the expired provisions in the 1968 Brussels Convention (Art. 27) and Brussels I (Art. 34).

As a starting point, the Court of Justice repeatedly stated that the grounds for opposing the recognition of judgments of other Member States' courts as defined in Art. 34 Brussels I must be interpreted strictly, because refusal hinders the achievement of the objectives of this regulation.<sup>42</sup> The Court of Justice in *Klomps v. Michel* referred to

<sup>40</sup> Court of Justice: judgment of 4 February 1988, case C-145/86, *Hofmann v. Krieg*, para. 10; judgment of 28 April 2009, case C-420/07, *Apostolides v. Orams and Orams* [GC], para. 66. See also: Court of Justice, judgment of 13 October 2011, case C-139/10, *Prism Investments v. Van der Meer*, para. 38.

<sup>41</sup> The Committee on Legal Affairs considered a substantive or procedural exception still necessary, considering that "such an exception might be required by Member States' international obligations, and both the Rome I and Rome II Regulations contain exceptions for public policy and overriding mandatory provisions. A Member State before which proceedings are brought is entitled to preserve its fundamental values; therefore, equally, it must be the case for a Member State in which the enforcement of a judgment is sought". See: Committee on legal affairs Report on the 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), A7-0320/2012.

<sup>42</sup> Court of Justice, judgment of 16 July 2015, case C-681/13, *Diageo Brands v. Simiramida-04*, para. 41. See also Court of Justice: judgment of 28 March 2000, case C-7/98, *Krombach v. Bamberski*, para. 21; judgment of 11 May 2000, case C-38/98, *Renault v. Mexicar*, para. 26; *Apostolides v. Orams and Orams* [GC], cit., para. 55.

the connection between the regulation of jurisdiction and recognition, and explained that the mutual recognition and execution of judgments was possible since the Brussels Convention “contains provisions regulating directly and in detail the jurisdiction of the courts of the State in which judgment was given, and also provisions concerning the verification of that jurisdiction and of admissibility”.<sup>43</sup> The Court also held that “the purpose of Article 27(2) of the Convention is to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised”.<sup>44</sup>

With regard to the rights of defence exception, the Court of Justice in its case law under the Brussels Convention 1968 had determined that the defendant had to be able to defend himself right from the beginning of proceedings. A remedy of recourse against a judgment at a later stage could not constitute “an equally effective alternative” to a possibility of defence right at the start of legal proceedings. Although under the 1968 Brussels Convention a formal requirement with regard to the documents to initiate proceedings needed to be fulfilled, since the entry into force of Brussels I this formality could no longer be considered to constitute an irregularity *per se*.<sup>45</sup> According to Art. 34, para. 2, Brussels I, recognition of judgments must be refused “where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, *unless* the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so [emphasis added]”. It is therefore quite possible to conclude that a defendant’s rights of defence have been sufficiently respected if he has been provided with an opportunity to commence proceedings to challenge judgment given in default.

The Court in *ASML v. Semiconductor Industry Services* under Art. 34, para. 2, Brussels I came to the conclusion that “a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement”.<sup>46</sup> The conclusion was based on the objectives of Brussels I, the assertion that the defendant’s rights of defence must be respected, and the European Court of Human Rights’s explanation under Art. 6 of the ECHR that the rights of defence require a concrete and effective protection

<sup>43</sup> Court of Justice, judgment of 16 June 1981, case C-166/80, *Kloms v. Michel*, para. 7.

<sup>44</sup> *Kloms v. Michel*, cit., para. 9. Court of Justice, judgment of 10 October 1996, case C-78/95, *Hendrikman v. Magenta*, para. 15.

<sup>45</sup> The Court of Justice in its case law under the Brussels Convention 1968 had decided that the defendant had to be able to defend himself right from the beginning of proceedings. A remedy of recourse against a judgment at a later stage could not constitute “an equally effective alternative” to a possibility of defence right at the start of legal proceedings. See *Hendrikman v. Magenta*, cit., para. 39.

<sup>46</sup> Court of Justice, judgment of 14 December 2006, case C-283/05, *ASML*, para. 47.

to guarantee the effective exercise of rights by the defendant.<sup>47</sup> The Court decided that for the defendant to be able to exercise his rights “he [the defendant] must have been aware of the contents of that [default] decision, which presupposes that it was served on him”.<sup>48</sup> Art. 34, para. 2, Brussels I therefore requires that the defendant has knowledge of the contents of a default judgment as well as sufficient time to arrange for his defence.

Following its judgment in *ASML v. Semiconductor Industry Services*, the Court of Justice in *Apostolides v. Orams and Orams* decided that the rights of defence have been respected if the defendant, who did not know about the initial proceedings or did not have sufficient time to prepare for his defence, and after a judgment has been given in default, could appeal against the default decision but failed to do so.<sup>49</sup> According to the Court of Justice, the wordings of Art. 34, para. 2, and Art. 45, para. 1, Brussels I point in that direction.

In *Lebek v. Domino* the defendant was faced with a default judgment by a French court, when the claimant requested recognition and execution of the judgment in Poland, where the defendant resided. The fact that it was possible for the defendant, on the basis of French law, to file for “relief from the effects of the expiry of the period for commencing proceedings”, but failed to do so, brought the Court of Justice to the conclusion that in these circumstances a defendant cannot rely on the rights of defence exception.<sup>50</sup> The French rule, in other words, fell within the scope of the aforementioned paragraphs in Art. 34, para. 2, Brussels I.

The court assessment requested under Art. 34, para. 2, Brussels I can be executed independently. This means that the requested court is allowed, as became clear in *Trade Agency v. Seramico Investments*, to review the consistency of the evidence with the information that is on the certificate, to enable the court, in the end, to conclude whether the defendant was in the position as guaranteed by Art. 34, para. 2, Brussels I.<sup>51</sup>

In addition to the rights of defence exception, and in fact also in addition to other grounds for refusing recognition of a judgment given by another Member State’s court, there is the public policy exception. The public policy exception, which says that the recognition of a judgment must be refused if that recognition is “manifestly contrary to public policy in the Member State addressed”, is to be applied very restrictively. In *Hendrikman v. Magenta* the Court referred to the Jenard report<sup>52</sup> and decided that this ex-

<sup>47</sup> *ASML*, cit., para. 23 *et seq.*

<sup>48</sup> *Ibid.*, para. 40.

<sup>49</sup> *Apostolides v. Orams and Orams* [GC], cit., para. 77.

<sup>50</sup> *Lebek v. Domino*, cit., para. 38.

<sup>51</sup> Court of Justice, judgment of 6 September 2012, case C-619/10, *Trade Agency v. Seramico Investments*, para. 38.

<sup>52</sup> Council Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, cit.

ception should only be applied in very exceptional cases. In any case, the exception will not apply when other exceptions, like the rights of defence exception, apply.

The Court of Justice under the 1968 Brussels Convention decided that it is for the Member States to define the material content of the public policy exception.<sup>53</sup> The Court of Justice in *Apostolides v. Orams and Orams* confirmed this rule under the Brussels I Regulation. The national determination of what public policy requires, however, comes with a European review of the correctness of its scope. In other words, it is up to the Court of Justice to judge the limits within which the courts of a Member State may have recourse to this concept for the purpose of refusing recognition to a judgment emanating from another Member State.<sup>54</sup> The Court of Justice in *Apostolides v. Orams and Orams* also confirmed the criterion it set to determine when public policy is at stake, as decided under the 1968 Brussels Convention in *Krombach v. Bamberski* and *Renault*.

“Recourse to the public-policy clause can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”.<sup>55</sup>

In the case of *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation* the Court of Justice decided that “the mere invocation of serious economic consequences” cannot constitute a breach of public policy that is ground for refusal of recognition as provided for in Art. 34, para. 1, Brussels I.

The public policy exception may apply if a substantive right or a procedural safeguard is violated. Both types of violations were addressed in the case of *Diageo Brands v. Simiramida-04*. As regards the alleged violation of the substantive rights in this case, the Court of Justice stated that incorrect interpretations of both national and EU law may give reason to apply the public policy exception. However, this does not affect the aforementioned strict test that has to be carried out for the public policy exception to apply.<sup>56</sup> The mere fact that the court of the Member State in which enforcement is sought considers that the court of origin’s interpretation of provisions in an EU directive

<sup>53</sup> *Krombach v. Bamberski*, cit., para. 22-23.

<sup>54</sup> *Apostolides v. Orams and Orams* [GC], cit. para. 57; see also: Court of Justice, judgment of 23 October 2014, case C-302/13, *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, para. 47; *Diageo Brands v. Simiramida-04*, cit., para. 42; judgment of 25 May 2016, case C-559/14, *Meroni v. Recoletos*, para. 39.

<sup>55</sup> *Apostolides v. Orams and Orams* [GC], cit. para. 59. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 49; *Diageo Brands v. Simiramida-04*, cit., para. 44.

<sup>56</sup> *Diageo Brands v. Simiramida-04*, cit., paras 48-50.

is wrong, does not suffice.<sup>57</sup> As in this case the Court of Justice clarified in response to the complaint concerning the alleged violation of a procedural safeguard, it is up to the litigant in the first place to appeal against a decision where an incorrect interpretation of EU law may have been given. In the end the court of last instance is obliged, on the basis of Art. 267 TFEU, to refer to the Court of Justice if the interpretation of a provision in a directive is uncertain.<sup>58</sup>

In the case of *Trade Agency v. Seramico Investments* the Latvian Court of Cassation submitted to the Court of Justice the question if a default judgment that gives no grounds for the decision may be contrary to public policy for the purposes of Art. 34, para. 1, Brussels I, as this would constitute a violation of the right to a fair hearing (Art. 47 of the Charter of Fundamental Rights of the European Union).<sup>59</sup> The Court of Justice first of all held that the right to a fair hearing indeed requires that a court gives the reasons for a judgment, as this enables the party against whom judgment is given to understand the judgment and to appeal appropriately and effectively against the decision.<sup>60</sup> This means, secondly, that a default judgment lacking the grounds for its decision may constitute a restriction of a fundamental right in the legal order of the Member State in which enforcement is sought.<sup>61</sup> However, as the Court of Justice thirdly notes, the fundamental rights are not absolute rights, but may be subject to restrictions. The justification for the restriction of the right to a fair hearing as given by the United Kingdom government (i.e. "to ensure the swift, effective and cost effective handling of proceedings brought for the recovery of uncontested claims, for the sound administration of justice") may in principle be a justified restriction, says the Court of Justice. It is up to the referring court to conclude whether it is not "manifestly disproportionate as compared with the aim pursued".<sup>62</sup> The Court thereby suggests, with reference to the AG's conclusion, that the extent of the obligation to provide reasons may depend on the "nature of the decision" and needs to be reviewed in light of the proceedings and of all relevant circumstances.<sup>63</sup>

As a concluding example, the Court of Justice in *Meroni v. Recoletos* decided that if a court order has legal effect on a third party this mere fact does not fulfil the criterion that triggers the public policy exception. According to the Court, such an order may well

<sup>57</sup> *Ibid.*, para. 52.

<sup>58</sup> *Ibid.*, paras 64-66.

<sup>59</sup> *Trade Agency v. Seramico Investments*, cit., para. 47.

<sup>60</sup> *Ibid.*, para. 53.

<sup>61</sup> *Ibidem*. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 51.

<sup>62</sup> *Trade Agency v. Seramico Investments*, cit., para. 59.

<sup>63</sup> *Ibid.*, para. 60. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 49.

stand the test under Art. 47 of the Charter if the third party has “a genuine opportunity of challenging a measure adopted by a court of the State of origin”.<sup>64</sup>

It is not controversial to conclude that the Court of Justice interprets the grounds for refusal of recognition strictly. The narrow interpretations by the Court of Justice of the “rights of defence exception” and the “public policy exception” that were discussed here can also be found in the case law of national courts. An extensive study into the application of the Brussels I Regulation (2007) conducted by Hess, Pfeiffer & Schlosser, leads the researchers to conclude that the main ground for refusal that is brought before national courts is the defence rights exception.<sup>65</sup> However, since the entry into force of the Brussels I Regulation, “its practical impact has been reduced considerably”, Hess, Pfeiffer & Schlosser say. According to the researchers, “case law shows that the former defence of a defendant that the document instituting the proceedings was not properly and timely served [under the Brussels Convention 1968] is no longer successful”.<sup>66</sup> As mentioned before, a defendant is expected to object to a decision in the Member State where a judgment is given in the first place. Although, as rightly stated by Hess, Pfeiffer & Schlosser, this “may amount to a heavy burden” on the defendant,<sup>67</sup> it is in line with Art. 36 that prohibits the courts from the Member States in which recognition is sought to review a foreign judgment as to its substance. The Court of Justice based its judgment on the wording of Arts 34, para. 2, and 45 Brussels I and argued that “a fortiori the rights of the defence that the Community legislature wished to safeguard by Article 34 (2) of Regulation No 44/2001 are respected where the defendant did in fact commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence”.<sup>68</sup> This must be seen in the light of the goals set with the mutual recognition, which is “the sound operation of the internal market”.<sup>69</sup> It could further be argued that it is up to the judicial system in the State where initial proceedings were initiated to give judgment in the first place, but also to be able to correct wrongs without intervention of courts of other Member States.

<sup>64</sup> *Meroni v. Recoletos*, cit., para. 50.

<sup>65</sup> B. HESS, T. PFEIFFER, P. SCHLOSSER, *Report on the Application of Regulation Brussels I in the Member States*, Study JLS/C4/2005/03, 2007. p. 239.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, p. 241.

<sup>68</sup> *Apostolides v. Orams and Orams* [GC], cit., para. 78.

<sup>69</sup> Recital 1 Brussels I Regulation.

#### IV. THE INTERRELATIONSHIP BETWEEN MUTUAL TRUST, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS IN BRUSSELS I RECAST IN RELATION TO THE EUROPEAN UNION'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

##### IV.1. MUTUAL TRUST, MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS PROTECTION

It has become clear from the preceding sections that it is assumed that the mutual recognition of judgments in civil and commercial matters, as provided for by Brussels I and Brussels I Recast, can only exist when the trust among Member State has reached a certain level, which amongst other things implies that the protection of fundamental rights is guaranteed adequately in initial proceedings.<sup>70</sup> This leads Kramer to raise the question whether the harmonisation of procedural law would be desirable, in order to guarantee a minimum level of protection during the initial proceedings. This was motivated by the idea that "it is better to try to avoid violations of fair trial ('pre-testing') than having to remedy them at the stage of enforcement ('post-testing')".<sup>71</sup> This idea is now a topic of study for the European Parliament, which – as explained *supra*, section II.3 – is concerned with the development of common minimum standards for civil procedure in Europe, "to build mutual trust in judiciaries".

However this may be, in its proposal for the Brussels I Regulation Recast, the European Commission referred to the principle of mutual trust, stating that: "Today, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States".<sup>72</sup> This simpler and more automatic system of circulation of judgments has become the automatic recognition without *exequatur* in Brussels I Recast. In the proposal the European Commission also emphasized the importance of compliance with fundamental rights standards. The Commission referred to the impact assessment to substantiate that "all elements of the reform respect the rights set out in the Charter of Fundamental rights, and, in particular, the right to an effective remedy and the right to a fair trial guaranteed in its Article 47".<sup>73</sup> These short notes in the Commission's proposal leave open the questions of what level of trust is necessary for mutual recognition and what this trust relates to? And another question may be raised here: What fundamental rights framework do we expect to guarantee what level of protection?

<sup>70</sup> X. KRAMER, *Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure*, in *Journal of Private International Law*, 2005, p. 222.

<sup>71</sup> *Ibid.*, p. 222.

<sup>72</sup> Proposal for a Regulation COM(2010) 748 final, cit., p. 6.

<sup>73</sup> *Ibid.*, p. 11.



#### IV.2. FUNDAMENTAL RIGHTS PROTECTION

Fundamental rights restrict the principle of mutual trust and the basic rule of mutual recognition of judgments in civil and commercial matters. Fundamental rights in the European Union in the first place find protection in the Charter of Fundamental Rights of the European Union that on the basis of Art. 6 TEU also has the status of primary EU law. Art. 6 TEU furthermore shows “the EU’s commitment to the protection of human rights” that therefore “enjoys a primary status”, says Oster.<sup>74</sup> It leads Oster to conclude that human rights prevail over the rule on mutual recognition in the Brussels I and in fact also over the other Brussels and Rome Regulations.<sup>75</sup> This status does not prevent the Court of Justice from considering that the principle of mutual trust requires Member States to presume other Member States to comply with, in particular, EU fundamental rights.<sup>76</sup> In fact, the Court of Justice considers that Member States reviewing other Member States’ compliance with fundamental rights would “upset the underlying balance of the EU and undermine the autonomy of EU law”.<sup>77</sup> Oster, in this regard, critically refers to the difference between compliance with fundamental rights and being bound by fundamental rights. To submit oneself to a fundamental rights regulation is one thing, but to comply with the standards is another.<sup>78</sup> Here it could, however, be argued that under the ECHR, everyone within the jurisdiction of the High Contracting Parties has a right to lodge a complaint with a supranational court, the European Court of Human Rights, about the non-compliance with rights in the ECHR. It is true that this is not provided for by Union law, but the ECHR does guarantee that in the context of the recognition and enforcement of foreign judgments within the EU, all individuals can complain about the non-observance of fundamental rights by a Member State with a supranational court. And this could strengthen the idea that a certain level of minimum protection of fundamental rights is guaranteed within the European Union.

The case law of the Court of Justice, as discussed *supra*, section III.2, also shows that the specific status that fundamental rights have does not easily constitute a reason for refusal of recognition of judgments in civil and commercial matters. The two grounds for refusal of mutual recognition that were the focus of attention in section III.2 serve as the main grounds for a restriction due to fundamental rights objections. The rights of defence exception is the specific ground for a fair trial defence. The public policy defence provides a more general exception for the protection of fundamental rights in cases where the other defence does not apply. The public policy defence allows complaints concerning both substantive rights and procedural rights. In legal practice little

<sup>74</sup> J. OSTER, *Public policy and human rights*, in *Journal of Private International Law*, 2015, p. 542 *et seq.*

<sup>75</sup> *Ibid.*, p. 548.

<sup>76</sup> Opinion 2/13, cit., para. 191.

<sup>77</sup> *Ibid.*, para. 194.

<sup>78</sup> J. OSTER, *Public policy and human rights*, cit., p. 550.

attention seems to be paid, however, to the former rights. This may be explained by the interests that are at stake in these types of cases. What sort of fundamental rights could be at stake as a result of a judgment in a dispute concerning a contractual relationship with the proviso that recognition of that judgment would be manifestly contrary to public policy in another Member State?

The criterion set by the Court to determine whether the public policy exception applies, requires that the recognition “would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought” and also that the violation “would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order”.<sup>79</sup> The Court of Justice set standards high. The high threshold works to the detriment of fundamental rights protection in the sense that the court of the Member State in which enforcement is sought is only under exceptional circumstances allowed to review the compliance with fundamental rights standards. This raises the question how this criterion relates to the minimum protection offered by the European Convention on Human Rights. Does the criterion set by the Court of Justice under all circumstances guarantee the protection that is guaranteed by the European Convention on Human Rights? The criterion also raises the question how the restraint that is expected from the Member States with regard to reviewing other Member States’ judgments in civil and commercial matters relates to the obligations all Member States have at the same time under the European Convention on Human Rights.

In *Avotiņš v. Latvia*, the case introduced in section I, the European Court of Human Rights (Grand Chamber) had the opportunity to elaborate on two important issues, which may clarify what is expected from the Member States under the ECHR here. In the first place, the case was the first for the Court after Opinion 2/13 in which it had the opportunity to decide on the tenability of the *Bosphorus* presumption. The European Court of Human Rights in *Avotiņš v. Latvia* summarized the presumption as follows:

“[...] action taken in compliance with [...] [international legal, JE] obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent – that is to say not identical but ‘comparable’ – to that for which the Convention provides (it being understood that any such finding of ‘equivalence’ could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection). If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has

<sup>79</sup> *Apostolides v. Orams and Orams* [GC], cit., para. 59. See also: *flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation*, cit., para. 49; *Diageo Brands v. Simiramida-04*, cit., para. 44.

not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation".<sup>80</sup>

This presumption, as became clear in *Avotiņš v. Latvia*, still holds after Opinion 2/13, and moreover was applicable in this case, as the two requirements for the presumption were fulfilled.

The European Court of Human Rights first of all, on the basis of the case law of the Court of Justice under Art. 34, para. 2, Brussels I, concluded that the Court of Justice left no degree of discretion to the courts of the Member States in which enforcement was sought.<sup>81</sup> Secondly, the European Court of Human Rights stated that in *Bosphorus* it had ruled that the EU's supervisory mechanisms provided equivalent protection to the level of protection "for which the Convention mechanism provided".<sup>82</sup> Part of this mechanism of course is the procedure of a preliminary ruling. The European Court of Human Rights in *Avotiņš v. Latvia* explicated that the second *Bosphorus* condition, i.e. that the full potential of the EU's mechanism for "supervising observance of fundamental rights" has been deployed, does not require that Member States always seek a preliminary ruling from the Court of Justice and that in this case there was no reason indeed to seek a preliminary ruling in order to clarify the interpretation of Art. 34, para. 2, Brussels I.

The second issue that was addressed in *Avotiņš v. Latvia* concerned the protection of fundamental rights in the context of the mutual recognition of judgments on the basis of Brussels I. Although the presumption that Latvia had not departed from the requirements of the Convention applied, this presumption could still be rebutted if the European Court of Human Rights were to conclude that the protection of fundamental rights were "manifestly deficient".<sup>83</sup> It was the first time for the Court to "examine observance of the guarantees of a fair hearing in the context of mutual recognition based on European Union law".<sup>84</sup> The Court seized this opportunity to first discuss more generally the mechanism of mutual recognition. The European Court of Human Rights endorsed the importance of mutual recognition, the principle of mutual trust underlying this mechanism and the ultimate goal of achieving an area of freedom, security and justice. However, under certain circumstances an obligation to presume fundamental rights protection by other Member States may be in breach of the obligation to secure that the protection of fundamental rights is not manifestly deficient. In my opinion,

<sup>80</sup> *Avotiņš v. Latvia*, cit., para. 101. See also European Court of Human Rights: judgment of 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*, para. 154; judgment of 6 December 2012, no. 12323/11, *Michaud v. France*, para. 106.

<sup>81</sup> *Avotiņš v. Latvia*, cit., para. 106. The Court based its findings on the fact that a regulation was applied and the concrete provision (Art. 34, para. 2, Brussels I) left no room for manoeuvre to the Member States. This last finding was based on an analysis of case law of the Court of Justice.

<sup>82</sup> *Ibid.*, para. 109.

<sup>83</sup> *Ibid.*, para. 116.

<sup>84</sup> *Ibid.*, para. 109.

Brussels I and Brussels I Recast leave the Member States sufficient room to comply with their obligations under the Convention and it was Opinion 2/13 that brought the European Court of Human Rights to present more general considerations. My *interim* conclusion may be different under e.g. the Brussels II bis Convention, which in some cases leaves no room for exceptions to the rule of automatic recognition of judgments. Biagioni in his recent paper on the case of *Avotiņš v. Latvia*, referred to Art. 42 Brussels II *bis*, which says: "The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition".<sup>85</sup> It is highly questionable whether this provision would hold before the European Court of Human Rights. It is important that the grounds for exception in Brussels I and Brussels I Recast are interpreted in a way that leaves room to redress a manifestly deficient guarantee of fundamental rights. The European Court of Human Rights so explicates and emphasizes the minimum standards set by the ECHR.

In response to the complaint of Avotiņš with regard to the Latvian Supreme Court's assessment as to the possibility for him to challenge the judgment of the Cypriot court as required by Art. 34, para. 2, Brussels I for reliance on the rights of defence exception in that provision, the European Court of Human Rights decided as follows. The Court blamed the Latvian court for simply criticizing the defendant for not challenging the Cypriot court's decision, without remarking on the "existence and availability" of a remedy under Cypriot law.<sup>86</sup> The Court however did not conclude on the basis of the above criticism that the protection provided to the defendant was manifestly deficient, as the Cypriot Government had clarified that there was a remedy available to the defendant<sup>87</sup> and Avotiņš, being an investment consultant, should have been able to foresee the consequence of signing the debt deed.<sup>88</sup>

On the basis of the foregoing, I would endorse Biagioni's conclusion that the approaches taken by the Court of Justice and the European Court of Human Rights with regard to fundamental rights protection in the context of mutual recognition of foreign judgments are fundamentally different.<sup>89</sup> While the former court takes as a starting point that states in which recognition and enforcement is sought should assume that, during the initial proceedings, fundamental rights have been adequately protected, the latter court requires states to be watchful at all times. These different approaches, nev-

<sup>85</sup> G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights*, cit., p. 594.

<sup>86</sup> *Avotiņš v. Latvia*, cit., para. 121.

<sup>87</sup> *Ibid.*, para. 121.

<sup>88</sup> *Ibid.*, para. 122.

<sup>89</sup> G. BIAGIONI, *Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights*, cit., p. 594.

ertheless, seem to be compatible under Brussels I and Brussels I Recast. However, this would be more difficult if the integration of legal systems went beyond the current rules of recognition and enforcement. The Brussels II *bis* Regulation may well serve as an example of a regulation that might not stand the test.

#### IV.3. THE PRINCIPLE OF MUTUAL TRUST AND THE EU'S ASPIRATIONS RELATING TO CONTRACTUAL RELATIONS

In its recent Opinion 2/13 on the accession of the European Union to the European Convention on Human Rights, the Court of Justice explained more generally that the principle of mutual trust "requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".<sup>90</sup> The existence of the principle, says the Court of Justice in the same opinion, is justified by "the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU".<sup>91</sup> It is this principle of mutual trust that justifies mutual recognition of judgment in civil and commercial matters. Recital 26 of the Brussels I Regulation Recast states: "Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure." The principle of mutual trust not only serves as the foundation for mutual recognition of judgments in civil and commercial matters, but is also used by the court in the context of the interpretation of the grounds for refusal of mutual recognition.<sup>92</sup> As we have seen in the case law discussed in section III, mutual trust justifies a strict interpretation of these grounds.<sup>93</sup>

The important role that is attributed to the principle of mutual trust raises the question if the supposed trust amongst the Member States does indeed exist or may be assumed to exist? Weller, with regard to the former point, the actual trust amongst citizens, refers to the Eurobarometer (2013) to show that EU citizens see large differences between legal systems within the European Union, in particular with regard to "quality, efficiency and independence".<sup>94</sup> This conclusion, however, is to be viewed in light of the trust of EU citizens in a broader sense, as the Eurobarometer also reveals that many EU citizens do not even trust their own national legal system.<sup>95</sup> Weller all in all concludes with regard to

<sup>90</sup> Court of Justice, opinion 2/13 of 18 December 2014, para. 191.

<sup>91</sup> Opinion 2/13, cit., para. 168.

<sup>92</sup> M. WELLER, *Mutual trust*, cit., p. 81.

<sup>93</sup> See *supra*, section III.2.

<sup>94</sup> M. WELLER, *Mutual trust*, cit., p. 66.

<sup>95</sup> *Ibid.*, p. 66.

the function of justification for mutual recognition that the principle of mutual trust in civil matters “appears quite demanding”.<sup>96</sup> This conclusion contrasts sharply, says Weller, with the “justificatory force of mutual trust” in criminal matters, being, as recognized by the European Commission, “a long-term objective that has still to be worked on”.<sup>97</sup>

An explanation for the far-reaching assumption of mutual trust could be found in the present state of harmonization of substantive private-law rules. This brings me to the question if mutual trust may be assumed to exist. In this regard, the principle of mutual trust should be considered in light of the EU’s first-pillar aspirations and achievements in that regard, i.e. in light of the convergence of substantive private laws.<sup>98</sup> Section II.2 explained that the further convergence of substantive private or contract law rules in the sense of a code or a less far-reaching optional instrument, is not under discussion at this moment. This does not prejudice the fact that national contract laws have been harmonized to a certain extent. Patrick Glenn in the early nineties interestingly observed that the harmonization of private law that took place in Europe “blurred the distinction between foreign and national law”.<sup>99</sup> According to Patrick Glenn the convergence of private laws should be reflected in the rules of private international law; “The presumption of conflict should be replaced by a presumption of harmony, and in most instances the presumption of harmony will be justified by underlying harmony. The distinction between national law and foreign law will become less important, and eventually less clear”.<sup>100</sup> Today, the convergence of substantive private laws is indeed reflected in the current starting point of a presumed mutual trust. When reviewing the role of the principle of mutual trust we must keep in mind the current situation as regards the harmonization of substantive rules. This harmonization of substantive rules, says Patrick Glenn, not only results from formal unification and harmonization, e.g. by the implementation of EU regulations and directives, but also from informal harmonization.<sup>101</sup> Informal harmonization for instance finds expression in common principles to the national contract laws. In the light of this, it should be noted that the Court of Justice in its case law contributed to this type of harmonization as it referred to some principles as “general principles of civil law” explicitly.<sup>102</sup> In *Société thermale d’Eugénie-les-Bains v. Ministère de l’Économie, des Finances et de l’Industrie*, for instance, the Court of Justice highlighted the *pacta sunt servanda* principle, stating: “In ac-

<sup>96</sup> *Ibid.*, p. 85.

<sup>97</sup> *Ibid.*, p. 85.

<sup>98</sup> See *supra*, section II.2.

<sup>99</sup> H. PATRICK GLENN, *Harmonization of law, foreign law and private international law*, in *European Review of Private Law*, 1993, p. 48.

<sup>100</sup> *Ibid.*, p. 57 *et seq.*

<sup>101</sup> *Ibid.*, p. 62.

<sup>102</sup> See e.g. N. REICH, *General Principles of EU Civil Law*, cit.; A.S. HARTKAMP, *The General Principles of EU Law and Private Law*, in *RabelsZ*, 2011, p. 241 *et seq.*; M.W. HESSELINK, *The General Principles of Civil Law: their Nature, Roles and Legitimacy*, in *Amsterdam Law School Legal Studies Research Paper*, 2011.

cordance with the general principles of civil law, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder".<sup>103</sup> Having said this, I do agree with Weller that it must be avoided that mutual trust is used as a legal fiction.<sup>104</sup> In this regard it could be concluded that, as far as mutual trust is assumed because the private laws of EU Member States have reached a certain level of harmonization, this should, ultimately, become common knowledge among the citizens who express their trust in national legal systems in the Eurobarometer. These citizens should therefore trust foreign systems like their own.

## V. CONCLUSIONS

This contribution sheds light on the mutual recognition of judgments in civil and commercial matters, on the underlying principle of mutual trust and on the protection of fundamental rights in this regard. The interaction between these three elements is also considered in the light of the European Union's aspirations relating to contractual relations. The aspirations not only entail close cooperation with regard to the recognition and enforcement of judgments in civil and commercial matters, but also relate to convergence of substantive laws. A climax in this regard may be the Draft Common Frame of Reference or the proposal for a Common European Sales Law. However, although the introduction of an instrument that further harmonizes contract law in Europe, like the aforementioned, is on the long-term agenda, other measures taken by the European Union in recent years have led to the convergence of national private laws in several ways. This finding led me to conclude, following Patrick Glenn, that this may serve as part of the justification for mutual trust as a basic principle underlying mutual recognition in private international law. Though, as stated by Weller, the European Union must ensure that this supposed trust is real trust.

Another conclusion in this paper relates to the strict interpretation of the exceptions that bring fundamental rights into the assessment. The courts are committed to automatically recognizing judgments by other Member States' courts and thus to interpreting the exceptions to the basic rule strictly. At the same time, the Member States are state parties to the European Convention on Human Rights and therefore obliged to guarantee the minimum standards set by the European Court of Human Rights. In the recent case of *Avotiņš v. Latvia* the European Court of Human Rights explained that the *Bosphorus* presumption of equivalent protection applies when States apply Art. 34, para. 2, Brussels I (today: Art. 45 Brussels I Recast). Still, it leaves room to assess whether

<sup>103</sup> Court of Justice, judgment of 18 July 2007, case C-277/05, *Société thermale d'Eugénie-les-Bains v. Ministère de l'Économie, des Finances et de l'Industrie*, para. 24.

<sup>104</sup> M. WELLER, *Mutual trust*, cit., p. 85. Weller refers to: N. KNAUER, *Legal Fictions and Juristic Truth*, in *St. Thomas Law Review*, 2010, p. 19 *et seq.*

the protection was manifestly deficient, but in the case of *Avotiņš v. Latvia* this test did not give reason to conclude that there had been a violation of Art. 6 ECHR.