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Mutual Trust between the Member States of the European Union and the United Kingdom after Brexit: Overview

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Abstract

The paper follows up on the arguments introduced in the author's article Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. This paper, titled Mutual Trust between the Member States of the European Union and the United Kingdom after Brexit: Overview discusses, whether there has been a loss of mutual trust between the European Union and the United Kingdom after Brexit. The UK, similarly to EU Member States, has been entrusted with the area of recognition and enforcement of judgements thus far. Should the Member States decrease the level of mutual trust in relation to the UK only because the UK ceased to be part of the EU after 47 years? Practically overnight, more precisely, the day after the transitional period, should the Member States trust the UK less in the light of legislative changes? The article also outlines general possibilities that the UK has regarding which international convention it may accede to. Instead of going into depth, the article presents a basic overview. However, this does not prevent the article to answer, in addition to the questions asked above, how a choice of access to an international convention could affect the level of mutual trust between the UK and EU Member States.

Keywords

Brexit; Mutual Trust; Recognition of Foreign Judgments; Private International Law.

1 Introduction

The United Kingdom ("UK") acceded to the European Economic Community on 1 January 1973 and withdrew from the European Union

("EU") on 31 January 2020. The withdrawal has brought up several questions, namely how the relations between the EU and the UK after Brexit are going to look like, as well as a question of the application of the EU regulations of private international law. It is currently foreseen that the transitional period ends on 31 December 2020 and the UK will no longer be obliged to apply EU regulations.

The main focus is the recognition and enforcement of judgments in civil and commercial matters falling within the scope of application of the Regulation (EU) No. 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 ("Brussels I bis Regulation"). In April 2020, the UK applied for access to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the so-called Lugano Convention 2007, "Lugano Convention"). This announcement at least partially ended speculation regarding the UK's return to the application of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"), or accession to the Hague Convention on Choice of Court Agreements of 30 June 2005 ("Hague Convention on Choice of Court Agreements")[1], or accession to the mentioned Lugano Convention. In September 2020, the UK also acceded to the Hague Convention on Choice of Court Agreements.

Since the paper focuses on mutual trust, it is necessary to make a few introductory remarks on this principle. There is no widely accepted definition of mutual trust in the context of the EU law.[2] *Arenas García* defines mutual trust on the one hand as a legal obligation, on the other hand as a fact. The former means that all authorities of a Member State trust the authorities

1 To discuss whether the Hague Convention on Choice of Court Agreements constitutes an appropriate solution instead of the Brussels I bis Regulation as far as prorogation is concerned, see e.g. ZABLOUDILOVÁ, K. Choice of Court Agreements after Brexit. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, pp. 266–314.

2 KRAMER, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law,* 2011, Vol. 1, no. 2, p. 218; HAZELHORST, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 41.

of another Member State. The latter refers to the issue of whether Member States genuinely trust each other.[3]

In my previous article, I dealt with the question if it was trust in justice or in legislation. I concluded that we should distinguish between trust in legislation and trust in justice (that applies legislation).[4] In general, it is trust in the legal system and judicial institutions.[5] It is primarily a matter of fundamental rights that are adequately protected throughout the EU.[6]

Within the EU, we can distinguish between different levels of mutual trust according to whether a declaration of enforceability (an exequatur) is required and whether regulations of the EU contain grounds for refusal of recognition and enforcement of judgments. The highest level of mutual trust among EU Member States is given when regulations do not require the exequatur and grounds for refusal of recognition are abolished. This model constitutes a free movement of judgments. A lower level of mutual trust is given when regulations do not require the exequatur but grounds for refusal of recognition remain. The lowest level of mutual trust is given when regulations require the exequatur and contain grounds for refusal of recognition.[7]

Following the above-mentioned, this is a matter of mutual trust among EU Member States. Until now (December 2020), mutual trust has also been applied to decisions given by the courts of the UK. However, once EU regulations cease to be applied before UK courts, will trust of EU Member States be reduced in relation to decisions given by the UK courts? Will the reduction in mutual trust be so significant?

3 ARENAS GARCÍA, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: BONOMI, A. and G. P. ROMANO (eds.). *Yearbook of Private International Law 2010. Vol. XII*. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 372.

4 MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, pp. 214–216.

5 Judgment of the Court of Justice (First Chamber) of 16 July 2015, Case C-681/13, para. 63.

6 HAZELHORST, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 235.

7 Ibid., p. 57.

First, the following article shall present the most important areas of private international law for which there are EU regulations, and it shall consider feasible solutions for the UK regarding what regulations to apply after Brexit. Then I shall discuss whether a "mere" change in legislation will change the approach of EU Member States to mutual trust in the recognition of judgments given by the courts in the UK.

2 Legal Sources for Recognition of Judgments – Civil and Commercial Matters

The issue of recognition and enforcement of judgments in civil and commercial matters falling within the scope of application of the Brussels I bis Regulation is the most common and important issue of the European private international law. Recognition of decisions under the Brussels I bis Regulation is not truly automatic. Although the regulation does not require exequatur which has been abolished compared to the Brussels I Regulation[8], it still contains grounds for a recognition refusal. Therefore, the regulation does not work with the highest possible mutual trust among Member States.

When the transitional period ends, there are several possibilities for the application of international treaties instead of the Brussels I bis Regulation – the Brussels Convention, the Hague Convention on Choice of Court Agreements, the Lugano Convention, the Hague Judgments Convention[9]. There is also an option to conclude a bilateral international treaty between the EU and the UK, as in case of the EU and Denmark. Last but not least, the application of national rules is possible.

The UK applied for accession to the Lugano Convention in April 2020. Lugano Convention is open to any state, but it is subject to the unanimous agreement of all the contracting parties – besides the possibility that the UK will become a future member of the European Free Trade Association

8 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

9 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

("EFTA").[10] While Iceland, Norway and Switzerland gave an affirmative opinion before the UK's application for accession, the EU (and Denmark) have not yet done so.[11]

The UK has also submitted the Instrument of Accession the Hague Convention on Choice of Court Agreements with the intention of ensuring continuity of application of this Convention in September 2020.[12] Accession to the Hague Convention on Choice of Court Agreements does not require the agreement of the contracting parties. Both the Lugano Convention and the Hague Convention on Choice of Court Agreements are likely to be applied in parallel.

2.1 Hague Convention on Choice of Court Agreements

As far as the recognition and enforcement judgments are concerned, there are differences in treatment of judgments under the Brussels I bis Regulation and the Hague Convention on Choice of Court Agreements. No special procedure is required for recognition if a judgment given in a Member State is recognised in the other Member State under the Brussels I bis Regulation.[13] In practice, it means that the judgment is recognized within another procedure, for instance in enforcement proceedings. Under the Hague Convention on Choice of Court Agreements a judgment given by a court of a Contracting State *"shall be recognised and enforced in other Contracting States in accordance with this Chapter"*[14] (the Chapter III of the Convention). It is stipulated, for example, that the procedure for recognition of the judgment is governed by the law of the requested State unless this Convention provides otherwise.[15]

10 Strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention. *EUR-Lex* [online]. 31. 7. 2018 [cit. 23. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al16029

11 Support for the UK's intent to accede to the Lugano Convention 2007. *GOV.UK* [online]. 23. 1. 2020 [cit. 23. 10. 2020]. Available at: https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007

12 Declaration/Reservation/Notification: Entry into force. *HCCH* [online]. 28. 9. 2020 [cit. 23. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=eif

13 Art. 36 Brussels I bis Regulation.

14 Art. 8 para. 1 Hague Convention on Choice of Court Agreements.

15 See Art. 14 Hague Convention on Choice of Court Agreements.

Recognition under the Hague Convention on Choice of Court Agreements is therefore not automatic if the law of the requested State makes provision for special procedure for the recognition of a foreign judgment. If the law of the requested State makes no provision for any special procedure, a judgment will be recognised automatically.[16] However, such a designation ("automatically recognised") is not exact, for the same reason that the designation of "automatic recognition" is not accurate under the Brussels I bis Regulation, although recognition is often referred to as automatic.[17]

Recognition under the Brussels I bis Regulation cannot be automatic, as the Regulation provides the grounds for non-recognition of a judgment which the court of the addressed Member State may use on the application of any interested party.[18] The Hague Convention on Choice of Court Agreements also provides the grounds for refusal of recognition.[19] However, when comparing the grounds in the Brussels I bis Regulation and in the Hague Convention on Choice of Court Agreements, it can be stated that the list of grounds is broader in the Convention. For instance, the Hague Convention on Choice of Court Agreements stipulates that recognition may be refused if the agreement was null and void under the law of the State of the chosen court (unless the chosen court has determined that the agreement is valid), when there was a lack of party's capacity or if the judgment was obtained by fraud.[20] In addition, the grounds for a recognition refusal under the Hague Convention on Choice of Court Agreements do not have to be examined on the application of any interested party, but *ex officio*.[21] Lastly, one shall be remember that the Hague Convention on Choice of Court Agreements

16 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 79 [cit. 27. 10. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

17 See MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, p. 226 and the literature cited therein.

18 Art. 45 Brussels I bis Regulation.

19 Art. 9 Hague Convention on Choice of Court Agreements.

20 Art. 9 letters a), b), d) Hague Convention on Choice of Court Agreements.

21 Ibid.

only applies to choice of court agreements. For more details, I hereby refer to the available literature and Explanatory Report to the Convention.[22]

The Brussels I bis Regulation mentions the principle of mutual trust in Recitals, point 26. It is stipulated that *"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"*.[23]

The Hague Convention on Choice of Court Agreements does not contain the principle of mutual trust in its wording. In general, it can only be stated that the Hague Conference on Private International Law ("HCCH") refers to mutual trust in its "strengths & values" on the basis of which world experts and delegates work together.[24] It is clear that the Hague Convention on Choice of Court Agreements is based on mutual trust among the contracting states. Otherwise, the states would not have to ratify or accede to the Convention.

One of the principal reasons why a recognition of a judgment could be refused is if such recognition manifestly contradicts public policy in the state that is to recognise a judgment of another state. The public policy clause is contained in both the Brussels I bis Regulation and the Hague Convention on Choice of Court Agreements.[25] The role of the public policy is to remedy any irregularities in the State addressed that have occurred in the State of origin.[26] However, this mechanism should only be used in exceptional

22 HARTLEY, C. T. *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, 495 p.; HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, 103 p. [cit. 27. 10. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; ZABLOUDILOVÁ, K. Choice of Court Agreements after Brexit. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, pp. 266–314.

23 Recital 26 Brussels I bis Regulation.

24 Vision and mission. *HCCH* [online]. [cit. 27. 10. 2020]. Available at: https://www.hcch.net/en/about/vision-and-mission

25 Art. 9 letter e) Hague Convention on Choice of Court Agreements; Art. 45 para. 1 letter a) Brussels I bis Regulation.

26 HESS, B. and T. PFEIFFER. Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law. *Directorate-General for Internal Policies* [online]. 2011, p. 20 [cit. 24. 10. 2020]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf

cases. On the one hand, public policy can be perceived as an intruder to the principle of mutual trust as it provides a way for a refusal of recognition of a foreign judgment. On the other hand, it can strengthen the principle of mutual trust since the states distrust each other. If a possibility to apply the public policy clause for the state of enforcement exists, then a state can genuinely trust other states because there is a way how a recognition of a foreign judgment could be occasionally refused.[27]

Weller points out another difference in public policy clause and the principle of mutual trust regarding these legislations.[28] Article 6 letter c) of the Hague Convention on Choice of Court Agreements determines an obligation of a court not chosen. A court of a contracting state other than that of the chosen court shall suspend or dismiss proceedings. This does not apply if giving effect to the agreement would be manifestly contrary to the public policy of the state of the court seized.[29] The Brussels I bis Regulation does not provide any similar provision, it requires to rely exclusively on a public policy control *ex post* at the stage of recognition.[30] Brussels I bis Regulation excludes any national norm by which derogation of a jurisdiction of a Member State by a jurisdiction agreement (governed by the Brussels I bis Regulation) would be invalidated. The purpose is to ensure the predictability of jurisdiction and legal certainty.[31]

To sum up the above, neither the Brussels I bis Regulation nor the Hague Convention on Choice of Court Agreements recognize judgments automatically. The recognition procedure under the Convention is less automatic because it is governed in principle by the law of the requested state which can theoretically impose recognition requirements. The reasons for a recognition refusal are also broader under the Convention, in addition they

27 MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, p. 234.

28 WELLER, M. Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes. *Journal of Private International Law,* 2017, Vol. 13, no. 1, p. 102 et seq.

29 Art. 6 letter c) Hague Convention on Choice of Court Agreements.

30 WELLER, M. Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes. *Journal of Private International Law,* 2017, Vol. 13, no. 1, p. 107.

31 Ibid., p. 108.

are applied *ex officio*. Mutual trust under the Hague Convention on Choice of Court Agreements is therefore lower than under the union regulation.

2.2 Lugano Convention

The purpose of the Lugano Convention is to extend the EU system to some European countries (the EFTA countries), specifically to Norway, Iceland, and Switzerland. For this reason, the provisions of the Lugano Convention are like the provisions of the Brussels I bis Regulation.[32] Of course, the Lugano Convention does not reflect the changes that have been adopted in the Brussels I bis Regulation. Thus, as far as the judgment recognition is concerned, there are differences in treatment of judgments between the Brussels I bis Regulation and the Lugano Convention.

Lugano Convention is considered to be appropriate because it has a much wider material scope of application, unlike the Hague Convention on Choice of Court Agreements. The Lugano Convention shall apply in civil and commercial matters.[33] There is a list of the excluded questions. But there are fewer excluded issues than under the Brussels I bis Regulation. It is worth noting, important for further reading, that the Lugano Convention also applies to maintenance obligations.

Some authors consider the application of the Lugano Convention to be inappropriate, in particular due to Protocol no. 2 of the Lugano Convention and due to the cultural divergences between the continental and the common law – anti-suit injunctions to name one such instance.[34] I shall focus solely on the issue of automatic recognition and the principle of mutual trust.

The main difference between the Brussels I bis Regulation and the Lugano Convention is that the Lugano Convention still requires a declaration of enforceability.[35] A special paragraph concerns the treatment of decisions in the UK. A judgment shall be enforced in the UK when it has been

32 HARTLEY, C. T. *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, pp. 15–16.

33 Art. 1 Lugano Convention.

34 See for example HESS, B. The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit. *Max Planck Institute Luxembourg for Procedural Law*, 2018, no. 2, 10 p.

35 Art. 38 para. 1 Lugano Convention.

registered for enforcement.[36] Registration is one of the forms of treatment with a foreign decision. It requires a foreign judgment to be registered with a domestic court.[37] According to the Explanatory Report of Lugano Convention, the declaration of enforceability must be in some measure automatic. In the first step, only the formalities are examined. At this stage, the State of origin is trusted to act properly. Examination of the grounds for refusal of recognition is deferred to the second step.[38] In my opinion, this can be applied by analogy to registration.

As mentioned in the previous paragraph, mutual trust between the contracting states to the Lugano Convention is indicated only in the Explanatory Report. The principle of mutual trust is explicitly stated during the phase of declaration of enforceability in the Explanatory Report. This stage of treatment of foreign judgments (exequatur) was in the Brussels I Regulation but was abolished in the Brussels I bis Regulation. The abolition of the exequatur presupposes mutual trust.[39] The grounds for a recognition refusal under both the Lugano Convention and the Brussels I bis Regulation remain almost identical.[40]

Even though the Lugano Convention corresponds, except for minor differences, with the Brussels I Regulation, which sets out the principle of mutual trust in Recital 16[41], there is no reason to presume that the same level of mutual trust should exist among the contracting states to the Lugano Convention. However, there have been changes in the Brussels I bis Regulation that the Lugano Convention does not reflect – the abolition of exequatur in particular. In this respect, it should be noted that the current EU regulation provides a higher level of mutual trust than the Lugano Convention.

36 Ibid., Art. 38 para. 2.

37 HEYER, J. Výkon cizozemských rozsudků. *Zprávy advokacie,* 1963, p. 112.

38 POCAR, F. Explanatory Report of Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *EUR-Lex* [online]. 23. 12. 2009, point 129 [cit. 28. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1223(04)&from=EN

39 See for example STORSKRUBB, E. Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice. In: BROUWER, E. and D. GERARD (eds.). *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law.* EUI Working Paper MWP 2016/13. San Domenico di Fiesiole: European University Institute, 2016, p. 18.

40 Art. 34 Lugano Convention; Art. 45 Brussels I bis Regulation.

41 Recital 16 Brussels I Regulation.

2.3 Other Options

Accession to the Hague Judgments Convention may become very useful in the future. So far, only two states have signed the Hague Judgments Convention – Ukraine, Uruguay.[42] In the future, one can expect the signing and accession of a large number of actors that participated in the preparation of the Hague Judgments Convention, for example the EU, China, USA, Canada, Russia or Japan.[43] Should the Hague Judgments Convention gain a large number of contracting states, the UK would be wise to accede to this Convention as well. As of today, the UK's accession to the Hague Judgments Convention would not have solved the fundamental question of how to deal with judgments, as this Convention has not yet entered into force. When it happens, it will be necessary to resolve the relationship with other (already existing) instruments.

The principle of mutual trust is not explicitly mentioned in either the Hague Judgments Convention or the Explanatory Report.[44] We can only refer to "strengths & values" of the HCCH where mutual trust is mentioned under the importance of the trust of world experts and delegates working together.[45]

The Hague Judgments Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters.[46] Material scope is defined in a similar way as in the Brussels I bis Regulation and the Lugano Convention in regards to the recognition and enforcement of judgments. However, there is a broader list of excluded questions out

42 Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. *HCCH* [online] [cit. 28. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=137

43 Nová Haagská Úmluva je na světě. *Justice.cz* [online]. 4. 7. 2019 [cit. 28. 10. 2020]. Available at: https://www.justice.cz/web/msp/tiskove-zpravy?clanek=nova-haagska-umluva-je-na-sve-1

44 GARCIMARTÍN, F. and G. SAUMIER. Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. *HCCH* [online]. 2020, 181 p. [cit. 28. 10. 2020]. Available at: https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935 b-b842534a120f.pdf

45 Vision and mission. *HCCH* [online]. [cit. 27. 10. 2020]. Available at: https://www.hcch.net/en/about/vision-and-mission

46 Art. 1 para. 1 Hague Judgments Convention.

of scope of the Hague Judgments Convention.[47] The list of excluded questions is similar to that set out in the Hague Convention on Choice of Court Agreements.[48]

A judgment shall be recognised (and enforced) in accordance with the provisions of the Chapter II of the Hague Judgments Convention.[49] Certain requirements must be fulfilled for recognition to be eligible.[50] The Convention further sets out the grounds for a recognition refusal.[51] Among others provisions, the Convention provides that *"the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise"*.[52] We can conclude that the recognition and enforcement of judgments is not automatic. The level of mutual trust can be compared to the level of mutual trust as in the Hague Convention on Choice of Court Agreements.

The UK has not embarked on the process of application of the Brussels Convention. This is appropriate because, among other things, not all EU Member States are contracting parties to the Brussels Convention.

A conclusion of a bilateral convention between the EU and the UK would seem to be an acceptable solution. *Hess* gives some reasons why such a way would be appropriate.[53] Even from the point of view of the principle of mutual trust this would be an optimal option, if the bilateral convention included the application of the same rules on recognition and enforcement as in the still applicable Brussels I bis Regulation. Unfortunately, it seems that such a bilateral treaty will not be implemented.

The last option allowing each EU Member State to apply its national law will not occur in case the EU agrees to UK's accession to the Lugano Convention. The elemental difference is that national legal systems (including also Czech legal system) require a precondition of reciprocity in order for a foreign

47 Ibid., Art. 1 and 2.
48 See Art. 2 Hague Convention on Choice of Court Agreements.
49 Art. 4 para. 1 Hague Judgments Convention.
50 Ibid., Art. 5.
51 Ibid., Art. 7.
52 Ibid., Art. 13 para. 1.
53 HESS, B. The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit. *Max Planck Institute Luxembourg for Procedural Law*, 2018, no. 2, 10 p.

judgment to be recognized.[54] Reciprocity is not required for the application of an EU regulation or an international convention, as the condition of reciprocity is met by mere EU membership or the signing of an international treaty.[55] Under Czech law, recognition is not automatic, there are grounds for a recognition refusal.[56] Thus, the level of mutual trust is at a quite low level.

To sum up, regardless of which of these conventions above the UK will apply after Brexit, mutual trust will be lower than under the Brussels I bis Regulation. A more detailed analysis will be given in Chapter 4 of this article.

Within the EU, three other regulations are applied for recognition and enforcement judgements in civil and commercial matters, which aim to simplify their cross-border recognition and simplify the administration related to recognition.[57] These are the Small Claims Procedure Regulation[58], the European Payment Order Regulation[59] and the European Enforcement Order Regulation[60]. The existence of these three regulations does not prevent the parties from applying the Brussels I bis Regulation within the EU. Therefore, it is assumed that instead of these three regulations, the same solution as for the Brussels I bis Regulation will be used.

54 More to the condition of reciprocity and the approach of Czech legal doctrine see SEDLÁKOVÁ SALIBOVÁ, K. Reciprocity as a Presumption for the Recognition of Foreign Decision. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, p. 242 et seq.

55 VALDHANS J. Uznání a výkon soudních rozhodnutí. In: ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, pp. 275–276.

56 See Art. 14 et seq. Czech Private International Act.

57 DRLIČKOVÁ, K. Kapitola IV. In: ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 284 et seq.

58 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

59 Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

60 Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

3 Legal Sources for Recognition of Judgments – Other Areas of Law

3.1 Maintenance Obligations

The second issue that deserves to be covered in more detail is the maintenance obligation. Recognition and enforcement of decisions in matters related to maintenance obligations is regulated at EU level by the Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation"). There are two ways of dealing with foreign decisions within this regulation, depending on whether the decisions given in a Member State are bound by the Hague Protocol on the law applicable to maintenance obligations[61] or not bound by that Protocol. The latter is applied to decisions given in the UK and Denmark.[62]

In the first mentioned way, followed by the majority of Member States, there is no special procedure for recognition of a judgment and there is no possibility of opposing its recognition and no need for a declaration of enforceability.[63] In other words, it constitutes an automatic recognition (free movement of decisions). In the second mentioned way, that applies to decisions given in the UK and Denmark, formal procedures such as a declaration of enforceability are required.[64] There are also grounds for refusal of a recognition.[65]

The Maintenance Regulation does not explicitly contain the principle of mutual trust in its wording. Nevertheless, it refers to the so-called Hague Programme in Recital 6. The Hague Programme (which was the European Commission's multiannual programme for years 2005–2009) underlined

61 Protocol of 23 November 2007 on the law applicable to maintenance obligations.
62 WALKER, L. *Maintenance and Child Support in Private International Law.* Oxford and Portland, Oregon: Hart Publishing, 2015, p. 97.
63 Art. 17 Maintenance Regulation.
64 Ibid., Art. 26.
65 Ibid., Art. 24.

the confidence-building and strengthening of mutual trust.[66] It is therefore clear that the regulation is based on the principle of mutual trust. However, for decisions given in the UK or Denmark, the Maintenance Regulation provides a lower level of mutual trust among Member States due to the need for more formal procedures than the approach taken for other Member States, where the Maintenance Regulation provides a very high level of mutual trust.

There has been a lower level of mutual trust in the application of EU regulations in the relation between the UK and EU. The Maintenance Regulation was prepared in parallel to the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance ("Hague Maintenance Convention"). The Hague Maintenance Convention contains a comprehensive treatment for maintenance obligations.[67] It was ratified by the EU in 2014. The UK as a member of the EU was part of the Convention. However, after Brexit and the end of the transitional period, the UK will cease to be a party to the Convention. On 28 September 2020, the UK announced the ratification of the Hague Maintenance Convention with the intention of ensuring continuity of application of the Convention.[68]

In the previous chapter, it was stated that the UK had also applied for accession to the Lugano Convention. Maintenance does not belong to excluded questions from the material scope of the Lugano Convention, so the Lugano Convention shall also apply to the maintenance obligations.[69] The relationship between the Lugano Convention and the Hague Maintenance Convention is not explicitly stated in any of the conventions. In fact,

66 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union. 2005/C 53/01. *EUR-lex* [online]. 3. 3. 2005, para. 3.2 [cit. 20. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303(01)&from=EN

67 KYSELOVSKÁ, T. Kapitola V. In: ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 325.

68 Hague Conference on Private International Law. 38: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Entry into force. *HCCH* [online]. 28. 9. 2020 [cit. 23. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1255&disp=eif

69 Art. 1 Lugano Convention.

the Hague Maintenance Convention does not affect any international instrument concluded before this Convention to which contracting states are parties and which contains provisions on matters governed by this Convention. The Hague Maintenance Convention also provides the most effective rule.[70] The relationship with other international conventions (generally defined) is also laid down in the Lugano Convention.[71]

Recognition and enforcement, their automaticity and mutual trust under the Lugano Convention, were discussed in the previous chapter. As with other Hague conventions, also the Hague Maintenance Convention does not contain the principle of mutual trust in its wording. It is clear that the Hague Maintenance Convention is based on mutual trust among the contracting states. Otherwise, the states would not have to ratify or accede to the Hague Maintenance Convention. Nevertheless, the Hague Maintenance Convention sets out the bases for recognition and enforcement, the grounds for refusing recognitions, as well as the procedure for application of recognitions.[72] Thus, it can be stated that mutual trust among the contracting states of the Hague Maintenance Convention is not so different from the approach taken in the Maintenance Regulation for States not bound by the Hague Protocol on the law applicable to maintenance obligations, including the UK. For a complete picture, I will add that the level of mutual trust in the Hague Maintenance Convention is significantly lower than among the EU Member States bound by the Hague Protocol on the law applicable according to the EU regulation.

To conclude, in the area of maintenance, the level of mutual trust after Brexit will remain approximately the same as before. A procedure for the recognition of judgments will be formal and non-automatic, a declaration of enforceability will be needed. At the same time, there will be grounds for the recognition refusal in both conventions – as in the Maintenance Regulation (for judgments given in the UK).

70 Art. 51 para. 1 and Art. 52 Hague Maintenance Convention.
71 Art. 68 and 69 Lugano Convention.
72 See Art. 20, 22, 23 Hague Maintenance Convention.

3.2 Insolvency

The highest level of mutual trust among EU Member States is in the area of insolvency under Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("Insolvency Regulation Recast"). The notion of automatic recognition is directly mentioned in its Recital.[73] In fact, the automatic recognition is immediate with no intermediate steps and is based on the principle of mutual trust. A judgment has the same legal effect in any Member State as in the State of the opening proceedings.[74] In other words, the practical consequence is that a foreign judgment has the same effect as if it was a domestic judgment.[75] Although recognition is determined as automatic, the Insolvency Regulation Recast allows one ground for a recognition refusal – public policy exception.[76] Public policy exception must be applied only in exceptional cases. This exceptionality is accentuated due its violation of the principle of mutual trust.[77]

The question which legislation will apply in the insolvency proceedings is not easy to answer. As part of the development of European insolvency law, the UNCITRAL Model Law on Cross-Border Insolvency of 1997 should be mentioned ("Insolvency Model Law").[78] As this Insolvency Model Law was prepared by the UN Commission on International Trade Law, it may be considered part of soft law. The Insolvency Model Law does not contain rules for determining international jurisdiction or applicable law but encompasses rules for recognition and enforcement. As *Carballo Piñeiro* points out, the rules are similar to those in the Insolvency Regulation Recast.[79]

73 Recital 65 Insolvency Regulation Recast.

74 Ibid., Art. 20 para. 1.

75 MAHDALOVÁ, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 63.

76 Art. 33 Insolvency Regulation Recast.

77 OBERHAMMER, P. Article 33. In: BORK, R. and K. Van ZWIETEN (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 387.

78 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation. *UNCITRAL* [online]. January 2014 [cit. 2. 11. 2020]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

79 CARBALLO PIÑEIRO, L. 'Brexit' and International Insolvency Beyond the Realm of Mutual Trust: Brexit and International Insolvency. *International Insolvency Review,* 2017, Vol. 26, no. 3, p. 274.

However, not all EU Member States have implemented the Insolvency Model Law (only four states have). If all Member States adopted it, the changes in insolvency after Brexit would not be major. In other words, implementing the Insolvency Model Law would lessen the impact of Brexit, because the sharing of common values of international insolvency would be maintained.[80] Nevertheless, recognition is not as automatic as under the Insolvency Regulation Recast. Still, there will be a loss of mutual trust after Brexit. The Insolvency Model Law provides for a much more demanding recognition and enforcement procedure than the Insolvency Regulation Recast. The effects of foreign insolvency proceedings are not equivalent to the effects in the sending states, as is the case in the Insolvency Regulation Recast.[81] In fact, the Insolvency Model Law requires application to a local court to gain recognition and relief.[82]

Since not all EU Member States have implemented the Model Law, domestic rules are likely to apply after Brexit. This seems to be the probable outcome, leaving no room for alternatives other than the application of the private international law rules of each Member State.[83] Inconsistences among Member States may be expected as their approaches will vary (due to a lack of statutory provision or developed jurisprudence).[84] Domestic rules usually stipulate several conditions for the recognition. The level of mutual trust is usually significantly lower compared to the Insolvency Regulation Recast.

3.3 Divorce

I will briefly outline the situation regarding the divorce process. Recognition of judgments relating to divorce among EU Member States is governed

80 Ibid., p. 274 and 293.

81 Ibid., p. 276.

82 UMFREVILLE, Ch., P. OMAR, H. LÜCKE et al. Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario. *International Insolvency Review*, 2018, Vol. 27, no. 3, p. 427.

83 CARBALLO PIÑEIRO, L. 'Brexit' and International Insolvency Beyond the Realm of Mutual Trust: Brexit and International Insolvency. *International Insolvency Review*, 2017, Vol. 26, no. 3, p. 293; UMFREVILLE, Ch., P. OMAR, H. LÜCKE et al. Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario. *International Insolvency Review*, 2018, Vol. 27, no. 3, p. 429.

84 UMFREVILLE, Ch., P. OMAR, H. LÜCKE et al. Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario. *International Insolvency Review*, 2018, Vol. 27, no. 3, p. 443.

by the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 ("Brussels II bis Regulation"). The Brussels II bis Regulation refers to the principle of mutual trust in the recognition and enforcement of judgments.[85] Recognition is called automatic.[86] Such designation is inaccurate because the reasons for a recognition refusal are detailed within. We can only speak of an automatic recognition until it is decided that the foreign judgment cannot be recognised.[87] A declaration of enforceability for judgments relating to divorce is not required.

After Brexit, one of the possibilities for the UK courts would be the application of Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations ("Hague Divorce Convention"), which is still in force. However, not all EU Member States, unlike the UK, are Contracting States to this Convention.[88] The Hague Divorce Convention shall apply to the recognition of divorces and legal separations. It provides a similar list of grounds for a recognition refusal as the Brussels II bis Regulation. The Hague Divorce Convention does not require a declaration of enforceability. Enforcement of judgments is not regulated.[89] Considering a similar recognition process and similar grounds for a recognition refusal, the principle of mutual trust is approximately at the same level as the recognition under the Brussels II bis Regulation.

Bilateral international treaties or national law apply to states that are not parties to the Hague Divorce Convention. For the sake of completeness, in the UK, the Family Law Act 1986 plays an important role in this area as well.[90]

85 Recital 21 Brussels II bis Regulation.

86 NÍ SHÚILLEABHÁIN, M. *Cross-Border Divorce Law: Brussel II bis*. Oxford: Oxford University Press, 2010, p. 237.

87 SIEHR, K. Art. 21. In: MAGNUS, U. and P. MANKOWSKI (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels IIbis Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 284.

88 Status Table Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. *HCCH* [online]. 4. 6. 2016 [cit. 4. 11. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=80

89 See Hague Divorce Convention.

90 NÍ SHÚILLEABHÁIN, M. *Cross-Border Divorce Law: Brussel II bis*. Oxford: Oxford University Press, 2010, p. 232 et seq.

3.4 Inheritance

There will be no change in matters of succession because the UK did not take part in the adoption of the Succession Regulation[91] and is not bound by it.[92] The treatment of judgments will follow the same rules as before Brexit.

4 Mutual Trust – Will It Change Significantly?

Mutual trust is one of the principles on which judicial cooperation in civil matters among EU Member States is based. The principle is stated either explicitly or by reference in individual EU regulations that apply in the field of private international law. However, mutual trust can be understood much more broadly – in general, whether one state trusts another state to apply the law properly via the court of the state of origin. It is on the latter level that the EU Member States will approach the UK after Brexit.

The main difference between mutual trust within the EU and mutual trust between the EU (or Member States) and non-EU Member States is as follows. Mutual trust within the EU is strengthened through the adoption of EU regulations that unify rules applicable to Member States. The level of mutual trust varies depending on whether the regulations require exequatur or whether they contain grounds for a recognition refusal, and the number and nature of such grounds. Analyses and evaluations of the regulations are carried out as if a declaration of enforceability is still really required or what the actual application of grounds for refusal is. For certain regulations, evaluations have already been carried out, for certain regulations not – especially those adopted in recent years.[93] It is thus possible that the declaration of enforceability will be abolished in those regulations which still require it. There will likely be no problem with changing the text of the regulations, as a new or recast EU regulations can be adopted. In general,

91 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

92 Recital 82 Preamble to the Succession Regulation.

93 See for example HAZELHORST, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 49 and there the results of that study.

a regulation shall have general application and it shall be directly applicable in EU Member States.[94]

Mutual trust between Member States and non-Member States is strengthened by the adoption of international treaties which also unify rules for contracting states to the conventions. The principle remains the same – one contracting state trusts another state that its courts apply the law properly. In general, the level of mutual trust is lower because of the individual conventions usually provide the bases for recognition, the procedure of recognition or the grounds for a recognition refusal. Of course, the text of the conventions can be amended, which usually leads to the adoption of a new international treaty. States must accept an amendment to the convention or become a contracting party to a newly adopted convention. This may result in a small number of contracting parties. It may also result in an inconvenient situation for some states, for they can end up being bound by an older convention with stricter rules for the recognition and enforcement of judgments, while the rest enjoy a new convention with milder rules in this regard.

The relationship between the EU and the UK after Brexit will be governed either by international conventions or by national law. In both cases, mutual trust will be mostly reduced. In areas where the recognition of judgments (or insolvency proceedings) has been almost automatic so far, the change will be considerable.

However, a change in the sphere of mutual trust will not be a mere change in the application of legislation or in justice. In a way, it will be a change in the trust of the institution that works and adopts or approves the legislation. Judicial cooperation in civil matters within the EU is based on the principle of mutual trust – the principle is stated either explicitly or by reference in Recitals of the EU regulations as in secondary law.[95] It can be con-

94 Art. 288 Treaty on the Functioning of the European Union ("TFEU").

95 For an explicit statement see for example Recital 26 Brussels I bis Regulation, Recital 21 Brussels II bis Regulation, Recital 65 Insolvency Regulation Recast. For an implicit statement (by reference to the Hague Programme 2004) see for example Recital 5 Succession Regulation, Recital 6 Maintenance Regulation.

cluded that the principle is also indirectly expressed in EU primary law.[96] The Hague Conventions, which I have discussed in this article and which probably to be applied after Brexit, do not contain the principle of mutual trust in their text (neither explicitly or implicitly). The HCCH does not refer directly to the principle either, with the exception of the declared "strengths & values", where mutual trust is mentioned under the importance of the trust of world experts and delegates working together.[97]

The parties to the Hague Conventions place trust in one another to a certain degree, otherwise they would not accede to the Convention. However, the Hague Conventions lay down fairly strict rules for the recognition of judgments. For instance, they require the recognition procedure to be governed in principle by the law of the requested state, so that recognition is not automatic. In addition, some rules determine bases for recognition, some set out the procedure for the declaration of enforceability. They also contain the grounds for a recognition refusal. All this significantly reduces the level of mutual trust.

In the future, it would be helpful to consider setting minimum standards in the Hague Conventions to protect the right to a fair trial. Similarly, as minimum standards are set by some EU regulations. This is not a solution suitable only as a consequence of Brexit, but a generally conceptual solution for international conventions. As a result, setting minimum standards would prove more effective in regard to automatic recognition of judgments, thus increasing mutual trust. As the contracting states to the Hague Conventions may be from different continents, I would only keep the possibility of refusing recognition a public policy clause. Other grounds for refusing recognition could be abolished and replaced by minimum standards. If the conditions for the application of the public policy clause are observed (a manifest

96 For instance, *Prechal* subsumes mutual trust to the principle of sincere (loyal) cooperation. *Kramer* points out to the mutual respect. Both loyal cooperation and mutual respect are explicitly stated in Art. 4 para. 3 TFEU. See PRECHAL, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*, 2017, no. 1, pp. 91–92; KRAMER, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*, 2013, p. 364; Art. 4 para. 3 TFEU.

97 Vision and mission. *HCCH* [online]. [cit. 27. 10. 2020]. Available at: https://www.hcch.net/en/about/vision-and-mission

contradiction with values of the state in which recognition is sought and which must be insisted on, sufficient intensity of the situation for the forum and its application only in exceptional cases)[98], then such a clause is not an obstacle to the automatic recognition. On the contrary, it can strengthen mutual trust. In this respect, the best solution seems to be the adoption of an agreement in the form of a bilateral convention between the UK and the EU.

5 Conclusion

The withdrawal of the UK from the EU will have an impact on judicial cooperation in civil matters in the area of recognition of judgments between the EU and the UK. Considering the principle of mutual trust, on which cooperation has continued so far, it will not change as dramatically in all matters as it might seem at first glance.

A more significant change, and thus a greater loss of mutual trust, will occur in areas where recognition has been considered (almost) automatic under EU regulations, especially in insolvency proceedings. A minor change, and thus approximately the same level of mutual trust, will occur in areas where rules for recognition of judgments have been established so far (more or less automatically) and where the regulations contain the grounds for a recognition refusal and require a declaration of enforceability. In particular, this includes matters of divorce and maintenance.

The area of natural interest is the change that will come to pass when the Brussels I bis Regulation ceases to apply before the UK courts. Whether the Hague Convention on Choice of Court Agreements or the Lugano Convention apply, in both cases the conventions work with lower mutual trust than the Brussels I bis Regulation. In the Lugano Convention, mutual trust is reduced by the requirement of a declaration of enforceability. In the Hague Convention, mutual trust is reduced by a broader list of grounds for refusing recognition that apply *ex officio* and by determining that recognition

98 ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer, 2016, pp. 179–180.

is governed in principle by the law of the requested state which can theoretically impose recognition requirements.

In conclusion, it remains to be seen what the very practice of recognition of judgments after Brexit will show and what the real functioning of recognition will look like.

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