The relationship between the hague judgement convention, the Brussels Ibis regulation and the agreement between Ukraine and the Republic of Lithuania on legal assistance

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Abstract

The aim of this article is to analyse the correlation between the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (hereinafter – Convention, Hague Judgement Convention), Regulation No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (hereinafter – Brussels Ibis Regulation) and the Agreement between the Republic of Lithuania and Ukraine on legal assistance (hereinafter – Agreement). To achieve this goal, the first part of the article analyses historical models of regulation in the sphere of enforcement and recognition of foreign judgements. The second part of the article defines the scope of application of the Hague Judgement Convention and compares it with the scope of application of the Brussels Ibis Regulation. The third part is devoted to the determination of the scope of the application of the Agreement. Parts five and six analyse the types of ‘relation clauses’ adopted in the Convention and the Brussels Ibis Regulation and define the order of the application of international instruments. The materials used include literature and scientific publications relating to resolving conflicts between international instruments in the field of recognition and enforcement of foreign judgements. The following methods were used to write this paper: description, analysis, synthesis and comparison.

Keywords

the Hague Judgement Convention • the Brussels Ibis Regulation • bilateral agreements • relationship

INTRODUCTION

On 2 July 2019, the Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (‘Instrument’ or ‘Convention’) was adopted. The Convention’s main objective is to promote effective access to justice and facilitate rules-based multilateral trade, investment and mobility. This Instrument has gone a long way towards developing international cooperation and reaching an agreement on the need for the mechanisms envisaged by the Convention prior to its adoption. Historically, the institutions of recognition and enforcement of foreign judgements have not been the most developed areas of international cooperation for a number of reasons. The main reason is that countries do not want to be obliged to perform certain actions that may affect the domestic exercise of sovereignty and its components (Baumgather, 2013). Inter-jurisdictional relations are often accompanied by a political frame that does not contribute to the objectification of legal relations, which has a direct consequence of a low level of willingness to be bound by contractual legal relations. Another circumstance that does not contribute to the development of international cooperation is the differences in legal systems. Those countries have distinct views on the functioning and application of international instruments.

The last Hague project on the recognition and enforcement of foreign judgements dates back to 1971, but it did not meet with significant international support, and only five countries have ratified it (von Mehren, 1994). After some time, the United States of America (US) initiated the new project, as this country had not yet participated in any special universal instrument that would provide for the possibility of enforcing court decisions in other jurisdictions. Given the significant growth of globalisation and inter-jurisdictional business activities, the US was much interested in the possibility of enforcing judgements in other jurisdictions (Baumgartner, 2005). This led to the adaptation of the Choice of Court Convention and its effective application at the international level. Since 2011, the international community has been focused on the adoption of a universal instrument that would allow the recognition and enforcement of judgements without the need to choose a court (Continuation of the Judgement Project, 2010). The primary basis for the functioning of such an act was the mechanism of automatic recognition, which should also define jurisdictional rules by analogy with the Brussels Ibis Regulation, but this initiative was directly rejected by the US (Conclusions & Recommendations Adopted by the Council, 2017). After
determining the main direction of work and the functioning of the recognition and enforcement of judgements based on the rules of indirect jurisdiction, the Working Group began to work on the draft text. In 2019, the work on the draft was completed by considering such aspects of the future act as the relationship with other international instruments and the limitation period on the enforcement of foreign judgements.

**Choice of an international instrument**

The procedure for recognising and enforcing a judgement in a foreign jurisdiction begins with the identification of the instrument that regulates the relevant area or has priority over others. The international practice has developed several ways to regulate these legal relations. First, there are universal special international agreements, such as the Hague Convention of 30 June 2005 on Choice of Court Agreements, which contains provisions on the recognition and enforcement of a court decision explicitly chosen by a party in the case of ‘indirect jurisdiction’. Second, there are regional special international acts, like Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters and the ‘parallel’ act of the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgements in civil and commercial matters, which extends the application of the ‘Brussels regime’ to the four members of the EFTA. Third, bilateral agreements on legal assistance between different countries exist. The last method is the easiest way to regulate the sphere of recognition and enforcement of foreign judgements since it is, to some extent, easier to agree on the position of the two parties than it is for the parties to a multilateral act. In addition, these treaties are comprehensive and often regulate not only the recognition and enforcement of foreign judgements but also the provision of legal assistance to citizens, sending documents, legal capacity, and so on. One such agreement is the Agreement between the Republic of Lithuania and Ukraine on legal assistance and legal relations in civil, family and criminal cases. Therefore, because of the existence of instruments regulating the recognition and enforcement of foreign judgements at the regional and international levels, the correct choice of an instrument is a prerequisite for the effective and prompt recognition and enforcement of a foreign judgement. Taking into account Lithuania’s membership in the European Union (EU) and Ukraine’s ratification of the Convention, it is necessary to determine the scope and procedure for the application of such instruments as the Brussels Ibis Regulation, the Hague Judgement Convention and the Agreement between Ukraine and Lithuania on legal assistance.

**RESEARCH RESULTS AND DISCUSSION**

Defining the scope of application is necessary to delineate the potentially applicable international instruments since the Convention and the Brussels Ibis Regulation have different scopes of application exclusions. Article 1 of the Convention states that it applies to recognising and enforcing judgements in civil or commercial matters. The main difference with the Brussels Ibis Regulation is the conjunction ‘or’ in the Convention, while the EU act uses the conjunction ‘and’. At first glance, this may indicate a different scope of legal relations included in this concept. However, the Explanatory Note to the Convention states that ‘The term “civil or commercial matters”, which has appeared in the past Hague Conventions, is functionally equivalent to the term “civil and commercial matters”’. The concept of ‘civil or commercial’ has been discussed extensively during the process of adopting the Instrument. In addition, the concept has an autonomous interpretation consistent with other Hague instruments, especially the Choice of Court Convention (Garcimartín and Saumier, 2020). The issue of the difference in the conjunctions ‘or’ and ‘and’ is not defined in the text of the Convention and the preparatory works and, therefore, remains open. The Explanatory Note to the Convention states that the main purpose of the relevant concept is to distinguish civil and commercial matters from *acta iure imperii*, criminal and administrative legal relations (Garcimartín and Saumier, 2020). Based on this, it can be noted that the general understanding of ‘civil or commercial’ and ‘civil and commercial’ matters should be interpreted consistently, as evidenced by Article 23.4. of the Convention, which defines the relationship between the Convention and acts of regional economic integration organisations, is an indirect reference to the Brussels Ibis Regulation. In addition, the adaptation of the Convention symbolises the agreement between the HCCH parties on international standards for the recognition and enforcement of foreign judgements (Pertegás Sender, 2020). Therefore, the international community uses the concepts of ‘civil or commercial matters’ and ‘civil and commercial matters’ as a criterion for distinguishing between public and private law relations, which does not directly indicate the scope of application of a particular instrument due to the complexity of private relations. When comparing the scope of application of the Convention and the Brussels Ibis Regulation, special attention should be paid to the exceptions to the scoping that are expressly stated in the texts of the acts.

**Exclusions from scope**

Article 2 of the Convention sets out an exhaustive list of legal relations to which it does not apply. Although certain legal relations are included in the concept of ‘civil or
commercial matters', they do not allow the applicant to seek recognition of a court decision in a foreign jurisdiction. The purpose of excluding certain legal relations from the scope of the Convention is that they are not 'model' and require a separate international legal instrument. For example, the exclusion relating to maintenance obligations in family law matters, including matrimonial property regimes, is explained by the fact that these legal relations cannot be categorised as 'contractual' or 'tort' (De Nardi, 2022). Moreover, some types of relations may be categorised as 'contractual' by certain national legislations, while in others, the same legal relationship may be classified as 'tort'. Therefore, it would be difficult to reach an agreement on the form of regulation of the relevant legal relationship (Garcimartín and Saumier, 2020). Scholars identify four general groups of legal relations excluded from the Convention's scope: (1) family relationships and maintenance obligation; (2) matters related to the civil status and civil capacity of a natural person; (3) acta iure imperii; and (4) certain cases regulated by other acts (the carriage of passengers and goods, intellectual property, law-enforcement activities) (De Nardi, 2022). To compare the application of the Convention and the Brussels Ibis Regulation, it is necessary to clearly distinguish the difference in the exemptions to the application of the relevant acts. For this purpose, the following table provides a list of excluded legal relations from the Convention and the Brussels Ibis Regulation scopes.

<table>
<thead>
<tr>
<th>Type of legal relationship</th>
<th>The Convention</th>
<th>The Brussels Ibis Regulation</th>
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</thead>
<tbody>
<tr>
<td>The status or legal capacity of natural persons</td>
<td>-</td>
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<tr>
<td>Maintenance obligations</td>
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<td>Wills and succession</td>
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<td>Insolvency and analogous proceedings</td>
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<td>The carriage of passengers and goods</td>
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<td>Transboundary and marine pollution</td>
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<td>+</td>
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<tr>
<td>Liability for nuclear damage</td>
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<tr>
<td>The validity, nullity or dissolution of legal persons</td>
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<td>+</td>
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<td>The validity of entries in public registers</td>
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<td>+</td>
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<tr>
<td>Defamation</td>
<td>-</td>
<td>+</td>
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<tr>
<td>Privacy</td>
<td>-</td>
<td>+</td>
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<tr>
<td>Intellectual property</td>
<td>-</td>
<td>+</td>
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<tr>
<td>Activities of armed forces</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Anti-trust (competition) matters.</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Arbitration</td>
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</tr>
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-, excluded from the scope. +, included in the scope. The comparison of the legal relations included in the Convention and the Brussels Ibis Regulation allows to conclude that the scope of the latter act is broader. Unlike the Convention, the Regulation applies to such relations as competition law, intellectual property, privacy, defamation, carriage of passengers and goods, transboundary pollution, liability for nuclear damage, the validity of legal persons and the validity of entries in public data. It should be noted that in legal relations with an inter-jurisdictional character, such as transboundary pollution, the Brussels Ibis Regulation applies if the place of harm materialises on the territory of the EU (Mankowski, 2016). Such a broad scope of application of the Brussels Ibis Regulation is explained by the high degree of regional integration and agreement on regulation models of certain legal relations in the EU.

Therefore, in determining the order of application of international instruments, attention should be paid to the types of legal relations to which they apply, as this determines the application of 'relation clauses'.

**SCOPE OF THE AGREEMENT**

With regard to the scope of the Agreement and its correlation with the Convention's scope and the Brussels Ibis Regulation, Article 42 of the Agreement stipulates that the parties recognise and enforce decisions of the judicial authorities in civil and family matters, as well as sentences for compensation for damages caused by a crime. The peculiarity of the scoping of this Agreement is that it does not explicitly state that it applies to commercial legal relations, which may raise questions since Lithuania and Ukraine divide legal relations into civil and commercial. The Ukrainian court practice provides some clarity on the application of the Agreement. Among the three court cases in which the Agreement was mentioned, two fall within the exclusive jurisdiction of commercial courts. Accordingly, the courts concluded that Article 3.1 should be interpreted broadly and applied to legal entities, resulting in the application of the Agreement to commercial legal relations (Cases No. 907/166/17, 916/466/18). This leads to the conclusion that the concept of 'civil matters' referred to in Article 3.1 should be interpreted broadly to include private law relations. At the same time, the concept of private legal relations may include a public-law party if it exercises private-law powers. This conclusion is supported by the opinion of the Court of Justice of the EU in Movic BV and Others, where the court noted that to determine whether a case falls within the concept of 'civil and commercial matters', it is necessary to determine the nature of the legal relationship between the parties to the action and the subject matter of the action (Case C-73/19). Ukrainian legislation follows the same approach.
Article 3 of the Agreement also provides that the scope of recognition and enforcement of awards is limited to the courts of the contracting states. Therefore, the Agreement does not apply to arbitral awards. The need and possibility of a harmonised interpretation of the concepts of ‘civil or commercial matters’ in the Convention, ‘civil and commercial matters’ in the Brussels Ibis Regulation and ‘civil matters’ in the Agreement are also confirmed by Article 23.1 of the Convention, which provides that provisions shall be interpreted as far as possible to be compatible with other treaties in force for the Contracting States. This provision applies regardless of when the Contracting States concluded the instruments, which is the basis for harmonising the institutions of recognition and enforcement of judgements (Garcimartín and Saumier, 2020).

Thus, the scope of application of the Agreement in the part on the recognition and enforcement of judgements extends to legal relations in respect of which the courts of the Contracting Parties have the right to hear and resolve private law disputes. For a more detailed description of the scope of application of this act, it is necessary to analyse the provisions of the national laws of the Contracting Parties regulating the jurisdiction of courts.

Relationship of the Hague Judgement Convention with other international instruments

The simplest and most effective method to resolve conflicts between treaties is to prevent conflicts from happening (Maria, 2023). At first glance, the resolution of contradictions does not seem to be a very complex issue. However, detailed regulation of this subject requires a careful study of the relevant provisions of the acts. The main way to resolve temperamental and substantive conflicts is to introduce rules that give preference to certain instruments in regulating legal relations. In terms of terminology, such rules are usually called ‘compatibility clauses’ and ‘coordination clauses’ (Maria, 2023). Despite specific differences in the content of these concepts, their purpose remains the same: to resolve certain types of conflicts between instruments of legal relations regulation.

There are generally two categories of clauses: (1) those that give priority to the present agreement and (2) those that give priority to other agreements (Blix et al., 1973). Blix et al. (1973) and Girina Emerson list six types of reservations of the first category: (1) This treaty prevails over all this agreement prevails over all other agreements; (2) This agreement prevails over all previous agreements; (3) This agreement prevails over previous agreements for the parties to this agreement; (4) The parties to this Agreement undertake not to enter into any later agreements that contradict this Agreement; (5) Additional agreements are allowed only if they are compatible with the present agreement; and (6) The parties to this agreement undertake to amend existing agreements they may have with third parties if they are compatible with this agreement (Blix et al., 1973).

On the contrary, the category that involves the use of other instruments is divided into three types: (1) Existing treaties prevail; (2) The present treaty is modified to conform to a future treaty; and (3) Supplementary agreements, not necessarily consistent with the present treaty, are permitted (Borgen, 2023).

These types of clauses are classic, almost all of which directly define the use of a particular instrument. At the same time, with the development of legal techniques, clauses that allow for applying a particular instrument depending on the fulfilment of certain conditions have become quite common. A typical example of such a clause is an ‘efficiency clause’, which provides for the use of other instruments if they provide a more favourable outcome for the parties. An excellent example of such a clause is Article VII of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides that the Convention sets a maximum standard for grounds for refusing to recognise and enforce arbitral awards, which allows interested parties to rely on legislation that provides a more favourable regime.

As for the Convention, an example of such a clause is Article 23.3 of the Convention, which establishes that ‘Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgement given by a court of a Contracting State that is also a Party to that treaty’. This provision is based on the principle of favor recognitionis, which provides for the promotion of the recognition and enforcement of judgements. Accordingly, this gives stakeholders a certain level of discretion in deciding which instrument to use, regardless of the temporal criterion. This decision may be influenced by the number of grounds for refusing to recognise judgement or the simplicity of the procedure. With this provision, the Convention becomes more flexible in shaping international practice, as the only requirement for applying Article 23.3 is that the State of Origin and the requested States are both the Contracting States to the Convention and parties to the later instrument. In addition, the phrase ‘as concerns the recognition or enforcement of a judgment’ may be used not only to refer to special universal or regional instruments on the recognition and enforcement of judgements but also to general instruments that contain a part on the recognition and enforcement of judgements.

As noted above, the use of subordination clauses with a temporal criterion is one of the most efficient ways to resolve the conflict of application of instruments (Weckel, 1989). The basis for such regulation is Article 30.1. Vienna Convention on the Law of Treaties (1969) provides that when a treaty
specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. Noodt Taquela notes that this type of clause is a common conversation between special and general instruments, even if the choice-of-act rule that the general instrument must be subordinate to the particular instrument is not applied (Maria, 2023). This approach to resolving conflicts is also adopted by the Convention, according to Article 23.2, of which the Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention. The relevant Article does not require the previous act to be in force but only considers the moment of adaptation. In other words, if the previous act was not adopted at the time of ratification of the Convention, but the state subsequently adapted the previous act, the latter shall be subject to application under this Article. Unlike Article 23.3, this Article does not require that the State of Origin also be a party to the earlier treaty (Garcimartín and Saumier, 2020). This general method of resolving conflicts with previously concluded instruments is intended to avoid any uncertainty in the timing element (Garcimartín and Saumier, 2020).

In addition, Article 23.4 provides special rules for resolving conflicts between instruments in the Regional Economic Integration Organisation. If such an organisation becomes a Contracting Party to the Convention, the acts of the organisation may prevail over the Convention if they were adopted earlier or were adapted later, provided that the provisions of the acts do not contradict Article 6 of the Convention, which provides that a judgement that ruled on rights in rem in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin. In practice, this means that regional organisations cannot adopt rules after the ratification of the Convention concerning the circulation of judgements within the regional organisation on the right in rem over immovable property located in another Contracting State (Garcimartín and Saumier, 2020).

As demonstrated, the Convention gives precedence to the application of any instrument that was adapted before the time of adaptation of the Convention, regardless of its form and the subject of adaptation, if it regulates the scope of recognition and enforcement of a foreign judgement. Preference is also given to instruments that were concluded later if the state of origin and the country of recognition of the judgement are members of the instrument. In the case of acts of the Regional Economic Integration Organisation, they should prevail if the provisions of the acts do not contradict Article 6 of the Convention.

Since the Brussels Ibis Regulation and the Agreement were adopted in 2012 and 1993, respectively, it is necessary to analyse the provisions of the Brussels Ibis Regulation on the relationship with other instruments to determine the applicable instrument.

Relationship of the Brussels Ibis Regulation with other international instruments

The main provision governing the relation of the Brussels Ibis Regulation to other instruments when applied to intra-EU relations is Article 71. The Article expressly states that the Regulation shall not affect any conventions to which the Member States are parties and which govern jurisdiction or the recognition or enforcement of judgements in relation to particular matters. The Regulation precedes other relevant instruments, but the Article implicitly incorporates a temporal criterion in determining the relationship with other instruments.

The Regulation gives precedence to those instruments that the Member States ratified at the time of the Brussels Ibis Regulation adaptation (Mankowski, 2016). Therefore, the Brussels Ibis Regulation is in no way excluded from the application if any other instrument governing the recognition and enforcement of foreign judgements has been adopted after the adoption of the Regulation in relations between the Member States.

The situation becomes more complicated when determining the relationship of the Brussels Ibis Regulation to intra-EU bilateral legal assistance treaties. Article 69 of the Brussels Ibis Regulation states that the Regulation shall supersede conventions covering the same matters as this Regulation applies. This implies that the Brussels Ibis Regulation provision replaces the application of intra-EU bilateral treaties in terms of the recognition and enforcement of foreign judgements. Moreover, this Article does not introduce any temporal criterion, which means that the application of all bilateral treaties between the Member States, regardless of when they were concluded, is replaced by the application of the Brussels Ibis Regulation provisions.

This leads to the interim conclusion that the Brussels Ibis Regulation has a full mandate in the field of recognition and enforcement of foreign judgements between Member States and supersedes the procedures provided for by the Convention and bilateral intra-EU treaties on legal assistance. The opposite situation applies in the case of regulation of the recognition and enforcement of judgements between the Member States and third countries. Bilateral treaties between Member States and non-Member States generally remain unaffected following Article 73.3 of the Brussels Ibis Regulation, (Mankowski, 2016), which provides that the Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation. In terms of the temporal criterion, the Brussels Ibis Regulation favours the application of bilateral treaties with third countries if they have been adopted before the Regulation enters into force. At the same time, the question of the application of bilateral treaties concluded after the Regulation’s entry into force remains open, given the
terrestrial scope of the Brussels Ibis Regulation application. In the author’s opinion, if such a case occurs and the interested party has to recognize a judgement from a Member State in a third country, the provisions of a bilateral treaty or other instrument, such as the Convention, should apply. However, in the opposite situation, if the person concerned has to recognize a judgement from a third country in a Member State with which there is a bilateral treaty concluded after the entry into force of the Brussels Ibis Regulation, the provisions of the Regulations shall apply. This approach will help preserve the territorial criterion for the jurisdiction of the application of EU acts and ensure the predictability of their application for individuals and legal entities from third countries.

**CONCLUSIONS**

The application of the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters is a complex task, as it is necessary to determine the relationship of this act with other international instruments. For the interests of the EU, the Convention gives full priority to the application of the Brussels Ibis Regulation to the extent that both acts are regulated. The situation may change with the modernisation of the Brussels Ibis Regulation and the adaptation of the new EU act if it contradicts the requirements of Article 6 of the Convention. The situation is similar in the case of bilateral treaties on the provision of legal assistance in the recognition and enforcement of foreign judgements that were concluded before the ratification of the Convention. At the same time, the situation changes if combining the three types of regulatory acts into one conflict. If a court judgement is to be recognised in the EU, the Brussels Ibis Regulation supersedes the application of bilateral treaties, regardless of the moment of their conclusion.

However, there is no clear answer to the question of the choice of instrument in the case of the need to recognize and enforce a judgement from a Member State in a third country. Given the Brussels Ibis Regulation territorial criterion, bilateral treaties should be preferred.

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