Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions

Reconnaissance et exécution des jugements étrangers hors des conventions de Bruxelles et de Lugano

Anerkennung und Vollstreckung ausländischer Entscheidungen ausserhalb der Übereinkommen von Brüssel und Lugano

Gerhard Walter
Samuel P. Baumgartner
(editors)

CIVIL PROCEDURE IN EUROPE 3

KLUWER LAW INTERNATIONAL

Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions / Reconnaissance et Exécution des Jugements Etrangers hors des Conventions de Bruxelles et de Lugano / Anerkennung und Vollstreckung ausländischer Entscheidungen ausserhalb der Übereinkommen von Brüssel und Lugano

Kluwer Law International
The Hague • London • Boston

Published by Kluwer Law International
P.O. Box 85889
2508 CN The Hague, The Netherlands

Sold and distributed in North, Central and South America by
Kluwer Law International
675 Massachusetts Avenue
Cambridge, MA 02139, USA

Sold and distributed in all other countries by
Kluwer Law International
Distribution Centre
P.O. Box 322
3300 AH Dordrecht, The Netherlands

A C.I.P. Catalogue record for this book is available from the Library of Congress

Cover design:
Bert Arts bNO

Printed on acid-free paper

ISBN 90-411-1374-6

© 2000, Kluwer Law International

Kluwer Law International incorporates the publishing programmes of Graham & Trotman Ltd, Kluwer Law and Taxation Publishers and Martinus Nijhoff Publishers.

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Printed and bound in Great Britain by Antony Rowe Limited.

Preface

It is a commonplace that the laws of procedure in the various Member States of the European Union vary considerably. This is a serious impediment to the proper functioning of the internal market, since it makes international litigation a hazardous and costly undertaking. It has been emphasized that the idea of a single 'internal market' requires for its complete realization a single system for the judicial resolution of disputes. Unfortunately, such a system is still a distant ideal. Therefore, the present series of books, of which this volume is the third, is intended to answer some of the more important questions pertinent to specific jurisdictions. The purpose of the books is to provide the practitioner with an explanation of national procedures dealing with similar issues. In addition, it is hoped that the series will stimulate the debate as regards an approximation of the laws of procedure and offer tools for the study necessary to achieve this goal. In this manner, the series will be a sequel to the work accomplished by the Working Group on Civil Procedure in Europe chaired by Professor Marcel Storme, whose report with proposals for the approximation of the law of procedures in Europe was submitted to the European Commission in 1993.[1]

A variety of subjects will be covered in the present series. The publication of volumes on the following subjects is being prepared:

1. Commencement of the proceedings
2. Computation of time
3. Conciliation, Arbitration and ADR
4. Costs
5. Default and setting aside
6. Evidence
7. Group actions
8. Injunction for payment
9. International conventions
10. International jurisdiction
11. The judgment
12. *Mareva* and other mandatory injunctions
13. Nullities

1. The report of the Working Group entitled 'Rapprochement du droit judiciaire de l'Union européenne/Approximation of the Judiciary Law in the European Union' was published by Kluwer/Nijhoff in 1994.

14. Provisional remedies and summary proceedings
15. Service of document abroad.

Each volume will contain chapters written by the most eminent national experts covering the law in each Member State. An additional chapter will include an overview of the various national procedures. The contributions to the books will either be written in English, French or German (occasionally in Spanish). Summaries in each of the two remaining languages will be appended to each contribution. Bibliographies will facilitate the user in finding material for further study.

C.H. van Rhee

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Préface

Dire que les droit relatifs aux procédures diffèrent considérablement dans les divers États membres de la Communauté européenne relève du lieu commun. Il s'agit pourtant d'un sérieux obstacle au bon fonctionnement du marché interne puisque cela fait de tout procès international une entreprise hasardeuse et coûteuse. On a insisté sur le fait que l'idée d'un 'marché international' unique nécessitait pour sa réalisation complète un système unique de règlement juridique des litiges. Ce système reste hélas un idéal encore lointain. C'est pourquoi cette collection, dont le présent ouvrage constitue le troisième volume, vise à apporter un soutien aux juristes engagés dans des litiges au sein de l'Union européenne, en apportant une reponse à quelques-unes des questions les plus importantes de manière pertinente pour les juridictions spécifiques. Le but de cette collection est de fournir aux juristes un exposé des procédures nationales. De plus, nous espérons que sette série stimulera le débat sur le rapprochement des droits de procédure et offrira les outils de recherche nécessaires pour atteindre ce but. Cette série fera ainsi suite au travail accompli par le Groupe d'Études sur la Procédure Civile en Europe dirigé par le professeur Marcel Storme, dont le rapport présentant des propositions en faveur d'un rapprocement des droits de procédure en Europe a été soumis à la Commission européenne en 1993.[1]

Ces séries couvriront divers thèmes, et les volumes traitant des sujets suivants sont actuellement en préparation:

1. Le commencement de la procédure.
2. Les délais.
3. La conciliation, l'arbitraige et 'ADR'
4. Les frais de justice.
5. Le défaut et l'opposition.
6. La preuve.
7. Actions collectives.
8. L'injonction de payer.
9. Les conventions internationales.
10. La compétence judiciaire internationale.
11. Le jugement.

1. Le rapport du Groupe d'Études intitulé 'Rapprochement du droit judiciaire de l'Union européenne/Approximation of judiciary law in the European Union' a été publié par Kluwer/Nijhoff (Pays-Bas) en 1994.

12. Les mesures conservatoires.
13. Les nullités.
14. Les mesures provisoires et les procédures rapides.
15. La signification des actes judiciaires à l'étranger.

Chaque volume proposera des chapitres écrits par les plus éminets experts nationaux. Un chapitre général présentera une vue d'ensemble des diverses procédures nationales. Les contributions à ces ouvrages seront rédigées en anglais, français ou allemand (occasionnallement en espagnol), avec, en annexe, un résumé dans les deux autres langues. Des bibliographies permettront au lecteur de trouver la documentation nécessaire à une étude plus approfondie.

C.H. van Rhee

Vorwort

Es ist allgemein bekannt, daß das Prozeßrecht in den verschiedenen Mitgliedsstaaten der Europäischen Union sehr unterschiedlich ist. Dies stellt eine ernsthafte Behinderung für das Funktionieren des europäischen Binnenmarktes dar, da die grenzüberschreitende Prozeßführung auf diese Weise zu einem riskanten und kostenträchtigen Unterfangen wird. Man hat darauf hingewiesen, daß der Binnenmarkt nur dann in vollem Umfang realisiert werden kann, wenn es ein einheitliches System für die gerichtliche Lösung von Streitfällen gibt. Leider ist ein derartiges System noch ein weit entferntes Wunschbild. Mit dieser Buchreihe – deren dritten Band das vorliegende Werk bildet – wird daher beabsichtigt, Anwälten, die im Bereich der innereuropäischen Prozeßfürung tätig sind, Hilfestellung zu leisten. Dies wird erreicht, indem wichtige Fragen der spezifischen Rechtsordnungen behandelt werden. Ziel der Reihe ist es, den Rechtsanwalt darüber aufzuklären, wie Gerichtsverfahren in vergleichbaren Fällen in den verschiedenen Ländern ablaufen. Außerdem hoffen wir, daß die Buchreihe die Diskussion über eine Annäherung der einzelnen Prozeßrechtssysteme anregen und Instrumente für die zur Verwirklichung dieses Ziels erforderliche Forschungsarbeit bereitstellen wird. In dieser Hinsicht ist das Werk eine Fortsetzung der von der 'Arbeitsgruppe über den Zivilprozeß in Europa' unter Vorsitz von Professor Marcel Storme durchgeführten Arbeit. Der Bericht dieser Arbeitsgruppe mit Vorschlägen über eine Annäherung der Prozeßrechtssysteme in Europa wurde der Europäischen Kommission 1993 vorgelegt.[1]

Die vorliegende Reihe behandelt eine Vielzahl von Themen. Bände zu den folgenden Schwerpunkten sind in Vorbereitung:

1. Klageerhebung
2. Fristberechnung
3. Schlichtungsverfahren, Schiedsverfahren, 'ADR'
4. Prozesskosten
5. Versäumnis und Einspruch
6. Beweismittel
7. Gruppenklagen
8. Mahnverfahren

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1. Der Abschlußbericht der Arbeitsgruppe mit dem Titel 'Rapprochement du droit judiciaire de l'Union europeenne/Approximation of judiciary law in the European Union' wurde 1994 von Kluwer/Nijhoff herausgegeben.

9. Internationale Verträge
10. Internationale Zuständigkeit
11. Das Urteil
12. Einstweilige Verfügungen
13. Nichtigkeiten
14. Vorläufige Anordnungen und summarische Verfahren
15. Auslandszustellung

Jeder Band enthält Beiträge renommierter Experten der einzelnen Mitgliedsstaaten zum jeweiligen nationalen Recht. Der allgemeine Teil enthält eine Übersicht der einschlägigen nationalen Verfahren. Die Beiträge sind entweder auf englisch, französisch oder deutsch abgefaßt (ausnahmsweise auf spanisch) und enthalten jeweils Zusammenfassungen in den beiden anderen Sprachen. Bibliographien erleichtern dem Benutzer das Auffinden weiterführender Literatur.

C.H. van Rhee

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General Report
The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions

Gerhard Walter and Samuel P. Baumgartner

Introduction

Of the various procedural topics explored in this series, the rules on recognition and enforcement[1] of foreign judgments are of particular importance in transnational litigation. They determine what, if any, effects a judgment of one country may have in another and thus ultimately define the efficacy of that country's judicial proceedings. This is distinctly practical business, and as such it is as essential for the practitioner choosing an appropriate forum as it is for the law reformer seeking to improve justice in a transnational setting. The present endeavor to study recognition law in Europe may thus benefit both practitioners and law reformers. Practitioners may gain a general overview of recognition law in the country of their interest from the national reports that follow, while law reformers should find ample opportunity to reflect critically upon their national law in this field.

There certainly is reason for such critical reflection. Given the recent boost in globalization of both economic and social life, it may well be worth reconsidering

1. Ordinarily, the enforcement of a judgment presupposes its recognition, while recognition alone may be sufficient, depending both on the kind of judgment and on the party filing suit in the recognition state. *See, e.g.*, Reinhold Geimer, Internationales Zivilprozessrecht 770–71 (3rd ed. 1997); Louise Ellen Teitz, Transnational Litigation 255–56 (1996); Gerhard Walter, Internationales Zivilprozessrecht der Schweiz 338 (2d ed. 1998). This distinction has not, however, been this clearly drawn in all countries, particularly not in those (*infra* note 301 and accompanying text) which require an *exequatur* proceeding for enforcement as well as for plain recognition. *See, e.g.*, Henry Battifol & Pierre Lagarde, II Droit International Privé ¶ 711 (8th ed. 1993). For purposes of simplicity, this report uses the term 'recognition' as encompassing both recognition and enforcement unless otherwise indicated.

Gerhard Walter and Samuel P. Baumgartner (eds.), Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions, 1–45.
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the rather restrictive approaches that the various countries currently take on judgments recognition.[2] To be true, it may still make sense for a country to ensure that the procedure in the rendition state was essentially fair to the losing party and that the resulting judgment is compatible with the recognition state's essential public policies. Accordingly, no country does now or has ever given foreign judgments effect on its territory without some inquiry into these aspects.[3] However, it bears recalling that the current recognition regimes of the continental European countries were developed during a time of pronounced nationalism.[4] Thus, the notion that a country does not have to give any effects to the judgments of another absent a treaty obligation to the contrary is not merely the point of departure in the countries of the Continent.[5] In a considerable number of them, it was for a time, or still is today, the only rule of recognition law.[6]

This general rule of non-recognition and the closely related requirement of reciprocity[7] are most clearly in need of reconsideration today. But there are more subtle aspects to contemplate as well. When reviewing the fairness of the foreign proceeding, be it under the heading of personal jurisdiction,[8] right to be heard,[9] or public policy,[10] the courts of the recognition state may be tempted to let distrust, an inclination to protect domestic nationals, inexperience with foreign legal systems, and a general preference for domestic solutions guide their decision. This is particularly true on the Continent, where both private law and civil procedure are mostly regulated on a national level, leaving courts with little experience from domestic practice in dealing with foreign legal solutions.[11] Such propensities are understandable. Yet, the increasing transnational dimension of both business and individual life appears to call for according relatively higher

2. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. ... Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.
Moses v. Shore Boat Builders, Ltd., 106 D.L.R. 4th 654 (B.C. Ct. App. 1993), reproduced in Teitz, *supra* note 1, at 252.
3. *See* Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 Am. J. Comp. L. 1, 11–12 (1988).
4. *See, e.g.*, Mathias Reimann, Conflict of Laws in Western Europe, 58 (1995).
5. *See* Juenger, *supra* note 3, at 5–6. *See also* national report of Belgium [hereinafter Belgium] at 99 (Public international law principle of sovereignty determines that a judicial decision can have no effect outside of a country's territory).
6. *See infra* text accompanying notes 133–41.
7. *See infra* Part III.10.
8. *See infra* text accompanying notes 180–94.
9. *See infra* text accompanying notes 201–206 and 224–234.
10. *See infra* Part III.6.
11. *Compare* Reimann, *supra* note 4, at 20 (noting that conflicts law in continental European countries involves almost by definition the laws of different nations). Of course, there are exceptions. In Switzerland, for example, each Canton still has its own code of civil procedure. *See* Bundesverfassung [Constitution] article 122(2). This is, however, about to change. Switzerland at 541.n.2.

weight to the interests of judicial economy, decisional harmony, and the winner's protection from relitigation.[12]

The drafters of the Brussels[13] (and later the Lugano)[14] Convention were well aware of these considerations. Believing that delivering justice with dispatch and, accordingly, the free movement of judgments were essential to free trade within the member states,[15] they set up uniform requirements and a largely uniform procedure for the recognition of member-state judgments. In fact, due to the advanced stage of European integration and the rapidly growing share of transnational business relations, Europeans are about to adopt a further simplification of the recognition regime of both Conventions,[16] although the more radical proposals of the Commission will have to await future discussions.[17]

12. On the interests to be balanced by recognition law see generally Reinhold Geimer & Rolf A. Schütze, Internationale Urteilsanerkennung, vol. I 2, 1367–79 (1984); Arthur T. von Mehren & Donald Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 Harv. L. Rev. 1601, 1603–05 (1968).
13. Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (1972 O.J. (L 299) 32).
14. Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (1988 O.J. (L 319) 40).
15. *See* Paul Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, 1979 O.J. (C 59) 1, 3.
16. Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, articles 32–49, COM (1999) (posted July 7, 1999) <http://europa.eu.int/eurlex/en/com/pdf/1999/en_599PC0348.pdf>.
17. The original proposal of the Commission had suggested to abolish the public policy defense as well as the choice of law defense. *Compare* current article 27 of the Brussels Convention *with* Commission Proposal for a Council Act establishing the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters in the Member States of the European Union, article 37a, 1998 O.J. (C 33) 20. But apparently, this simplification appeared too radical to a majority of the member states of both the Brussels and Lugano Conventions. *See* Proposal, *supra* note 16, article 41(1) (maintaining the public policy defense, but limiting it to 'manifest' violations). This is not the end of the story, however. For the long run, the Council has recently suggested to abolish recognition procedures altogether, leading to a truly free movement of judgments. In a first step, this abolition is envisioned for small claims and certain family matters. *See* Presidency Conclusions, Tampere European Council, October 15/16, 1999, no. 34 <http://europa.eu.int/council/off/conclu/oct99/oct99_en.pdf>. On these developments see Gerhard Walter & Fridolin M.R. Walther, International Litigation: Past Experiences and Future Perspectives, 25 Swiss Papers on European Integration 5, 31–32 (2000). Whether such simplifications will be politically feasible remains to be seen. There has been strong support for keeping a public policy defense. *See, e.g.*, Alexander Bruns, *Der anerkennungsrechtliche ordre public in Europa und den USA*, 53 Juristenzeitung 278 (1999); Astrid Stadler, *Die Revision des Brüsseler und des Lugano-Übereinkommens über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen – Vollstrechkbarerklärung und internationale Vollstreckung, in* Revision des EuGVÜ – Neues Schiedsverfahrensrecht (Peter Gottwald ed., 2000).

The present tome is thus concerned with those areas of European recognition practice that have not been harmonized by the Brussels and Lugano Conventions. Broadly speaking, that includes two categories of judgments – those emanating from non-member states and those regarding the subject matters which are excluded from coverage in article 1 of both Conventions.[18] However, the recognition of arbitral awards,[19] bankruptcy decrees, and judgments in matters of social security are not commonly regarded as part of the law on judgments recognition in most European countries and have therefore largely been left out of the picture by the national reporters.

While reports from some of the EU countries could not be obtained, the following collection includes several reports from non-member states of the European Union. Interestingly, their recognition regimes are often similar to those of their immediate neighbors – Germany in the case of Switzerland; Denmark and Sweden in the case of Norway. This suggests a certain amount of cross-fertilization across national borders, an issue addressed in more detail below.[20] Even in the Czech Republic, Hungary, and Poland, all of which originally belonged to the civil law community,[21] the recognition statutes have much in common with those of Austria or Germany.[22] Yet, after more than four decades of communist rule and, subsequently, its demise, it is not exactly clear how some of these rules will or should be applied in practice. Unfortunately, this situation is not likely to change since the recognition and enforcement of foreign judgments appears to have remained a rarity in these countries.[23] Moreover, getting at the relevant statutes, learned commentary, and court decisions is not always

18. With regard to the latter category, the European Union has made large progress. The draft convention on cooperation in bankruptcy matters, 35 I.L.M. 1223 (1996), was ready to be adopted by the Council of Justice Ministers in 1996 before it became a victim of the controversy about BSE between the European Union and the United Kingdom, *see, e.g.*, Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 1996 – Anpassung und Transformation der nationalen Rechte*, 16 Praxis des Internationalen Privat- und Verfahrensrechts [IPRax] 377, 388–89 (1996). After a three-year cool-off period, the draft convention has again been put on the table by the initiatives of the European Parliament, Germany, and Finland. *See* Walter & Walther, *supra* note 16, at 22–23. A convention on divorce, nullity of marriage and legal separation paralleling the Brussels Convention is in a relatively advanced stage of drafting. *See* Council Act of May 28, 1998, Drawing up, on basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction, and the Recognition and Enforcement of Judgments in Matrimonial Matters, 1998 O.J. (C 221) 1; Alegría Borrá, Explanatory Report, 1998 O.J. (C 221) 27.
19. The recognition of arbitral awards has also been successfully harmonized by the widely adopted United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958.
20. *See infra* text accompanying notes 39–44.
21. But note that the Hungarian law was only partly codified prior to socialist rule. *See* Rudolf B. Schlesinger et al., Comparative Law, 290 n.* (5th ed. 1988).
22. There are, however, some minor deviations. *See, e.g., infra* text accompanying notes 196–98.
23. Letter from the national reporter for Hungary, Professor Dr. Miklós Kengyel, to Professor Dr. Gerhard Walter (December 19, 1997).

easy.[24] Even obtaining national reports in printable form from the Czech Republic and from Poland presented considerable logistical problems.

For their guidance, the national reporters were supplied with a questionnaire.[25] Some of the reporters chose to answer the questionnaire question by question. Others used the format that they felt most comfortable with. In either case, although somewhat easier to detect in the latter category, the reports reveal some familiar national characteristics. The reports from Belgium, France, and Luxembourg put great emphasis on elegance of style; the German report carefully defines concepts and systematically lists the relevant statutes; the Swiss report stresses the difficult questions of finding the applicable law in a federal form of government; and the Dutch report reflects the transnational tradition of that country. Moreover, the civil law reports are relatively systematic and logical in expounding their material but at times fail to indicate the source (own opinion, doctrine, court decision) when stating a legal proposition. That obviously reflects civil law tradition, particularly the supposed lack of a binding force of judicial decisions[26] and the importance of academic doctrine in statutory interpretation[27] within that tradition. Yet, it may present a particular challenge to one engaging in comparative study.[28] For, as we shall see, the major differences between the various European countries do not lie in the general rules regarding recognition and enforcement, but rather in their ramifications and in the ways in which they are understood and applied in each individual nation.

I. Sources of Recognition Law

From a comparative perspective, the sources of recognition law and their historical development offer some particularly interesting insights.

1. TREATIES

First of all, it is striking, at least from a common law point of view, to see the staggering number of treaties that the continental European states have concluded over the last 150 years. Initially, the negotiation of recognition treaties was necessary to alleviate the effects of the strict territorialist approach that the continental Europeans chose for judgments recognition.[29] While the relatively liberal recognition practice of the English courts yielded largely satisfactory results,[30] those

24. Telephone interview with Dr. Jaroslav Vondracek (November 4, 1997). *See also* Czech Republic at 126.
25. The questionnaire could not be published in this book.
26. *See infra* note 77 and accompanying text.
27. *See infra* note 87 and accompanying text.
28. *See infra* text accompanying notes 363–69.
29. *See supra* text accompanying notes 4–6.
30. *See* Juenger, *supra* note 3, at 9–11.

countries on the Continent that enabled their courts to review foreign judgments at will found themselves negotiating recognition treaties early on in order to provide judgment holders from home and abroad with better protection against relitigation. Thus, France, originally a champion of both *révision au fond*[31] and recognition treaties, concluded treaties as early as 1760 (with Sardinia; renewed with Italy in 1860),[32] 1828 (with Switzerland; renegotiated in 1869),[33] and 1846 (with the Grand duchy of Baden).[34] By the latter half of the 19th century, recognition treaties had become standard fare for many continental European countries and principalities.[35] Increasingly, such treaties included provisions on acceptable bases of jurisdiction and ultimately became true *conventions doubles*, regulating both personal jurisdiction and the recognition of judgments.[36] During this century, the recognition and enforcement of foreign judgments became the subject of multilateral conventions within the Hague Conference[37] and, finally, the Brussels and Lugano Conventions. Thus, what had started in the early 19th century as a necessity given the continental European states' territorialist views had developed into a large network of cooperative agreements on various aspects of transnational litigation a hundred years later.

One may deplore the differences in recognition standards resulting from bilateral treaties.[38] Indeed, the complex overlap of multilateral, bilateral, and statutory rules that this fondness for treaties has created may render the search for the proper recognition rules rather difficult as the recent decision of the European Court of Justice in *Van den Boogaard v. Laumen* shows.[39] Yet, this negotiating activity has had an impressive integrating effect in transnational litigation. Particularly the bilateral compacts have allowed the states involved to adapt their recognition regimes step by step and with considerable awareness of

31. *See id.*, at 7 and *infra* text accompanying note 58.
32. *See* F. Meili, Das internationale Civilprozessrecht, 457 (1906).
33. The treaty of 1869 is reproduced in *id.* at 569–82. The interpretative protocol concluded along with it, *id.* at 583–90, repeatedly refers to the earlier treaty. In fact, the 1828 treaty can be traced back to an earlier compact concluded in 1803, *see* Emil Schurter & Hans Fritzsche, I Das Zivilprozessrecht des Bundes 204 (1924).
34. *Id.* at 456. For other early recognition treaties, many of which are no longer in force, *see id.*, at 456–61.
35. *See id.* at 456–61.
36. *Id.* On *conventions doubles* see also Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 Law. & Contemp. Probs. 271, 282–83 (Summer 1994).
37. The first attempt at a multilateral recognition treaty came with the adoption in 1925 of a Draft Treaty on the Recognition and Enforcement of Foreign Judgments by the 5th Hague Conference. This draft treaty, in turn, again served as a basis for bilateral negotiations. *See, e.g.,* Botschaft zu den Verträgen mit der Tschechoslowakei und Österreich, BBl 1927 I 370 (Switzerland).
38. *See* Juenger, *supra* note 3, at 8.
39. Case C-220/95, 1997 E.C.R. 1176 (holding that the recognition of an English judgment requiring the husband to pay his wife a lump sum as part of the divorce decree is to be recognized according to the Brussels Convention rather than the Hague Convention on Recognition and Enforcement of Judgments in Matrimonial Matters).

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