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REVIEW OF JURISDICTION IN THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

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ÖZET

Mahkeme kararlarının tanınması veya tenfizinde kararı veren mahkemenin yetkisinin tanıma veya tenfiz talebinde bulunulan mahkeme tarafından gozden geçirilip geçirilemeyeceği konusu onem taşımaktadır Bu konuda Avrupa Birliği ulkeleri arasında yururlukte bulunan Bruksel Sozleşmesi ile global nitelikte olma amacındaki halen tasarı halındeki Lahey Sozleşmesi hukumlerinin karşılaştırılması yararlı olabilecektir

Bruksel Sozleşmesi çerçevesinde kural, kararı veren mahkemenin yetkisinin gozden geçirilmemesiyken, Sozleşme kapsamında bu kuralın bazı istisnaları yeralmaktadır. Diğer taraftan, Lahey Tasarı Sozleşmesi çerçevesinde –aksi yonde- duzenlemeler dikkati çekmekte ve Tasarı Sozleşmede kararı veren mahkemenin yetkisinin gozden geçirilmesi gerekliliğine ilişkin bir hukum bulunmaktadır Ayrıca Tasarı Sozleşmenin birçok maddesinde de kararı veren mahkeme yetkisinin gozden geçirilmesine ilişkin çeşitli duzenlemeler yeralmaktadır

Bu kapsamda durum kıyaslandığında, farklılıkların ozellikle iki sozleşmenin ozde farklı niteliklerinden kaynaklandığı duşunulebilir Kararı veren mahkeme yetkisinin gozden geçirilmesine ilişkin olarak her iki sozleşme için de bu bağlamda bazı onerilerde bulunulabilir

I. Introduction:

The question of the limits of jurisdiction review of the court of origin by the court addressed in the recognition or enforcement of judgments is an important matter to be analysed. When the court addressed is allowed to review the jurisdiction of the court of origin in every case, it might lead to unnecessary delays whereas there might be conflicts concerning the competency of a foreign court in reviewing jurisdiction of the courts of "another state" as well. On the other hand, prohibition of jurisdiction review of the court of origin could lead to ignoring false determinations concerning jurisdiction of the court of origin in

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some cases. So, determination of the competency of the court addressed in reviewing the jurisdiction of the court of origin should be considered carefully.

Both in the Brussels Convention[1] and in the Draft Hague Convention,[2] there are provisions for the review of jurisdiction of the court of origin in the court addressed when recognition or enforcement is sought. Though the main principle is the "non-review" of jurisdiction of the court of origin in the context of the Brussels Convention as explicitly stated in articles 28/3 and 34/2, there are exceptions within this Convention to this rule. On the other hand, in the Draft Hague Convention, there is the article 27/1 directing the court addressed to verify the jurisdiction of the court of origin and there are many possibilities that allow the court addressed to review the jurisdiction of the court of origin.

The usual trend in common law jurisdictions about the "review of jurisdiction" matter in the field of recognition or enforcement of judgments is inclined to allow the review of jurisdiction of the court of origin in the court addressed.[3] This characteristic may be seen when former English practice is viewed. In a 1960 case,[4] jurisdiction of a Belgrade court was questioned by an English Court and in a case of 1965[5] again jurisdiction of a foreign court -this time a Belgian one- was of question and the registration of enforcement order of the foreign court of origin was set aside due to the reason that it had no jurisdiction with regard to the case.

The situation is the same even when the US "sister case judgments" are considered. In this respect, in a 1940 case,[6] the jurisdiction of the Wyoming Court was questioned in another state, Colorado. Though the Colorado Court gave "full faith and credit" to the Wyoming Court judgment, the Supreme Court of Colorado reversed this and in its decision it was ruled that the jurisdiction of the court of origin could be reviewed in another court.

Similarly, in a 1957 case,[7] though the US Supreme Court reversed the decision, the jurisdiction of the California Court was reviewed by the District Court in Texas and the judgment of the court of origin was accepted as void.

Furthermore, in a 1958 case,[8] the jurisdiction of the Florida Court was reviewed in another action in Delaware, and the judgment of the court of origin

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[1] *<http://www.europa.eu.int/eur-lex/en/lif/reg/en_register_1920.html>*
[2] *<http://www.hcch.net/e/workprog/jdgm.html>*
[3] P. Stone, **Civil Jurisdiction and Judgments in Europe,** UK, Longman, 1998, p. 159.
[4] **Re Trepca** *Mines, [1960] 1 WLR 1273.*
[5] **Societe Cooperative Sidmetal v. Titan International Ltd.,** *[1966] 1QB 828.*
[6] **Milliken Et al v. Meyer 311 US 457, 1940 US LEXIS 2.**
[7] **Mc. Gee v. International Life Insurance 355 US 220, 1957 US LEXIS 2.**

was accepted as having no "full faith and credit" effect. The US Supreme Court similarly by reviewing the jurisdiction of the court of origin held that the Florida Court had no jurisdiction to decide the case.

In another 1963 case[9] where a land conflict between the parties was the issue, the US Court of Appeals decided that the District Court of Missouri was not required to give "full faith and credit" to the judgment of the court of origin which was a Nebraska court. Though the US Supreme Court reversed this decision, US Court of Appeals in its judgment, stressed that the Missouri Court was free to review the jurisdiction of the court of origin.

II. The Situation Under the Brussels Convention:

A. In General:

With regard to the Brussels Convention, both in articles 28/3 and 34/2 the principle of prohibition of the "review of jurisdiction" of the court of origin is emphasized. It is stated that the reason for adopting this kind of a principle is the close relationship between the contracting states and the mutual confidence of each other to each other's courts.[10] Also, related with this issue, it is stressed that the general policy of the Convention is to draw the defendant to take active part in the proceedings at the court of origin so that the jurisdiction problems can be resolved as soon as possible[11].

In the Jenard Report,[12] it is emphasized that the general aim of the Brussels Convention is to provide the free movement of judgments between the contracting states as further as possible.[13] It is underlined that in the spirit of the Convention there is the assumption that the court of origin had correctly applied the rules of jurisdiction. In this regard, it is stated that preventing the possibility of an alleged failure as to the jurisdiction in the court addressed is important.[14] In accordance with these aims, the limitation of powers of the court addressed by establishing a "non-review of jurisdiction" principle is stated as a vital factor in the simplification of the recognition and enforcement procedure.[15]

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[8] **Hanson,Executrix, Et Al. v. Denckla Et 357 US 235, 1958 US LEXIS 752.**
[9] **Durfee v. Duke 375 US 106, 1963 US LEXIS 129.**
[10] Stone, pp. 159-160.
[11] CMV Clarkson and J.Hill, **Jaffey on the Conflict of Laws,** UK,Butterworths, 1997, p. 182.
[12] **Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,** *OJ C 59/1, 05.03.1979.*
[13] **Ibid.** p. 42.
[14] **Ibid.** p. 46.
[15] **Ibid.** p. 47.

The present situation in the Brussels Convention is in conformity with all these aims. Limitation of the "review of jurisdiction" of the court of origin only to some exceptional cases simplifies the procedure of recognition and enforcement and by this way, the process speeds up, free movement of judgments can be achieved more easily.

B. The Exceptions in the Text of the Convention

According to articles 28/3 and 34/2, the jurisdiction of the original court may not be reviewed as a rule. But, there are three exceptions set out in the text of the Convention in articles 28/1, 54 and 59.[16] There is a general criticism about the exceptions as these can be used as a delaying tactic in the process[17]. But, especially when the three exceptions about the consumer, insurance contracts and exclusive jurisdiction are considered, it may be concluded that considering the protective effect on the related party and the importance of the exclusive jurisdiction cases in these articles, these grounds may be accepted as worth considering to review the jurisdiction of the court of origin.

On the other hand, there are also doubts as to the necessity of a principle of "non-review of jurisdiction" of the court of origin. In this respect, it is suggested that it would have been possible to lay down a "double check" on jurisdiction in the state addressed. Especially it is underlined that there may be false determination of jurisdiction in the court of origin under the national rules and rules may have been misapplied.[18] But, when this opposite view is considered, it may be easily concluded that to use the "review of jurisdiction" principle in all cases would so much delay the flowing of proceedings and there might be many unnecessary review of jurisdiction practices. This kind of review may lead to getting far away from one of the general aims of the Brussels Convention which is to provide the flowing of judgments as quickly as possible.

According to the article 28/2, the court addressed is bound by the findings of jurisdiction of the court of origin. It is suggested that this article reduces the effect of the exceptions specified.[19] In this regard, it is suggested that the "findings of the fact" should not include a finding as to the policy holder's or consumer's domicile, but only a finding as to his principal establishment, substantial residence or other connection relating to domicile. On the other hand, this suggestion is criticized as unfounded, especially in limiting the effect

[16] According to the Lugano Convention there are two more exceptions stated in articles 28/2-54B/3 and 28/2-57/4.
[17] P.Kaye, **Civil Jurisdiction and Enforcement of Foreign Judgments,** UK,Professional Books Limited, 1987, p.1505.
[18] P.M. North, J.J, Fawcett, **Cheshire and North's Private International Law,** 12th. ed., UK, Butterworths, p. 434.
[19] Stone, p. 160.

of article 28/2 to only insurance and consumer cases.[20] Indeed, this kind of a suggestion would only include especially the insurance and consumer cases though there are more exceptions to the general principle of the "non-review of jurisdiction".

Related with article 28/2 in the Jenard Report, it is stressed that this provision is already included in a number of conventions and the need for that is to avoid recourse to delaying dublication in the exceptional cases where review of the jurisdiction of the court of origin is allowed.[21] This article has remained unchanged in the Working Party Study of April 1999[22] and –except the numbering of the article as 35/2- in the Council Regulation of December 2000.[23] The reason for this can be assessed as the general confidence of the contracting states in each other's courts and parallel to the aim explicitly stated in the Jenard Report, to prevent the delays as to the flowing of the procedure of the recognition and enforcement.

Also, related with this provision, it is emphasized that the court addressed can not review the jurisdiction of the court of origin about other claims, such as that the defendant had not voluntarily appeared before the original court.[24] Indeed, article 28/2 is a provision inclined to be interpreted in a broadly sense. It does not include any exceptions as to the findings of the court of origin so it is likely be concluded that the court addressed is bound by every findings of jurisdiction of the court of origin.

The first exception within article 28/1 is where the dispute falls in the scope of articles 7-12A, 13-15 or 16. These are the articles for protective jurisdiction of insurance and consumer contracts and of the exclusive jurisdiction cases. Article 28/1 has remained unchanged in the Working Part Study of April 1999. In the Regulation of December 2000, it is observed that the text of article 35/1 of the Regulation has remained unchanged as to allowing jurisdiction review in the cases of consumer, insurance contracts and exclusive jurisdiction.

So, when the court of origin determines its jurisdiction contrary to those provisions, the judgment shall not be recognised or enforced in the court

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[20] Lasok and Stone, **Conflict of Laws in the European Community**, Abingdon, Peofessional Books Limited, 1987, p. 296.

[21] **Ibid**. p. 46.

[22] **30 April 1999,** *7700/99*. On 12 March 1999, the Council agreed to freeze this Study on the assumption that a proposal for a Community Act would be presented by the Commission shortly after the entry into force of the Amsterdam Treaty.

[23] **Official Journal L012**, 16/01/2001, pp. 1-23.

[24] Dicey and Morris, **The Conflicts of Laws,** 14th ed., Vol. 1, London, Sweet&Maxwell, 2000, p. 550.

addressed. These articles refer to very exceptional and important situations and in accordance with this, stating these as exceptions to the general rule of "non-review of jurisdiction" may be considered as necessary.

The second exception is specified in article 59 by the reference of article 28/1. This exception is accepted as offering some protection for the persons domiciled or habitually resident outside the contracting states from the judgments given on jurisdictional bases under article 4.[25] According to article 59, the contracting states can conclude agreements with non-contracting states on the recognition and enforcement of the judgments. When there is such kind of an agreement, the courts of the contracting states may undertake an obligation of not to recognize or enforce judgments given in other contracting states against defendants domiciled or habitually resident in that non-contracting state. So, if there is such kind of a judgment of the court of origin, the judgment shall be refused of recognition and enforcement in the court addressed. In the Jenard Report, it is stated that the approach adopted by the Committee about this article is to stress that agreements related to particular matters prevail over the Convention.[26]

The third exception is specified in article 54. According to this article, if the Convention entered into force after an action had been instituted, whereas the judgment was given after the entry into force, for the court of origin to have jurisdiction, it must have had jurisdiction under Title 2 of the Convention or under another convention which was in force between the two states when the action was instituted. If there is not such jurisdiction of the original court, the recognition or enforcement of the judgment of the court of origin shall be refused in the state addressed.

In the Jenard Report it is stated that though as a general rule, enforcement treaties have no retroactive effect[27] and the aim in this article is stated as to protect the defendant who had no opportunity to contest the jurisdiction in the court of origin on the basis of the Convention[28]. The text of the article remained unchanged both in the Working Party Report of April 1999 and –except it was renumbered as 66/2- in the Regulation of December 2000.

C. The Exception "Invented" by the Mietz Case:

With the Mietz case, a further exception to the "non-review" of jurisdiction of the court of origin is "invented". This is a very important development in the

[25] Stone, p. 160.
[26] **Ibid.** p. 60.
[27] **Ibid.** p. 57.
[28] **Ibid.** p. 58.

evolution of the case law of the European Court of Justice. For example, when a case of 1991[29] is taken into consideration, it may be observed that it has been explicitly stated by the Court that the exceptions stated in the Convention within articles 28 and 34/2 are the ones that are exhaustively specified. In this respect it may be concluded that no other review of jurisdiction grounds would exist under the Convention and the Convention does not authorise review under any other grounds.

By the Mietz case[30] on the other hand, article 24 of the Convention is "invented" to be a case where the jurisdiction of the original court may be reviewed. In this specific case, though it was not the competent court to deal with the substantive issues of the case, the Netherlands court has given an "interim payment" which was declared to be provisionally enforceable. According to article 24, it had the competency to give such a measure though it was not the competent court to rule on the substantive issues. In this case, the Court ruled that if a court goes beyond the article 24, recognition or enforcement of that judgment of the court of origin shall be refused in the state addressed. So, a new exception to the rule of "non-review of jurisdiction" was introduced. In the judgment, though it was not explained in this case completely, the system of article 24 was described as a "special" regime.

This special regime was explained in a previous Court judgment of 1980.[31] In this case, a French court had given a provisionally enforceable order and a German court had given an enforcement order for this measure.[32] The Court declared in its judgment that the specific object of this type of provisional measure is to produce a surprise effect intended to safeguard the threatened rights.[33] On the other hand, it is expressed that all the provisions of the Brussels Convention relating to the recognition and enforcement were indicating the intention that the proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed.[34] As a result, it was stated that the procedure of 24 was a special one and that it should not to be covered by the simplified procedure of the recognition and enforcement of the judgments procedure within the Convention.[35]

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[29] **Overseas Union Insurance Ltd. And Deutsche Ruck UK Reinsurance Ltd. and Pinotop Insurance Company Ltd. v. New Hampshire Insurance Company C 351-89, 1991 ECJ CELEX LEXIS 2877.**

[30] **Mietz v. Intership Yachting Sneek, C-99/96, 27th** *April 1999.*

[31] **Bernard Denllauler v. Sn.n. Couchet Freres, Case 125/79,** *[1980] ECR 1553.*

[32] **Ibid.** p. 1565.

[33] **Ibid.** p. 1566.

[34] **Ibid.** p. 1569.

[35] **Ibid.** p. 1571.

III. The Situation Under the Draft Hague Convention:

In the General Report on the Draft Hague Convention,[36] the aim of having a greater degree of flexibility than the Brussels Convention is stressed.[37] In this respect, the state addressed is considered to have competency to review the jurisdiction of the court of origin.[38] It is expressed that a number of jurisdictional bases for reviewing the jurisdiction of the court of origin like the Brussels Convention were adopted for this reason.[39] In this regard, it is emphasized that in the expanded geographical context of the Draft Hague Convention, it is necessary to require a check on the jurisdictional rules used by the court of origin.[40]

In the Report of Work of the Special Committee,[41] with regard to the review of jurisdiction of the court of origin, similarly, many experts supported the idea that since the future convention would have no uniform and mandatory system of interpretation like the Brussels Convention, the review of jurisdiction of the court of origin is necessary.[42]

When articles related with the "review of jurisdiction" under the Draft Hague Convention are taken into consideration, a lot of provisions allowing the court addressed to review the jurisdiction of the court of origin may be observed. According to article 25/1 of the Draft Hague Convention, the foreign judgment should be in accordance with the provisions of jurisdiction of the Draft Hague Convention in order to be recognised or enforced. All articles of jurisdiction under the Draft Hague Convention are given in article 25/1 in this respect, articles from 3 to 13.

According to the consecutive article of 26, the judgments not to be recognised or enforced are stated. In this respect, at first, the provision for submission agreements under article 4, and submission by appearance situations under article 5 are given. Secondly, the jurisdiction situations in consumer contracts under article 7 and thirdly individual employment contracts under article 8 are stated. Lastly, the exclusive jurisdiction under article 12 and prohibited grounds of jurisdiction under article 18 are emphasized. So, if the jurisdiction of the court of origin is contrary to any of these articles, the judgment will not be recognised or enforced.

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[36] **Preliminary Document No.7, April 1997**.,*<http://www.hcch.net/e/workprog/jdgm.html>*
[37] **Ibid.** p. 10.
[38] **Ibid.** p. 11.
[39] **Ibid.** p. 11.
[40] **Ibid.** p 46.
[41] **Preliminary Document No.9, March 1998**, *<http://www.hcch.net/e/workprog/jdgm.html>*
[42] **Ibid.** p. 18.

Apart from all these, in article 27/1, it is stated that the court addressed shall verify the jurisdiction of the court of origin. Like the Brussels Convention, there is the article 27/2 which states that the court addressed is bound by the findings of fact which the original court based its jurisdiction. But there is one exception to this rule, being for the judgments given by default. So, by this way, the defendant's non-appearance in the court of origin will be able to be reconsidered in the court addressed and the court addressed shall not be bound by the findings as to the jurisdiction by the court of origin related with this matter. When the "global" aimed nature of this convention is thought, this may be considered as a necessary ground to review the findings of jurisdiction of the court of origin.

In 27/3 it is stated that the court addressed can not decline recognition or enforcement of a judgment though it considers that the original court should have declined jurisdiction in accordance with article 22 which gives the original court discretion to decline jurisdiction in favour of another contracting state's court.

IV. Conclusion:

When the Brussels Convention and the Draft Hague Convention are compared with regard the "review of jurisdiction" of the court origin in the recognition or enforcement of judgments by the state addressed, similarities and differences can be observed. First of all, though in the Brussels Convention the general rule is stated as "non-review of jurisdiction", in the Draft Hague Convention there is not such a general explicit rule. Rather in an opposite way, in the Draft Hague Convention it is explicitly stated that the court addressed will verify the jurisdiction of the court of origin.

The characteristic in this sense in the Draft Hague Convention is totally in conformity with the considerations in the Reports about the Draft. The "global" aimed nature of the Draft is always emphasized and especially due to this reason the need for the review of the jurisdiction is underlined. On the other hand, the Brussels Convention, to which European Community countries which have many similarities in their system in common are parties, does not have this kind of a "global" characteristic. The main aim of the Convention is always emphasized as providing the speedy flow of judgments between the contracting states.

When the two conventions are compared, it is observed that though the protective jurisdiction grounds of consumer and insurance contracts are rewievable under Brussels Convention, there is a difference in the reconsiderable grounds in this context within the Draft Hague Convention. In

the Draft, individual contracts of employment are in this field where there is not such kind of a provision under the Brussels Convention. Though under Section 5 of the Regulation of December 2000 about the Brussels Convention, there are special provisions with regard to the jurisdiction in individual employment contracts, these are not accepted as rewievable grounds under the Regulation either. On the other hand, though jurisdiction review is allowed in the context of Brussels Convention in relation to jurisdiction in insurance contracts, there is not such kind of a provision under the Draft Hague Convention.

In this regard, two suggestions may be put forward concerning the review of jurisdiction of the court of origin in the recognition or enforcement of judgments. The jurisdiction review with regard to the insurance contracts present under the Brussels Convention may be suggested for the Draft Hague Convention. On the other hand, the review of jurisdiction in individual employment cases present under the Draft may be considered as necessary for the Brussels Convention. Both of these provisions may be concluded as very important grounds aiming to protect the related parties.