George Svanadze

Recognition of foreign judgments in Georgia: Is the Recognition of foreign judgments in Georgia predictable? (Comparative analyse)

Autor: **George (Giorgi) Svanadze, MLB., (Master of Law and Business, Bucerius Law School/WHU), PhD Student at Christian-Albrechts-University (Kiel, Germany), Attorney-at-Law (Tbilisi, Georgia)**

Stand der Arbeit: November 2009

Herausgeber: Referat "Russland und weitere GUS-Staaten" am Max-Planck-Institut für ausländisches und internationales Privatrecht, Mittelweg 187, 20148 Hamburg

Umsetzung: Dr. Eugenia Kurzynsky-Singer / Vladimir Primaczenko / Walter Grenz

Zitiervorschlag: Svanadze, in: Beiträge und Informationen zum Recht im postsowjetischen Raum (www.mpipriv.de/gus), http://mpipriv.de/shared/data/pdf/2009_12_09_02.pdf

Introduction

After the collapse of the Soviet Union and the foundation of Georgia's[1] market economy in the time when markets have become increasingly, global and the competition is still being intensified, where the dimensions and level of trade and commerce[2] are rapidly raising, and "… *trading abroad is now common-place*"[3] the international, cross-border litigations[4] gained its importance for Georgia as well. One of the main goals of Georgia is the integration in the western legal culture, harmonization and unification of Georgian legal system according to the internationally recognized principles. The U.S. is considered as the most important political and economic partner of Georgia, on the one hand, Germany, the largest European economy is principal partner of Georgia in forming the new legislation, on the other hand.[5] The fundamentals of newly drafted Georgian law are in accordance with the German law, and the recognition of foreign judgments is not an exceptional case. However, there are some relevant differences between them that need clarifications for development of Georgian justice. The very field still remains beyond the scope of Georgian scholarly attention.[6]

The divergences arise initially on the legislative system level, as the recognition of foreign judgments in Georgia is regulated in the Law of Georgia on International Private Law (IPR-

[1] Georgia is a country in the Caucasus region of Eurasia. Situated at the juncture of Western Asia and Eastern Europe, it is bounded to the west by the Black Sea, to the north by Russia, to the south by Turkey and Armenia, and to the east by Azerbaijan. Georgia covers a territory of 69,700 km² and its population is 4.7 million, largely ethnic Georgians. See: http://en.wikipedia.org/wiki/Georgia_(country) (last visited 08.07.2009).

[2] "World trade", "trips", "communications" and "growing level of migrations" are considered as significant factors for the developments. See: von Hoffman/Thorn, Internationales Privat Recht, p. 1; Thomas Müller-Froelich, Der Gerichtsstand der Niederlassung im deutsch-amerikanischen Rechtsverkehr, p. 17.

[3] Cf. Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & Com. 1993-1994, p. 211; Martinez, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted – A Call for Revised Legislation in Florida*, 4 J. Transnat'l L. & Pol'y, 1995, p. 49.

[4] Campbell/Popat, *Enforcing American Money Judgments in The United Kingdom and Germany*, 18 S. Ill. U. L. J., 1993-1994, p. 519.

[5] See Chanturia, Das neue Zivilgesetzbuch Georgiens: Verhältnis zum deutschen Bürgerlichen Gesetzbuch in: Aufbruch nach Europa. 75 Jahre Max-Planck-Institut für Privatrecht, Jürgen Basedow, Ulrich Drobnig, Reinhard Ellger, Klaus J. Hopt, Hein Kötz, Rainer Kulms, Ernst-Joachim Mestmäcker (Hrsg.), Mohr Siebeck, 2001, pp. 893-904; Zoidze, Reception of european Private law in Georgia, 2005 (in Georgian: Evropuli Kerdzo Samartlis Recepcia Saqartveloshi); Chanturia, Die Europäisierung des georgischen Rechts: bloßer Wunsch oder große Herausforderung? Vortrag auf einem deutsch-georgischen Kolloquium zur Europäisierung des georgischen Rechts am Max-Planck-Institut für ausländisches und internationales Privatrecht in hamburg am 24.05.2008; http://www.cac-civillaw.org/land/georgien.html (last visited: 09.07.2009).

[6] There are only General course books, that have far-reaching importance for Georgian jurisprudence, but they only address the issue very narrowly under the several sub-chapters as the purpose of those books is the general overview of Georgian International Private Law and not the detailed clarification the particularities of recognition and enforcement of foreign judgments in Georgia: see Liluashvili, International Private Law, 2001 (in Georgian: Saertashoriso Kerdzo Samartali); Gabisonia, Georgian International Private Law, 2006, (in Georgian: Qartuli Saertashoriso Kerdzo Samartali); Gamkhrelidze, Introduction to International Private Law, 2000 (in Georgian: Saertashoriso Kerdzo Samartlis Shesavali).

Georgia)[7] while the German legislator deals with the issue in the Code of Civil Procedure (*Zivilprozessordnung - ZPO*).[8]

The Georgian case law concerning the issue have not been evolving that much. The judgments are similar to each other, they lack important legal clarity and the relevant sections[9] of the appropriate law are not construed comprehensively. In general the court decisions are covering CIS countries. There are no in-depth interpretations of relevant sections, Georgian courts are not giving the clarifications regarding the concepts of recognition, and they only refer the sections, providing the text of law without further discussions. In some cases the court even applies section 68 of the IPR-Georgia together with the applicable convention, which is not right way, as when the convention is applicable, than application of the IPR-Georgia is automatically excluded.[10] There is no treaty concluded between U.S.A. and Georgia concerning the issue.[11]

It is apparent that Georgian law needs further interpretation in this particular area. The article constitutes a modest attempt to research the problems, gaps and in particular the state of legal situation on recognition of foreign judgments in Georgia compared to the model provided by German legislation and justice regarding the recognition of foreign money judgments. Although there is no case regarding recognition of USA or German money judgments in Georgia, this attempt is aimed at clarification and measurement degree of readiness of Georgian law and Georgian courts for recognition of coming foreign money judgments in Georgia. The attempt also encompasses the purpose to serve as an unassuming contribution on the way of Europeanization of Georgian recognition law and the development of Georgia's *"Internationales Zivilprozessrecht – IZPR"* (International Civil Process Law).[12]

---

[7] See section 68 of the IPR-Georgia infra p. 13.
[8] See ZPO section 328 (1) infra n. 87.
[9] For the purposes of the article, articles, paragraphs or other names of statute's provisions in every mentioned legal system hereto is referred as "section".
[10] See http://www.supremecourt.ge/default.aspx?sec_id=191&lang=1 (last visited: 07.07.2009) see the cases: No.a-2297-sh-53-08 02.02.2009; No.a-1824-sh-480 02.02.2009; No.a-2481-sh-55-08 26.02.2009; No.a-2444-sh-1609 26.02.2009; No.a-1647-15-09 26.03.2009; No.a-1647-15-09 06.04.2009; No. 492-sh-24-09 13.04.2009; No.a-407-sh-19-09 13.04.2009; No.a-1666-sh-59-07 15.01.2008; For the state of circumstances of the issue within the framework of recognition and enforcement of foreign arbitral awards in Georgia see: Tsertsvadze, Recognition and Enforcement of Foreign Arbitral Awards in Georgia, in: Beiträge und Informationen zum Recht im postsowjetischen Raum (www.mpipriv.de/gus), http://www.mpipriv.de/de/data/pdf/2009_11_19_01.pdf (last visited: 30.11.2009).
[11] The treaties Georgia has signed are with CIS countries. Georgia is the contracting state of Minsk Convention "On Legal Assistance and Legal Relations in Civil, Family and Criminal Matters" 1993.
[12] German scholarly writing distinguishes the fields of laws: "IZVR" (Internationales Zivilverfahrensrecht), "IPR" and "IZPR", see for further information: v.Bar/Mankowski, Internationales Privatrecht, 2nd edition, 2003 (pp. 346-348); Schack, Internationales Zivilverfahrensrecht, 2nd edition, 1996 (pp. 1-10); Schack, Internationales Zivilverfahrensrecht, 3rd edition, 2002, (pp. 1-10); Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, (pp. 1-10); Rauscher, Internartionales Privatrecht, 3rd edition, 2009 (pp. 1-5); Schütze, Deutsches Internationales Zivilprozessrecht unter Einschluss des Europäischen

As mentioned, the article deals only with the foreign judgment's recognition issue. The enforcement of judgments does not constitute the subject of the research. It is apparent that the recognition is principle stage for enforcement, and on the basis of this assumption the enforcement is excluded from this article.[13]

The method applied for the research is so-called method of comparative law ("*Rechtsvergleichung*"), the primary aim of which, as professors Zweigert and Kötz have undisputedly formulated, is cognition, knowledge ("*Erkenntniss*").[14] This method assists not only to define "…*the techniques of interpreting the texts, principles, rules, and standards of a national system, but also* [to discover] *models for preventing or resolving social conflicts*…".[15] Therefore, German approach concerning the issue is employed as a model for development of Georgian law regarding the recognition of foreign money judgments.

1. Differences in the Systematic Approach to the Issue and Technique of the Regulation between German and Georgian Legislations

German legislator's approach and legislative technique exercised regarding the issue stipulates the terms and conditions which might serve as obstacles during the proceedings concerning recognition of foreign money judgments in Germany.

A foreign money judgment may be recognised if the judgment meets the requirements as follows: 1) The judgment is considered as having the status of *res judicata*; 2) the court rendered the judgment had jurisdiction; 3) the defendant has received proper notice; 4) there is no conflicting judgment existing; 5) the judgment is not incompatible with German public policy; and 6) reciprocity between the countries of the relevant courts exists.[16] (Section 328 of the ZPO).[17]

Zivilprozessrechts, 2nd edition, 2005 (pp. 1-26); Kropholler, Internationales Privatrecht, 5th edition, 2004, (pp.571-578); Geimer, Internationales Zivilprozeßrecht, 6th edition, 2009 (pp.1-35).

[13] Otherwise, the quite narrowed topic would expand and could not match the required measure for the article.

[14] See Zweigert/Kötz, Einführung in die Rechtsvergleichung, 1996, p. 14; Zweigert/Kötz, An Introduction to Comparative Law, 1998, pp.14-15.

[15] Ibid.

[16] Cf. v.Bar/Mankowski, Internationales Privatrecht, 2nd edition, 2003, p. 429; Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 733.

[17] The section 328 (1) of the German Code of Civil Procedure – ZPO reads as follows:
The judgment of a foreign court shall not be recognised:
(1) where the courts of the country to which the foreign court belongs have no jurisdiction under German law;
(2) where the documents instigating the proceedings were not served duly on the defendant, who has not appeared in the proceedings and relies on that fact, in accordance with law or was not served in such a timely manner to enable him to arrange his defence;

The recognition of foreign judgments in civil and commercial matters in Germany is considered as belonging to IZPR rather than IPR (International Private Law).[18] In accordance with the German understanding of the issue, IPR constitutes a body of regulations which determine whether law of which country shall be applicable in a particular case. Thus, as Professor H. Schack stresses: "… German IPR can "order" only a German court as to what private law to apply, while German IZPR may oblige it to apply the procedural law of a foreign state in particular matters".[19] The tools for the IPR are so called conflict rules.[20] In contrast to the IPR, which defines the applicable substantive law for each appropriate case, the subject of the German IZPR is a set of the national rules regulating the Procedural relationships with an international component.[21] The difference between the IZPR and the IPR is the technique of regulation.[22] In general, the structure and body of the legislation, the system and approach to the regulation of issue is significant for each legal system, especially when it comes to the circumstances dealing with legal systems of so called Civil Law countries, which have codified law developed from Roman codified law. The issue of interaction between several fields of law is relevant for the final result. The question of the correlation between substantive and procedural law is an issue of daily consideration for academic as well as for practitioner circles.[23]

The considerations and discussions that have occurred periodically within the Georgian scholarly writing regarding the place of international private law in the Georgian legal system have generally not touched upon the issue of IPR and IZPR in this context. The recognition of foreign judgments in Germany is regulated under ZPO and not under the Einführungsgesetz zum

(3) where the judgment conflicts with a German judgment or with an earlier recognizable foreign judgment or where the proceedings underlining the foreign judgment conflict with a German proceeding that began before the foreign proceeding;
(4) where recognition of the judgment would lead to a result that would manifestly ("*offensichtlich*") conflict with essential ("*wesentlichen*") principles of German law, in particular if recognition is incompatible with the German [Constitution's] basic rights (Basic Law: Grundgesetz);
(5) Where reciprocity is not guaranteed;
For the purposes of translation cf. Hay, *The Recognition and Enforcement of American Money Judgments in Germany – The 1992 Decision of the German Supreme Court*, 50 Am. J. Comp. L. 1992, Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005.

[18] See supra n. 33.

[19] Cf. section 3 I EGBGB; Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, p. 2.

[20] Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, p. 1.

[21] Ibid, p. 2.

[22] Nagel/Gottwald, Internationales Zivilprozessrecht, 6 th editionm 2007, p. 16-17.

[23] Svetlanov, *The International Civil Process and Conflict of Laws,* pp. 199-213, p. 199 in Festschrift für Boguslavskij, Russland im Kontext der internationalen Entwicklung, Internationales Privatrecht, Kulturgüterschuty, geistiges Eigentum, Rechtsvereinheitlichung, by Trunk, 2004.

Bürgerlichen Gesetzbuch (EGBGB) which finds its applicability "if a situation is connected to the law of another country".[24] In some circumstances it may be the case when the same issue regulated in different countries in different statutes or fields of law entails dissimilar consequences.

Despite the fact that German legislation with its system constitutes the main basis and ground for Georgian legislation adopted after the collapse of Soviet Union, especially in the field of Civil Law, International Private Law and Civil Procedural Law there are some differences still remaining between the legislation of these two countries. Among others is the case with regard to the recognition of foreign judgments. As opposed to German legislation, which regulates the issue - recognition of foreign judgments – in the ZPO, the Georgian legislator has decided to deal with the issue in the IPR-Georgia enacted in 1998.

Section 68 of IPR-Georgia sets forth the precondtion for recognizing the foreign judgments in Georgia.[25] In accordance with the section 1 of IPR-Georgia: the provisions of the statute designates as the law applicable to the cases with foreign elemts as well as the procedural rules in respect of the case.[26] Unlike the German ZPO, Georgian Code of Civil Procedural Law (GCCP) remains silent regarding recognition of foreign judgments. However, the way section 68 of the IPR-Georgia prescribes the prerequisites for recognizing the foreign judgments in Georgia is quite similar to the approach of Germany.

The section 68 of the IPR-Georgia reads as follows:

1. Georgia shall recognize the valid judgments made by a foreign Court.

2. A judgment shall not be recognized if:

a) a case falls under the Georgia's exclusive jurisdiction;

b) a party was not given judicial summons or there were other procedural violations according to the law of the country where the judgment was rendered;

[24] http://www.wf-kanzlei.de/wf-info/artikel/erb-und-erbschaftsteuerrecht/egbgb-deutsch-englisch.html (last visited 21.06.2009).

[25] See infra p. 8.

[26] Cf. EGBGB section 3:
Soweit nicht
1. unmittelbar anwendbare Regelungen der Europäischen Gemeinschaft in ihrer jeweils geltenden Fassung, insbesondere die Verordnung (EG) Nr. 864/2007 des Europäischen Parlaments und des Rates vom 11. Juli 2007 („Rom II") (ABl. EU Nr. L 199 S. 40) über das auf außervertragliche Schuldverhältnisse anzuwendende Recht, oder
2. Regelungen in völkerrechtlichen Vereinbarungen, soweit sie unmittelbar anwendbares innerstaatliches Recht geworden sind, maßgeblich sind, bestimmt sich das anzuwendende Recht bei Sachverhalten mit einer Verbindung zu einem ausländischen Staat nach den Vorschriften dieses Kapitels (Internationales Privatrecht).

c) where the judgment conflicts with a Georgian judgment or with an earlier recognized foreign judgment;
d) where the courts of the country to which the foreign court belongs have no jurisdiction under Georgian law;
e) a foreign country does not recognize the Georgian Court decisions, i.e. where reciprocity is not guaranteed;
f) where the proceeding which gave rise to the foreign judgment is irreconcilable with a Georgian proceeding instituted earlier here;
g) where the recognition of the judgment would produce a result which would be irreconcilable with fundamental principles of Georgian law.[27]

On the one hand, at first sight the regulations provided by the two countries basically seem identical to each other,[28] but on the other hand, there are some details to be clarified and considered as differences.

2. The Preconditions for the Recognition in Germany and in Georgia

I. Jurisdiction

As it is apparent, German ZPO deals with determination of jurisdiction of the German courts not only on the domestic level, but also on the international level establishing the understanding of the concept of jurisdiction in international sense. This very feature of relevant section of the ZPO allows scholarly writing in Germany to consider the sections regarding jurisdiction as having double function ("*Doppelfunktion*")[29]. The sections are divided in three parts: a) the sections not manifestly regarding the international cases; b) the sections manifestly regarding the international cases; and c) the sections that are exclusively devoted to the international jurisdiction matters.[30]

As opposed to German approach, IPR-Georgia contains the part two named as "International Jurisdiction of Georgian Courts" with the sections 8, 9 and 10 providing the legal definition of concept international jurisdiction. The general determination of the concept is stipulated by the

[27] The author's translation of this source.
[28] Geimer/Schütze, Europisches Zivilverfahrensrecht, Kommentar, 2nd edition, 2004, p. 1269.
[29] Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, p. 86, par. 236.
[30] See Kropholler, Internationales Privatrecht, 6th ed., 2006, pp. 609-610.

section 8 which reads as follows: "the Georgian courts shall have the international jurisdiction if the defendant is domiciled or has statutory seat or habitual residence in Georgia."[31]

The section 9 prescribes the particular cases of the international jurisdiction concerning the disputes arisen in connection with or out of contractual relations (similar to Germany defining the significant connection as place of the performance – the section 9 (b)), torts (in this case also identically as it was in Germany before enactment of Regulation (EC) Rome II[32] stating as main factor the place where the action was committed[33] or where the damage has occurred[34] - the section 9 (c)), regarding branches (determining the domicile of the Branch as the decisive point) and etc.,.

The section 68 (2)(a) hereto sets forth that: "a judgment shall not be recognized if a case falls under the Georgia's exclusive jurisdiction." This raises the question of what the meaning of the term "exclusive jurisdiction" is. The first explanation must be provided by the law itself. Hence, section 10 of the law is named as "International Exclusive Jurisdiction". Therefore in the section 68 (2)(a) stipulated term "exclusive jurisdiction" shall be considered and construed in accordance with the section 10 as the section itself is allocated under the chapter 2 of the law named as "The International Jurisdiction of the Georgian Courts". Section 10 reads as follows:

The Georgian Courts shall have the exclusive international jurisdiction solely to the claims regarding:

a) the real property if it is located on the territory of Georgia;

b) the validity or the termination of an entity's or its body's resolutions if the entity's or its body's residence is in Georgia;

c) the registration of the legal entities by the Georgian Courts or the other authorities;

d) the registration of a patent, trademark or another right where the registration or the relevant request was made in Georgia;

e) the enforcement measures where they have been requested or taken in Georgia.[35]

[31] The author's translation of this source.
[32] See Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations – in force for Germany from 11.1.2009 instead of sections 38-42 of the EGBGB.
[33] See old version of EGBGB art. 40.
[34] The mentioned regulation examines this approach in its article 4.
[35] The author's translation of this source.

The approach stated above can be considered as a defensive measure for Georgian legal regime. It can be considered as one of the obstacles for recognizing foreign judgments in Georgia.

This means that in contrast to German approach, the provisions of GCCP dealing with the jurisdiction issues in the sections 13-24[36] do not bear the double function and are applicable only in domestic cases. Pursuant to Georgian legislation the IPR-Georgia is the special law with its special scope of regulation, therefore, the provisions of this law are applicable regarding the recognition of foreign judgments in Georgia as the provisions prevail over the provisions of GCCP.

II. Service of summons

The interesting issue is comparison between section 328 (1) No. 2 of the ZPO and the section 68 2(b) of IPR-Georgia. The wording of the ZPO is as follows: "The judgment of a foreign court shall not be recognised where the documents instigating the proceedings were not served duly on the defendant, who has not appeared in the proceedings and relies on that fact, in accordance with law ("*Ordnungsmäßigkeit"*) or was not served in such a timely manner to enable him to arrange his defence ("*Rechtszeitigkeit"*)".[37] Regarding the issue it is important to name two concepts provided by German legislator. The concepts are named as *"Ordnungsmäßigkeit"* and *"Rechtszeitigkeit"*.[38] Firstly, the very provision of German law can be considered as a source for section 27 of Brussels Convention of 1968, it has been adjusted to the article 27.[39] The requirement regarding the service of the relevant documents that it shall be served duly in accordance with law ("*Ordnungsmäßigkeit"*) or in such a timely manner to enable the defendant to arrange his defence ("*Rechtzeitigkeit"*) is construed differently in scholarly writing. On the one hand, according to Professor H. Schack for the purposes of German national law, the two

[36] See GCCP; Die Zivilprozessordnung Georgiens http://www.gtz.de/de/weltweit/europa-kaukasus-zentralasien/26450.htm (last visited: 11.07.2009).
[37] See section 328 (1) No. 2 of the ZPO.
[38] (1) Die Anerkennung des Urteils eines ausländischen Gerichts ist ausgeschlossen:
2. wenn dem Beklagten, der sich auf das Verfahren nicht eingelassen hat und sich hierauf beruft, das verfahrenseinleitende Dokument nicht ordnungsmäßig oder nicht so rechtzeitig zugestellt worden ist, dass er sich verteidigen konnte (section 328 (1) No. 2 of the ZPO).
[39] Cf. Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, par. 845; Rauscher, Europäisches Zivilprozeßrecht, Kommentar, 2nd edition, 2006, volume I, 566, par. 23; Kropholler, Europäisches Zivilprozeßrecht, kommentar, 8th edition, 2005, 421; Geimer/Schütze, Europisches Zivilverfahrensrecht, Kommentar, 2nd edition, 2004, p. 555; Magnus/Mankowski, Brussels I Regulation, 2007, p. 579; Geimer, Internationales Zivilprozeßrecht, 5th edition, 2005, pp. 911-912; Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 741. See the text of the article 27 in German: *Eine entscheidung wird nicht anerlannt: wenn dem Beklagten, der sich auf das Verfahren nicht eingelassen hat, das dieses Verfahren einleitende Schriftstück oder ein Gleichwertiges Schriftstück nicht ordnungsgemäß und nicht so rechtyeitig yugestellt worden ist, daß er sich verteidigen konnte.*

requirements - *"Ordnungsmäßigkeit"* and *"Rechtzeitigkeit"* - are not supposed to be considered as cumulative ("*kumulativ*") requirement, but on the other hand, for the purposes of the interpretation of section 27 of Brussels Convention of 1968 Professor T. Rauscher citing the ECJ decision from 1990 Lancracy/Peters stresses that the two requirements are to be satisfied cumulatively.[40] In section 34 of the Brussels I Regulation the requirement of "*Ordnungsmäßigkeit*", assessed as conflicting with the main "goal and purpose"[41] of the regulation is excluded. The section 34 (2) reads that: A judgment shall not be recognised where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

The purpose and meaning of the section 68 (2)(b) of IPR-Georgia can be considered as comparable with the above discussed German provision as the wording of the Georgian law is: A judgment shall not be recognized if a party was not given judicial summons or there were other procedural violations according to the Law of the country where the judgment was rendered. As it is apparent the Georgian law is not stipulating namely the concepts of "*Ordnungsmäßigkeit*" and *"Rechtszeitigkeit"*. It expressly states that the defendant shall be duly served in accordance with the law of first judgment country. The interpretation of the German provision is the same.[42] However the Georgian text may raise misunderstandings and difficulties for the Court of Georgia to construe the very provision in the above mentioned way:

Firstly, the ground for saying that is the wording of the provision, as a part of it reads as obstacle for recognising foreign judgment the presence of "…other procedural violations". The

[40] See EuGH Rs. Case 305/88 *Lancracy/Peters* EuGH 07.03.1990, the court held: *Art. 27 Nr. 2 GVÜ ist dahin auszulegen, daß eine im Versäumnisverfahren ergangene Entscheidung nicht anerkannt werden darf, wenn das verfahrenseinleitende Schriftstück dem Beklagten, der sich auf das Verfahren nicht eingelassen hat, nicht ordnungsgemäß, jedoch so rechtzeitig zugestellt worden ist, daß er sich verteidigen konnte.* Cf. Kropholler, Europäosches Zivilprozeßrecht, 8th edition, 2005 pp. 421-422, par. 33; Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, par. 845; Rauscher, Europäisches Zivilprozeßrecht, Kommentar, 2nd edition, 2006, volume I, 566, par. 23; However, it should be noted that inspite the fact that the term „*ordnungsmäßigkeit*" is excluded from the article 34(2) of the Brussels I Regulation, "… the regularity of service has thus not lost all relevance … the judge can thus consider that service was effected on time for the defendant to organize his defence even if he never became aware of the proceedings, *simply because service was duly affected*", " … that the defendant did not know of the proceedings is no sufficient ground for refusal when service was duly effected" (CA Luxembourg Pas. Lux. 2000, 227-234, ECJ Website № 2001/47), see in Magnus/Mankowski, Brussels I Regulation, 2007, p. 548, par. 48.

[41] Geimer/Schütze, Europisches Zivilverfahrensrecht, Kommentar, 2nd edition, 2004, p. 555.

[42] Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, par. 846.

procedural violations can be interpreted very widely; especially difficulties can arise based on the fact that the procedural violations shall be considered in accordance with the foreign law.

Secondly, as a matter of fact, there is a lack of case law[43] devoted to the subject in Georgian jurisprudence and it makes difficult to find real interpretation of the Georgian provision.

And finally, it is worth noting that Georgia is not the contracting state of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 Nov. 1965.[44]

III. Conflicting Judgments and Lis Pendens

A foreign judgment to be recognized may include a subject matter that has already been the subject of other litigation in another court. The conflicting judgments on the same matter rendered by different courts and arisen between the same parties bring the problem of which has to be recognized.[45] "Whereas the problem of conflicting judgments was once considered to be within the realm of public policy,[46] it is now discussed to be a barrier to recognition".[47] Several approaches for the possible solutions are provided by the different doctrines. The United States favors the later judgment relying on the assumption that it could be decided on "better", or more current and recent facts.[48] As opposed to the Unites States, where the main concept is so called the "last-in-time rule"[49] the judgment rendered first prevails in Germany, this meaning is provided by the section 328 (1) No. 3 of the ZPO. A foreign judgment is not recognizable if it would conflict with the decision of a German court regarding the case with the same subject matter, between the same parties. In order to eliminate any incentive for the plaintiff to begin a second proceeding in another state, the "first-in-time" rule was established in German doctrine, the underlining assumption of which is " … that in parallel proceedings, priority should be given to the first judgment".[50]

---

43 See supra n. 31.
44 See for the details regarding the convention Practical Handbook on the Operation of the Hague Service Convention, Permanent Bureau of the Hague Conference on Private International Law, 2006.
45 Cf. Dieter Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 743; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 185.
46 Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 743.
47 Ibid.
48 *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939).
49 Cf. Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, par. 856; Hay, US-Amerikanisches Recht, 3rd edition 2005, par. 211.
50 Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 185.

Regarding domestic German cases there is a certain national provision concerning "lis pendens" in connection with recognition of foreign judgments in accordance with section 328 No. 3 of the ZPO. The section 261 (3) No. 1 of the ZPO provides that the case pending before another court based on an earlier filed action shall bar the adjudication by the second court. This approach in Germany is extended to the recognition of foreign judgments according to section 328 (1) No. 3 of the ZPO.[51] Hence, foreign courts are required not to disregard "lis pendens" proceedings pending in German courts due to ensure the recognition or enforcement of their judgments before German court, as foreign judgments are not recognizable if the proceeding conflict with ("*unvereinbar*") the proceedings established before that in Germany.[52]

Regarding the discussed issue, it has to be stated that Georgian legislation is drafted in accordance with the German one. Only difference is the technique of regulation. German ZPO prescribes the above considered approach in the one section 328 (1) No. 3, while the Georgian legislator achieves the equality with the German provision splitting the requirements of the section 328 (1) No. 3 in two parts. Namely, the section 68 (1) (c) (where the judgment conflicts with a Georgian judgment or with an earlier recognizable foreign judgment) and (f) (where the proceeding which gave rise to the foreign judgment is irreconcilable with a Georgian proceeding instituted earlier here) of the IPR-Georgia together are comparable to the German understanding of the point.

IV. Public Policy in Georgian Legislation

The concept of public policy is well-known for the Georgian legislation. Similar to the German approach, the Georgian law even includes the special norms in the several statutes laying out the separate sections regarding the public policy reservation. As an example can be provided section 5 (Public Policy, Public Order) of the IPR-Georgia stipulating that: *the norms of a foreign country shall not be applied in Georgia if this* [i.e. the application of the foreign country's norms] *is irreconcilable with fundamental legal principles of Georgia.*

Firstly it must be stated, that as opposed to the German law, which differentiates between the national Public Order (section 6 EGBGB) and the Public Order concerning the recognition and

[51] Cf. Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 744; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 185.
[52] Ibid.

enforcement of foreign Judgments (section 328 (1) No. 4. ZPO.)[53], the Georgian law does not prescribe the distinctive understanding of the Public Order, defining the concept only on the national level.

At first glance the Georgian provision sounds identical to the section 6 of the German EGBGB.[54] However, it should be noted that the Georgian legislator has not included the term as "manifestly" ("*offensichtlich*") and the Georgian text is not clearly expressing whether it is based on the negative doctrine (German approach) of public order or on the positive understanding of the public policy (French-Italian approach),[55] but nevertheless, the language of the section 5 gives right to consider it as examining the approach as Germany does, in particular, the Georgian legislator speaks about the consequences of the application of foreign law leading to the irreconcilability with the Georgian fundamental legal principles. This conclusion and assessment can be derived from the sections 63(4), 64(a) and mentioned 68(2)(g) of the IPR-Georgia.

The section 64(a) dealing with the topic of foreign court's motion asking for legal assistance (aid) from the Georgian courts prescribes that the legal assistance (aid) shall not be provided where the satisfaction of the foreign court's motion would lead to the infringement of the Georgian fundamental legal principles.

The mentioned section 68(2)(g) read and construed with the section 5 (Public Order) carries an equivalent meaning of the section 328 (1) No. 4 of the ZPO. However, it is worth noting regarding the similarity of the section 68(2)(g) and section 328 (1) No. 4 of the ZPO that there is no clearly defined destinction between understanding of public policy in substantive law and public policy in procedural law provided by the Georgian law (the sections 68(2)(g) and 5 (Public Order)). Although the very separation does not derive from the plain text of the relevant German law provisions too (section 328 (1) No. 4 of the ZPO and section 6 of the EGBGB). It is a result of interpretation of the Courts. Hence, the Georgian legislator's language regarding the issue is quite widely understandable, as it sets forth the terms "… fundamental legal principles of Georgia …".[56] Therefore under the terms fundamental legal principles can be understood as legal

[53] Zöller, ZPO, 27th edition, 2009, p. 1122, par. 211, see Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, p. 297, par. 861.
[54] See EGBGB section 6: "Eine Rechtsnorm eines anderen Staates ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist".
[55] Martiny, Handbuch des Internationalen Zivilverfahrensrecht, III/1, 1984, pp. 444-445, par. 976-978.
[56] Cf. sections 68 (2) (g) and 5 of the IPR-Georgia.

principles of every field of Georgian law of course among constitutional law principles including the procedural law of Georgia too.

Arguing from the point of legislation the same idea can be stated when construing the section 2 (4) of the Civil Code of Georgia (CCG) which stipulates that: *customary norms shall be applied only if they do not contravene universally recognized principles of justice and morality, or the public order.*[57]

Even more is possible to say about the issue; in particular, the section 63(4) of the IPR-Georgia goes further and makes the mentioned interpretation regarding the public policy in procedural law, as covered by the relevant Georgian provisions establishing the understanding of the public order. The section reads that if concerning the legal assistance (aid) the foreign court files the motion to the Georgian court asking to apply its procedural rule(s) in proceedings, the procedural provisions of the foreign Law may be applied in the proceedings unless they are in conflict with the fundamental legal principles of Georgia. Accordingly, this very provision expressly prescribes the public policy in procedural law using the same term - "fundamental legal principles of Georgia" – as applied by the mentioned sections 5, 64(a) and 68 (2) (g).[58]

IPR-Georgia even contains the reservation that could be considered as similar to the "Overriding mandatory provisions" provided by Rome I[59] and Rome II. Georgian legislator uses the term "imperative" instead of "mandatory". Section 6 of the IPR-Georgia provides that: "This law shall not restrict the application of the imperative provisions of Georgian law irrespective of the law otherwise applicable to the case".

Hence, the provided discussions concerning the regulation of the public policy on the level of Georgian legislation shows that the main grounds and principles are intended to be in accordance with the German understanding of the issue. At least, the functional considerations and interpretations give possibility to state that. Therefore, it is relevant for the Georgian courts, waiting for the future coming cases regarding recognition of foreign money judgments in Georgia, to follow the developments of German approach.

---

[57] See the Civil Code of Georgia in English published by Bakur Sulakauri Publishing and United States Agency for International Development (USAID) through IRIS Center at the Univeristy of Maryland, (Translated by I.Gabriadze) p. 11.

[58] However worth noting is the article 4(2) of the civil code of Georgia bearing the particular practical purpose for Georgia as legal transformation country which reads that: "*a court may not refuse to apply a law on the grounds that in its opinion a norm of the law is unjust or immoral*". The allocation of the provision in Civil Code is criticized from the systematic point of view; see Kereselidze, *Introductory Provisions of the Civil Code*, 2004, Georgian Law Review – vol. 7. N 1.2004, p. 22.

[59] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.

V. The Reciprocity

There are countries recognising only the judgments rendered by the court of that country with which the recognising country has reciprocity garuanteed. The underlining assumption behind the concept of reciprocity is that two nations agree to recognise the judgments of each other in accordance with the same conditions.[60] There is no reciprocity requirement on the federal level, for instant, in the United States. Only a few states require reciprocity. The Uniform Foreign-Money Judgments Recognition Act adopted by more than 30 states sets forth no requirement on reciprocity.[61]

On the other hand, in Germany the reciprocity principle is considered as a prerequisite for recognition of foreign money judgments. Although, there is no definition derived from the German legislator, the room for interpretation and determination is left to the German courts.[62]

This very requirement in Germany was stronger in the beginning of 20th century. The precondition has served for along time as a real obstacle for recognizing US-judgments in Germany. In 1907, because of lack of assurance of reciprocity between Germany and state of California the German Imperial Court denied the recognition of Californian Courts default judgment obtained by the parties damaged in the 1906 San Francisco earthquake. The German court held that the California statute authorized the California courts with wider review powers in contrast to German courts.[63] However, the decision of the Court was broadly criticized as holding the requirement of having the different countries practically with an identical approach to the subject and similar regulation of the matter unfair. It is even impossible to maintain the identity from country to country on each level of legal relations.[64] The request for abolition of the reciprocity requirement has been gaining in strength.[65] The requirement of reciprocity can harm every citizen, irrespective of German or any other, as the German law does not contain the

---

[60] Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 186.

[61] Cf. Schütze, Ausgewählte Probleme des internationalen Zivilprozessrechts, 2006, *Aktuelle Fragen der Anerkennung und Vollstreckbarerklährung von US-amerikanischen Schiedssprüchen und Gerichtsurteilen in Deutschland*, p. 350. Lowenfeld, International Litigation and Arbitration, 3rd edition, 2006, p. 544.

[62] Cf. Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 751; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 186.

[63] See Imperial Court Decision – Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 70, 434; Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, pp. 302-303, par. 872.

[64] Cf. Schütze, Ausgewählte Probleme des internationalen Zivilprozessrechts, 2006, *Zur partiellen Verbürgung der Gegenseitigkeit bei der Anerkennung ausländischer Zivilurteil,* pp. 328-337, p. 329; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 187; Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 70, 434; Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, par. 872.

[65] Cf. Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & Com. 1993-1994, p.223; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 187.

distinctive regulations according to the different nationalities.[66] It is true that despite the strong criticism prescribed by the scholarly writing the text of the section 328 (1) No. 5 still contains the requirement hereto, but it is worth mentioning that nevertheless, the criticism achieved its substantial goal which has found its reflection in the following decisions awarded by the German courts containing the very soft interpretations of the reciprocity requirement. This tendency has brought the situation to the approach where the existence of reciprocity is assumed by the courts without requiring any kind of special guarantee that the first judgment court will recognize the German judgments and there is no requirement that the first judgment state has to already have recognized a German decision. The fact proving the significant relaxation of the reciprocity requirement by the German court is the approach according to which there is no more requirement derived by the German courts regarding recognition of German judgments under the same conditions required by the German law.[67]

It can be stated that to some extent, this approach has given the possibility to Professor R.Kniper, despite the fact that there was no case law regarding recognition and enforcement of foreign judgments between Germany and Georgia,[68] to state that the reciprocity between the two countries is guaranteed.[69] However, the judgments of countries whose law allows revision on the merits ("*révision au fond*") are not recognizable.[70]

As provided above, the section 68 (2) (e) of the IPR-Georgia contains requirement that reciprocity must be guaranteed, but however there is no case law devoted to the subject and similar to German approach the legislator has not determined the concept of reciprocity. In this very field, similar to others mentioned above, it is significant for Georgian courts to follow the recent developments the modern liberal approach acknowledges in the international transborder litigations. The reciprocity requirement is the concept that has to be considered and applied very carefully, as the facts and considerations stated above clearly shows that this requirement can serve as an obstacle to international cooperation.[71] The private parties, who have litigated fairly

[66] Cf. Schack, Internationales Zivilverfahrensrecht, 4th edition, 2006, par. 872; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 187.
[67] Cf. Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 750; Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 2005, p. 187.
[68] In 2008 the supreme court of Georgia rendered two decisions No a-2230-sh-7104, 11.02.2008 and No. a-300-sh-19-08 19.03.2008 recognising German judgments in Georgia in Family law cases.
[69] See in Geimer/Schütze, Europisches Zivilverfahrensrecht, Kommentar, 2nd edition, 2004, p. 1268, par.164.
[70] Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 750.
[71] Martiny, *Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,* 35 Am. J. Comp. L. 1987, p. 749.

should not suffer because of the failure of their governments to have agreed to assure reciprocity. Thus, Georgia has to employ more liberal approach to the issue than Germany does, in order to fascilitate the transborder litigation process. The preconditions such as "jurisdiction" and "Public Policy" can ensure the defence of the recognising Countrie's interest.

3. Conclusion

The considerations developed in the article illustrate, that the Georgian legislator attempts to achieve the similar approach as the German one does. However, there are differences in the structures of the legal systems and in the technique of the regulations.

The comparison of the relevant sections of Georgian and German legislation regarding recognition of foreign judgments demonstrates that there are systematic differences. The issues are regulated in different legal acts with the different regulative purposes.[72] However, the detailed consideration of relevant sections brings their content close to each other. For example, the term and meaning of "exclusive jurisdiction" as an obstacle for the recognition is provided by the Georgian law among the other prerequisites for the recognition, while the German ZPO regulates it separately giving the sections "double function".

The state of circumstances is identical to the above considered service of summons. It is true, that Georgian law does not expressly contain the concepts of "*Ordnungsmäßigkeit"* and "*Rechtzeitigkeit"*, but the general idea, derived impliedly from Georgian law is similar to German one. The only aspect to be noted in this context is that it is necessary for Georgia to become contracting party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 Nov. 1965.

Despite the lack of significant interpretations of Georgian courts regarding the reciprocity concept, the range of the above mentioned similarities between German and Georgian legislations allows one to state that the understanding of reciprocity in Georgia should not be considered beyond the scopes of the German approach. Even more, Georgia has to employ more liberal approach. Therefore it is highly predictable that the reciprocity requirement would not impede the recognition of foreign money judgments in Georgia.

[72] Cf. ZPO section 328 and IPR-Georgia section 68.

On the one hand, the Georgian law does not differentiate the understanding of the Public Policy in the national law from its meaning regarding the cases of recognition of foreign judgments. But, on the other hand, the plain text and interpretation of appropriate sections of IPR-Georgia makes it possible to think that the Georgian law is familiar with the distinction between the public policy in substantive law and in procedural law. The approach of Georgian courts must be developed case by case according to the German one in order to achieve the unity and predictability regarding the issue, which is valuable for the evolution of the countries' economy and justice, especially when the Georgian understanding of the national Public Policy concept is near to the German concept.

After demonstrating the wide range of similarities between Georgian and German recognition regulations it is possible to stress that fundamental principles of Georgian IZPR are allocated under the IPR-Georgia while the German understanding of the field IZPR derives mainly from the ZPO.[73]

The above analysis justifies assessing the degree of readiness and predictability of Georgian law and Georgian courts for the recognition of future foreign money judgments in Georgia on a quite reasonable level. There is wide scope left to the courts for the interpretations and the courts must treat the issues very carefully in order to achieve high standard of unified approach.

[73] See sections 68, 5, 63, 64 of the IPR-Georgia.