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PART XIV

CROSS-BORDER AND INTERNATIONAL DIMENSIONS

CHAPTER 7

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

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1 INTRODUCTION TO THE CHAPTER

1 This chapter deals with the recognition and enforcement of foreign judgments: that is to say, with the procedures and conditions leading to the acknowledgment of the legal force and binding procedural effects of a decision (recognition) and/or to the forced execution of a (previously recognized) decision (enforcement).

2 The chapter follows a comparative approach. Recent scholarly publications compile and analyse national systems providing precious information on said systems.[1] Our intention has not been to reproduce or summarize these materials: those who wish to delve deeper into the existing solutions in a given national jurisdiction have these studies available. In relation to this chapter, they have served as background allowing to identify characteristic features of the recognition and enforcement of foreign decisions, with the purpose to study them, in a second step, in relation to a number of selected international instruments.

3 Most jurisdictions agree to recognize the (or some of the) effects of foreign decisions, and to enforce them on their territory. The 'import' of a foreign decision usually takes place upon application of the judgment debtor through a procedure where some conditions are checked. At first sight, both the procedures and the conditions present many similarities across jurisdictions. This impression of uniformity is actually a mirage. If most fora accept to receive and support the enforcement of decisions produced by foreign courts or authorities, not all do so for the same reasons nor to the same extent or in the same manner. While the mechanisms applied to recognize and enforce a foreign decision are nominally the same everywhere, they differ in the details from one jurisdiction to another. In a similar vein, recognition and enforcement depend upon

[1] Already in 2013, R F Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press 2013) Part VI, for Commonwealth Africa, and more recently, A Moran and A Kennedy, *Commercial Litigation in Anglophone Africa* (Juta 2022). See as well A Reyes, *Recognition and Enforcement of Judgments in Civil and Commercial Matters,* Studies in Private International Law – Asia (Hart Publishing 2019), for fifteen Asian States; covering the ASEAN Member States, as well as Australia, China, India, Japan and South Korea, A Chong, *Recognition and enforcement of foreign judgments in Asia* (Research Collection School of Law 2017). For Indonesia, A Kusumadara, *Indonesian Private International Law* (Hart Publishing 2021); for India, S Jolly and K Saloni, *Indian Private International Law,* Studies in Private International Law – Asia (Hart Publishing 2021). Regarding Europe and European countries, see V Rijavec, K Drnovsek, R van Rhee, *Cross-border enforcement in Europe: national and international perspectives* (Larcier Intersentia 2020). Although not focusing on singular national systems, see as well A Yekini, *The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective* (Hart Publishing 2021), and D Stamboulakis, *Comparative Recognition and Enforcement* (Cambridge University Press 2022). Two recent courses from the Hague Academy deserve as well a special mention: G Cuniberti, *Le fondement de l'effet des jugements étrangers* (Collected Courses of the Hague Academy of International Law vol 394, Brill | Nijhoff 2019); and M Weller, *Mutual Trust: A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?* (Collected Courses of the Hague Academy of International Law vol 423, Brill | Nijhoff 2022). It should be noted, though, that information is lacking almost entirely regarding some legal systems, especially in Africa, due to the absence of scholars' publications on the matter, and of the pertinent case law.

conditions which can be described as 'classical', both because they go back in time and because they tend to be formulated alike across jurisdictions.[2] However, each legal system is free to impose them or nor; in addition, the understanding of the formally analogous requirements is not necessarily uniform. In short, the first impression of standardization fades quickly, superseded by one of plurality of solutions and interpretations. It could hardly be otherwise: the provisions on recognition and enforcement belong to a given legal system and must be consistent with it. Of course, history and the social and economic contexts in which these rules are conceived and must be applied vary as well.

4 This chapter reflects the above already from its structure. After a first section addressing the rationales underpinning recognition and enforcement, and the sources of regulation, a second part focuses on a number of specific legal systems.[3] Section II is divided into headings, and these into subheadings, designed around the common elements above mentioned. Diversity appears at a second step, within each heading and at the level of the examples. The latter are taken from conventions, international agreements or (in the European Union) regulations, ie, instruments in force for a group of States, or intended to become so for a number of jurisdictions, or to serve as a model for the reform and modernization of existing national rules, fostering at the same time their convergence. They are hence examples of attempts at legal unification or harmonization in the field of recognition and enforcement. Taken separately, each of them shows the limits of the success of the endeavor; seen through the lenses of comparison, the differences become evident.

5 The option for instruments on recognition and enforcement of a conventional or supranational nature or, where appropriate, model instruments, is not arbitrary. A comparison of all existing national legal systems would have been impossible. By contrast, our choice allows focusing on texts representative of the will of States which, mainly for economic reasons, but also due to geographical, political, or even religious proximity, get together in order to facilitate mutual judicial cooperation. It also reveals

[2] The review of the international jurisdiction of the judge of origin, as well as the requirements of conformity to the forum's public policy, finality and authenticity of the foreign decision, appear already in multilateral and bilateral agreements and in national codifications of procedural law of the nineteenth century. See, for instance, Art 56 of the Convention internationale sur le transport de marchandises par chemin de fer, signée à Berne, le 14 octobre 1890, among Austria (then Austria-Hungary) Belgium, France, Germany, Italy, the Netherlands, Luxembourg, Russia and Switzerland; Art 11 Convention entre la Belgique et la France sur la compétence judiciaire, sur l'autorité et l'exécution des décisions judiciaires, des sentences arbitrales et des actes authentiques, signée à Paris le 8 juillet 1899; Art 941 Italian Procedural Code 1865 ; Art 10 Loi belge sur la compétence du 25 mars 1876.

[3] What the chosen instruments are and the reasons for the choice is detailed below, 'Sources of regulation', paragraph 32 ff.

the outer limits of this consensus[4] and, ultimately, provides an indicator of the level of harmonization in the matter.[5]

6 The chapter addresses the recognition and enforcement of foreign judgments in civil and commercial disputes; the category does not cover personal status, family, succession or insolvency matters.[6] Decisions on non-contentious proceedings[7] are excluded; so are arbitral awards.[8] In the chapter, the expression 'originating State' or 'State of origin' designates the jurisdiction where a judgment is handed down; 'requested' or 'destination State', the jurisdiction of recognition or enforcement.

2 SECTION I

2.1 Rationales and Foundations of the Recognition and Enforcement of Foreign Judgments

2.1.1 Absence of International Constraints

7 In today's economic and social context, cross-border civil and commercial exchanges are as common as domestic ones. It is perfectly reasonable to expect that a decision ending a dispute related to those exchanges in one jurisdiction will be valid in another, so that it is not necessary to repeat or duplicate the process. However, judgments are official acts of the judicial arm of a sovereign State, thus manifestations of sovereign power; per definition, their force is geographically limited to the territory of the delivering State.

[4] Starting already at the level of the subject matters covered: the material scope of application of each instrument reflects the reach of the consensus. This is particularly relevant regarding the Hague Convention 2019, given the large number of civil and commercial disputes excluded.

[5] Admittedly, the choice has its downsides. There is little guidance as to how said instruments work in practice in each contracting party or Member State; research would require a titanic effort as no repository exists to date compiling the national decisions on any of the instruments. In addition, comparison of the texts alone just offers a partial picture: firstly, because they apply in the context of national systems; secondly, because they need to be supplemented by national law to one extent or another.

[6] It should be noted from the outset that this delimitation does not correspond to the material scope of application of the legal texts selected for the purposes of comparison. A more precise definition of 'civil and commercial' matters is however not possible. All legal texts under examination here fail short of defining the category. Depending on the text, it is narrow (specific matters whose 'civil or commercial' nature as such is undisputed are excluded for otherwise no political agreement would have been reached), or broad (the rules on recognition and enforcement apply to decisions rendered in labor and administrative proceedings; it cannot be excluded that said labour or administrative decisions are considered as pertaining to the 'civil and commercial' category under other instruments).

[7] That is, where the intervening authority has not the power to rule of his own motion on possible points of contention between the parties. Of the legal texts analysed, only the CEMAC Agreement refers openly to foreign 'décisions gracieuses', and includes them under the scope of its Title V ('De l'exequatur').

[8] So are authentic documents and settlements. Under some of the texts under examination in this chapter authentic documents and settlements enforceable in the State of origin are entitled to circulate outside the jurisdiction where they have been created, in principle under the conditions applicable to judgments. However, just like it happens with arbitral awards, some specific features may have required separate explanations.

Cross-border circulation of judicial decisions in civil and commercial matters is not a given. There is no universal principle imposing the recognition and enforcement of foreign decisions; not even a universal principle of *favor recognitionis*. This is mainly due to a lack of confidence of the States in each other's legal system. Indeed, countries may have different understandings of public policy and due process; the independence and legal ability of a foreign judiciary cannot be taken for granted.

8 Whether, and how much, a judgment will be given effects in a different jurisdiction is a policy decision. Under Public International Law, each nation is free to commit to cooperation with other nations by becoming a member of an organization where, in order to foster trade and economic exchange, rules on recognition and enforcement have been adopted; equally free to assume recognition and enforcement obligations by ratifying bilateral or multilateral treaties; and free to unilaterally adopt the political decision to cooperate, or the opposite one. In other words, States are not under a duty, external to them, to recognize or enforce the judgments of other States.[9]

9 Recent studies show nevertheless that, if only for self-interest reasons,[10] almost all existing nations[11] accept that foreign decisions have some kind of legal value as such: that is to say, not only as facts or as authentic deeds to which evidential value can be accorded in relation, at the very least, to the existence of a claim. Systems differ widely, though. Whether or not to legislate to this purpose and, in particular, to do so in agreement with other States, depends on many factors: not even the goal of commercial or economic integration has always been enough to boost judicial cooperation in civil matters.

2.1.2 Rationales

10 This heading refers to the reasons why a State agrees to recognize and enforce in its territory a judgment made by a foreign judge or court. By 'reasons' we mean the motives underpinning a national legislator's policy decision to recognize and enforce, and not the requirements which, when met, make recognition and enforcement possible in a given

[9] H L Ho, 'Policies underlying the enforcement of foreign commercial judgments' (1997) 46(2) International and Comparative Law Quarterly (Cambridge University Press) 443, 449, 'the making of an independent choice whether for or against enforcement of a foreign judgment is an assertion, not a compromise, of internal sovereignty'. Recalling the absence of customary law, R Michaels, 'Recognition and Enforcement of Foreign Judgments' in Wolfrum R, *Max Planck Encyclopedia of Public International Law* (2009), 11.

[10] Ho (n 9) 454, summarizes it: 'If we do not enforce the judgment of a court in a foreign State, it might retaliate by not enforcing our judgments'.

[11] Indonesia is usually quoted as a jurisdiction where recognition and enforcement do not take place in the absence of a treaty, which is still to be signed: A Chong, 'Moving towards harmonisation in the recognition and enforcement of foreign judgments rules in Asia' (2020) 16(1) Journal of Private International Law 31, 35, 38-39. In detail, Kusumadara and other (n 1), Chapter 4.

case. However, the distinction is not always easy: reciprocity, in particular, can be conceived as a reason to grant recognition or as a condition for it.

11 Previous studies attempting to systematize the foundations of the 'import' of foreign decisions make it clear that there is no single, universally valid rationale. In what follows we offer a summary,[12] preceded by the (admittedly unnecessary caveat) that the arguments are combined differently and bear a different weight depending on the jurisdiction under examination.[13]

2.1.2.1 Economic Rationale

12 It is certainly correct to assume that the willingness of a sovereign State to recognize and enforce the decisions of another always corresponds, to an extent or another, to an economic rationality, in the interest of the parties, or in general. This logic can be autonomous (to avoid a second process on the same dispute), or accessory to another one (supporting commercial exchanges; possibly, encouraging investment). Often, there is a combination of both. At its core, the rationale is pragmatic: after all, an unwillingness to recognize and to support the enforcement of a foreign decision entails the risk of re-litigation costs and of irreconcilable decisions, and uncertainty, which in turn deters private actors from entering into transnational business. A negative approach to foreign decisions hampers cross-border trade, for it requires the support of effective mechanisms for dispute resolution. If there is a wish to impulse cross-border commercial exchanges, it must be coupled with a will to accept and implement the product of foreign adjudication.[14]

13 The bond between investment/economic integration and enhanced international judicial cooperation in civil and commercial matters is a reality as far as the EU is concerned. Scholars are more reluctant to assert it in other contexts.[15] Weller's starting theory in his Hague Lecture is that market integration pushes for developing judicial

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[12] For a deep analysis we refer to Cuniberti (n 1). In the past, covering common and civil law jurisdictions, see A T von Mehren and D T Trautman, 'Recognition of Foreign Adjudication. A Survey and a Suggested Approach' (1968) 81 Harvard Law Review 1601. Other texts of interest are Ho (n 9); B Elbati, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments: A lot of Bark but not much Bite' (2017) 13(1) Journal of Private International Law 184; Yekini (n 1) Chapter 2.

[13] See for instance Stamboulakis (n 1) 92 ff, on the rationales underlying common law recognition and enforcement, starting from comity and analysing its relationship with other theoretical underpinnings (reciprocity, the doctrine of obligation, concerns with respect for the administration of justice). The author highlights the divergence in approach amongst common law States, and concludes at 107 that there is no 'universally accepted or singular rationale or policy for giving effect to foreign judgements'.

[14] The argument goes back to the past: as Ho (n 9) 458, recalls, it was the maritime expansion of the seventeenth century that first created the demand for enforcement of foreign judgments in England.

[15] A Reyes, 'Introduction' in Reyes (n 1) 6, points out he has not found empirical evidence of the relationship between foreign investment and liberalization of a country's law on the recognition and enforcement of foreign judgments. It is nevertheless sound to believe that, like all steps tending to reduce costs of litigation and to facilitate enforcement, a simple and swift system to 'import' foreign decisions favours doing business abroad.

cooperation:[16] taking, among other, the South American case, he correctly concludes that, in fact, this is not always the case. Conceptually, though, the hypothesis is right: conventions and protocols have been adopted among South American countries; their limited success is more likely due to political instability and economic underdevelopment.

2.1.2.2 Legal Rationale

14 From a legal perspective, it is possible to distinguish two logics underpinning the recognition and enforcement of foreign decisions: one focuses primarily on the parties, the other adopts an international public law perspective, or, more widely, looks at the relations between sovereign States.

2.1.2.2.1 Parties' Rights-Based Approach

15 The recognition and enforcement of a foreign decision may be a concession to the fact that said decision creates rights for the parties. In this context, there are two variants: one, traditionally followed for money judgments in common law jurisdictions,[17] is the so-called 'doctrine of obligation.[18] According to it, foreign judgments cannot deploy effect in the forum unless the judgment debtor owes an obligation to the judgment creditor under the laws of the originating State. The foreign decision constitutes a new cause of action in the requested State; the judgment creditor files a claim against the judgment debtor for a debt corresponding to the one owed under the foreign decision in order to obtain a new local judgment to be enforced by execution.

16 The second perspective associates recognition and enforcement to the vested rights doctrine, but also with the right to effective judicial protection. While the former explanation is based on substance (and on the expectations of the parties), the latter is procedural in essence. It is worth noticing that understanding the recognition and enforcement of a foreign decision as pertaining to the right of access to the courts means, at least in some systems, giving it a constitutional dimension as part of a fundamental right of the individual.[19]

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[16] Weller (n 1).

[17] The mechanism goes back to two 1870 decisions rendered by the Queen's Bench: *Godard v Gray* (Court of Queen's Bench, England), Judgment 10 December 1870 [L. R. 6 Q.B. 139]; and *Schibsby v Westenholz* (Court of Queen's Bench, England), Judgment 10 December 1870 [L. R. 6 Q.B. 155]. Cuniberti (n 1) 81, provides case law of other jurisdictions.

[18] A Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 Law and Quarterly Review 87.

[19] Cuniberti (n 1) 63 ff, on Art 6 of the European Convention of Human Rights and denial of exequatur. In the same lines see Art 20, paragraph 1 of the Resolution on Private International Law and Human Rights of the Institut de Droit International, held online in 2021 (https://www.idi-iil.org/app/uploads/2021/09/2021_online_04_en.pdf, accessed August 2024).

2.1.2.2.2 States-Based Approach

17 From the perspective of public international law (more precisely, relations between sovereign States), recognition and enforcement of foreign judgments is typically explained in terms of comity and reciprocity.

2.1.2.2.2.1 Comity

18 In Private International Law, the comity rationale is associated, on the one hand, with the XVIIth century and the figure of U. Huber; on the other, with the US Supreme Court decision of 1895 *Hilton v Guyot*, and the famous statement of Grey J.[20] After all these years, the debate around what comity is, whether it entails an obligation to recognize foreign decisions or not, or its relation to reciprocity, has not come to and. Neither has the criticism against the comity doctrine, which leaves recognition and enforcement of a foreign judgment at the discretion of the requested court.[21] Be it as it may, in practice, comity works today as a ground underpinning a (unilaterally adopted) decision to recognize and enforce a foreign judgment, in particular in common law jurisdictions. International comity combined with an economic rationale -the 'need in modern times to facilitate the flow of wealth, skills and people across state-lines in a fair and orderly manner'- accounts for the expansion of the scope of recognition of foreign judgments at the beginning of the millennium in the common law provinces in Canada.[22] Also, courts in the Cayman Islands, Guernsey and Australia have recently resorted to comity to enforce non-money judgments, departing from the common law.[23] Scholars refer to Philippines case law as unique in Asia in that it emphasizes 'comity', rather than 'reciprocity', as the basis for recognition and enforcement.[24]

2.1.2.2.2.2 Reciprocity

19 Surprising as it may be, reciprocity, an argument of a political rather than of a legal nature, remains largely the source of the policy decision to recognize and enforce foreign judgments (or the opposite).

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[20] *Hilton v Guyot*, No 130, 34 (Supreme Court, US) [159 U.S. 113 (1895)] '*Comity*, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'

[21] W L M Reese, 'The Status in This Country of Judgments Rendered Abroad' (1950) 50(6) Columbia Law Review 783, 784; von Mehren and Trautman (n 12) 1603; A Briggs, *The Principle of Comity in Private International Law*, Collected Courses of the Hague Academy of International Law, vol 354 (Brill | Nijhoff 2012) 145-147, on the limited explanatory power of comity.

[22] Following *Beals v Saldanha*, Case 28829 (Supreme Court of Canada), Judgement 18 December 2018 [2003 SCC 72].

[23] Yekini (n 1) 28.

[24] Reyes (n 1) 318-319.

20 Reciprocity does not belong to the past, in spite of the numerous criticisms it raises both at a practical and theoretical level. Proving reciprocity is costly and difficult. Reciprocity authorizes refusing recognition and enforcement of a foreign decision even if, as such, it is correct. It hence works as a measure of retaliation, a fact that looks disproportionate given the stakes in civil and commercial matters (at least, where only private parties are involved). It is also unfair towards the litigants, who are penalized for positions taken by governments.[25] The expectations that, by conditioning recognition and enforcement of foreign decisions to reciprocity, reluctant States would modify their attitude, have not been met.[26]

21 The reciprocity rationale works both for international and domestic regimes.[27] However, its role differs depending on the jurisdiction under consideration. Sometimes it is the key to recognition and enforcement, while others it is (*de jure* or *de facto*)[28] only residual. In some systems, the reciprocity requirement does not extend to the conditions the foreign decision must meet. It does in others: reciprocity determines thus *if* a foreign judgment will be imported and *how* it will imported, the receiving State making recognition and enforcement dependent upon the same conditions that, in the State of origin of the judgment at stake, would be requested of its own decisions.

22 The divergence alluded to exist even among jurisdictions belonging to the same legal family, like the Commonwealth countries:[29] while most members still rely on reciprocity,

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[25] Claiming reciprocity is unconstitutional in Japan for this reason, see Y Okuda, 'Unconstitutionality of Reciprocity Requirement for Recognition and Enforcement of Foreign Judgments in Japan' (2018) 13(2) Frontiers Law China 159, 168 ff.

[26] See A Bonomi, 'New Challenges in the Context of Recognition and Enforcement of Judgments' in F Ferrari, D P Fernández Arroyo, *Private International Law* (Elgar 2019) 390, 401 with further references. Reciprocity has nevertheless helped recognition of foreign judgments in China, below paragraph 24. Noticing a 'change of attitude from the erstwhile restrictive regime', Yekini (n. 1), 35, refers to the recognition in Russia of judgments from the UK, the Netherlands, Germany and Japan on grounds of reciprocity.

[27] On how reciprocity developed in domestic law see F K Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' in F K Juenger, *Selected Essays on the Conflict of Laws* (Brill | Nijhoff 2000) (reprint from 1988 The American Journal of Comparative Law) 281, 287-288: 'To condition recognition on reciprocity must have seemed logical once nations began to enter into treaties for the mutual enforcement of judgments. At that point, it became apparent that what a formal international compact might do could also be accomplished by means of a unilateral policy to honor judgments from states that were prepared to enforce those of the forum'.

[28] *'De facto'* means that in practice the reciprocity requirement is ignored by the courts. This used to be the case in Spain under Art 951 of the Ley de Enjuiciamiento civil 1889, in view of the difficulties parties faced to prove reciprocity.

[29] Because common law enforcement can be quite time-consuming and expensive, a more streamlined process for enforcing judgments was created in Commonwealth States by way of 'reciprocal enforcement of judgments' legislation, following the UK model. The statutory registration scheme applies mostly within the Commonwealth; some members have extended it to other States through bilateral treaties. It is worth noticing that the Commonwealth Model Law Act 2017 does not rely on reciprocity.

others do not.[30] Referring to the national systems of the Association of Southeast Asian Nations (ASEAN) countries, scholars highlight the unclearness of the concept and its different scope depending on the jurisdiction at stake.[31] In a number of Arab countries, reciprocity is just a condition among others, while in some other Arab jurisdictions, it means 'equal treatment': the recognition and enforcement of a foreign judgment will be subjected to the same conditions applied in the State of origin to those from the requested State.[32]

23 Reciprocity is not a requirement of recognition and enforcement between EU Member States. However, it is used differently when it comes to third States. In Austria, procedural law (sec 406 of the Enforcement Act)[33] does not permit the recognition of judgments from third States unless there is a multilateral or bilateral treaty (principle of strict reciprocity). By contrast, in Germany, para 328(1) no 5 German CCP, only requires 'practical reciprocity', i.e. the proof that German judgments are recognized in the requesting State by case-law thus not formally requiring any international treaty. Under Section 15 of the Czech Republic 91/2012 Coll. Act, dated 25th January 2012, governing private international law, reciprocity is not required if the foreign judgment is not aimed at a citizen of the Republic, or a Czech legal entity. Outside the EU, under the Swiss Federal Act on Private International Law of 18 December 1987, reciprocity was[34] only required under Art 166(1)(c) for judgments opening insolvency proceedings, whereas in Liechtenstein it remains the rule.[35]

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[30] Stamboulakis (n 1) 125-126. In the US, reciprocity is explicitly excluded in the 1962 Uniform Foreign Money-Judgments Recognition Act as well as in the 2005 Uniform Foreign-Country Money Judgments Recognition Act. It is nonetheless a mandatory ground for recognition in Georgia and Massachusetts, and a discretionary one in Florida, Idaho, Maine, North Carolina, Ohio and Texas.

[31] Weller (n 1) 198, mentions it as a requisite common to the 10 ASEAN member States.

[32] B Elbati, 'The recognition of foreign judgments as a tool of economic integration – Views from Middle Eastern and Arab Gulf countries' in P Sooksripaisarnkit and S R Garimella (ed), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018) 218, 223-226, where the author examines all the different ways reciprocity is to be established.

[33] Section 406 *Exekutionsordnung* (Enforcement Act) reads as follows: 'Akte und Urkunden sind für vollstreckbar zu erklären, wenn die Akte und Urkunden nach den Bestimmungen des Staates, in dem sie errichtet wurden, vollstreckbar sind und die Gegenseitigkeit durch Staatsverträge oder durch Verordnungen verbürgt ist.' ('Acts and documents are to be declared enforceable if the acts and documents are enforceable according to the provisions of the state in which they were drawn up and the reciprocity is guaranteed by state treaties or regulations'). In this regard, Austrian law appears to be one of the most restricted systems in Europe, as it has only concluded very few bilateral treaties on judicial cooperation.

[34] The rule was deleted as of January 2019.

[35] The enforcement of judgments in civil law issues is exclusively based on the Liechtenstein Enforcement Act of 24 November 1971 (Exekutionsordnung, 'EO'). According to it, a formal recognition and enforcement of a foreign judgment in Liechtenstein depends on reciprocity, and is thus generally not possible. However, decisions of foreign courts may be used as a basis for summary proceedings under the Civil Procedure Code of 10 December 1912 (Zivilprozessordnung): T Nigg and D Vogt, 'Liechtenstein' in L Freeman (ed), *The International Comparative Legal Guide to Enforcement of Foreign Judgments 2024* (Global Legal Group 2024) (https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/liechtenstein accessed August 2024).

24 In China, one of the jurisdictions experiencing a notable increase in the requests for recognition and enforcement, Art 298 of the Civil Procedure Law (2023 Amendment) provides three bases for the recognition and enforcement of foreign judgments: in the absence of international conventions or bilateral treaties, reciprocity applies. For reciprocity to be established, Chinese courts have for a long time required *de facto* reciprocity, analysing whether there were precedents of courts of the country of origin recognizing and enforcing Chinese decisions on civil and commercial matters. The very limited number of States meeting this criterion accounts for the low number of cases of recognition and enforcement of foreign judgments. The situation seems to be changing, though, especially after the clarification provided in 2022 by the Supreme People's Court in the sense of accepting legal reciprocity as a standard for recognition.[36]

25 The conclusion of conventions or agreements on recognition and enforcement (or, where applicable: the declaration whereby a contracting party accepts the accession of another State to a given convention) is a manifestation of reciprocity: the signatories of the agreement commit to reciprocally recognize their respective decisions, in the conditions stipulated in said agreement.[37] For judgments falling under its scope there will be no need to prove reciprocity any longer - which does not mean, of course, that it is not possible to deny recognition or enforcement in a specific case, although only in accordance with the provisions of the agreement itself.

26 Paradoxically, the commitment to reciprocity can work against a convention and prevent its success. In relation to the (then draft) Hague Convention 2019, scholars have posited that 'countries may be hesitant to ratify a judgments convention which allows any other country to join and automatically receive reciprocal benefits'.[38] To counter this problem,

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[36] Art 44 of the Conference Summary of the National Symposium on Foreign-Related Commercial and Maritime Trial Work. Already before, scholars had reported a change in attitude in relation to judgments from specific countries, see among other J Huang, 'Reciprocal Recognition and Enforcement of Foreign Judgments in China: Promising Developments, Prospective Challenges and Proposed Solutions' (2019) 88(2) Nordic Journal of International Law 250; Y Nishitani, 'Coordination of Legal Systems by the Recognition of Foreign Judgments - Rethinking Reciprocity in Sino-Japanese Relationships' (2019) (14)2 Frontiers Law China 193; W S Dodge and W Zhang, 'Reciprocity in China-US Judgments Recognition' (2020) 53(5) Vanderbilt Journal of Transnational Law 1541. In the last three years, news of the recognition in China of foreign judgments on the bases of reciprocity have appeared more and more frequently in specialized blogs such as the one of the European Association of Private International Law (EAPIL) (https://eapil.org/blog/ accessed August 2024) or Conflictoflaws.net (https://conflictoflaws.net/ accessed August 2024).

[37] The existence of the convention, treaty or agreement, even if not yet in force, may work also as a proof of reciprocity. See for instance the Brazilian Agravo Regimental of Rogatory Letter No 7613, of 3 April 1997, DJ of 9 May 1997, on an Argentinian case, where the Supreme Court reversed its prior position of denying *exequatur* to rogatory letters based on the existence of the Agreement Protocol of Jurisdictional Cooperation and Assistance in Civil Commercial, Labor and Administrative Matters, done on 27 June 1992 (Las Leñas Protocol).

[38] R Brand 'The Circulation of Judgments under the Draft Hague Judgments Convention' (2019) University of Pittsburgh School of Law, Faculty Publications https://scholarship.law.pitt.edu/fac_articles/453 accessed July 2024.

the final text includes several possibilities to opt-out of the Convention, with a different scope.[39]

2.1.2.2.2.3 Mutual trust

27 The recognition and enforcement of a foreign decision may be based on the mutual trust accorded by the receiving State to the judiciary and administration of justice of the originating State. The EU provides the most accomplished model at the international level. Comparable instances can be identified regarding the circulation of judgments of sister states (provinces or territories, as the case may be) in the US,[40] but also in Australia or Canada.[41]

28 In the EU, judicial cooperation in civil and commercial matters is both an imperative imposed by the extraordinary development of intra-EU cross-border trade, and a corollary of the political will to consolidate a community of shared values rooted on democracy, the defense of fundamental rights and the rule of law. However, as scholars have not failed to notice,[42] mutual trust is seldom mentioned as an underlying principle in the texts governing recognition and enforcement, which allude rather to the 'principle of mutual recognition' of judicial decisions as a tool to facilitate access to justice, which, in turn, shall help establish an 'area of freedom, security and justice'. This may be due to the fact that mutual trust is still more 'a socio-legal objective (transferred into a normative presumption) than a matter of (existing) empirical evidence'.[43] By contrast, reference to mutual trust as the basis for mutual recognition is constant in the Court of Justice of the European Union's (CJEU) preliminary rulings delivered upon request of the Member States to interpret EU legal texts.[44]

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[39] Under Art 18, States with a 'strong interest' not to apply the Convention to a particular matter may make a declaration to this effect; a similar solution is possible under Art 19 with respect to judgments pertaining to a State. Pursuant to Art 29, States may declare that the Convention's obligation do not apply to decisions from a particular contracting State.

[40] Following Art 4 section 1 of the US Constitution - the full faith and credit clause- extended by Congress to judgments from US territories. For a brief description of history and operation, see S C Symeonides, 'Full Faith and Credit clause' in J Basedow, G Rühl, F Ferrari, P de Miguel Asensio (ed), *Encyclopedia of Private International Law* (Elgar 2017) 823.

[41] Art 118 of the Australian Constitution. No similar clause exists in Canada: however, the Canadian Supreme Court decision *Hunt v T&N plc*, Case 22637 (Supreme Court, Canada), Judgment 18 November 1993 [1993 4 SCR 289] expressly stated that 'it is inherent in the structure of the Canadian federation that the courts in each province should give "full faith and credit" to the judgments of the courts of other provinces'. In addition, a certain degree of *de facto* harmonization of the rules governing recognition and enforcement is achieved where the territorial lawmakers follow the model statutes on the matter - the 1998 Enforcement of Canadian Judgments Act (ECJA), revised for the last time in 2023.

[42] Cuniberti (n 1) 251, 252.

[43] W H Roth, 'Mutual Recognition' in P Koutrakos and J Snell (ed), *Research Handbook on the Law of the EU's Internal Market* (Elgar 2017) 427.

[44] For a selection of relevant decisions B Hess, 'Seminal Judgments (les Grands Arrêts) in the Case Law of the European Court of Justice' in B Hess and K Lenaerts, *The 50th Anniversary of the European Law of Civil Procedure* (Nomos 2020) 11.

29 Technically, reliance on mutual trust entails watering down, even abolishing, the procedures set in the requested State to receive (and check) the foreign decision, and of the conditions usually required to accept it, in the belief that the rule of law and due process standards of the Member State of origin correspond to those of the requested State, and had been respected in the case at hand.[45] Recognition and enforcement without an intermediary procedure in the State of destination is possible under Brussels I bis Regulation;[46] the person against whom they are pronounced can apply for the rejection of either or both in the requested Member State. Other instruments go one step further. Exequatur is not required under Regulation (EC) 805/2004 on uncontested claims,[47] Regulation (EC) 1896/2006, on a European order for payment procedure, where, unless the defendant lodges a statement of opposition with the court issuing the order, the latter is automatically recognized and enforced in other EU countries,[48] Regulation (EC) 861/2007, establishing a European small claims procedure,[49] or Regulation (EU) 655/2014, establishing a European account preservation order.[50] According to Regulation (EC) 4/2009 of 18 December 2008, on maintenance obligations, a declaration of enforceability is not needed for decisions of Member States bound by the 2007 Hague Protocol.[51] Where those Regulations apply, it is no longer possible to contest enforcement in the requested Member State on the typical grounds, not even public policy.[52] The defendant may still be accorded a right of review before the courts of the Member State of origin, normally limited to the situation where she could not properly defend herself in the proceedings that took place there and led to the decision on the merits.

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[45] The solution can be said to replicate the 'State-of-origin principle', or 'home country control', where the competence to regulate a certain matter (here, the competence to ensure the respect of essential legal safeguards) is vested in the originating State, and not any longer in the receiving one. In general, the suppression of *exequatur* is accompanied by a minimal harmonization of basic procedural standards.

[46] Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 1215/2012 of 12 December 2012 (EU).

[47] Regulation creating a European Enforcement Order for uncontested claims, 804/2004 of 21 April 2004 (EU), Art 5.

[48] Regulation creating a European order for payment procedure, 1896/2006 of 12 December 2006 (EU), Art 19.

[49] Regulation establishing a European Small Claims Procedure, 861/2007 of 11 July 2007 (EU), Art 20 paragraph 1.

[50] Regulation establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, 655/2014 of 15 May 2014 (EU).

[51] Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 4/2009 of 18 December 2008 (EU), Art 17 paragraph 2.

[52] Irreconcilability with an earlier judgment given in any Member State or in a third country may be an exception, see for instance Art 22 of Regulation 861/2007 (n 49); Art 21 paragraph 2 Regulation 4/2009 (n 51).

2.1.3 Sources of Regulation (and Delimitation of the Chapter)

30 It would be difficult to find one State that flatly rejects recognition and execution of civil and commercial decisions in all cases, and even less so as a matter of principle.[53] The attitude favorable to recognition can materialize in agreements between States ensuring the mutuality of the circulation of their decisions; or in unilateral rules or practices. Generally speaking, the requirements imposed on a foreign decision for it to be recognized or enforced in the forum are more lenient where there is an international agreement or convention, which may include a clause of *favor recognitionis*[54] admitting the prevalence of other regimes, even if formally of lower rank, provided they ease recognition in a given case. It should be noted, though, that the contracting parties to a convention are free to opt for the opposite solution and allow applying or taking into account requirements imposed by the national systems in addition to those established in the convention.[55]

2.1.3.1 Conventions and supranational instruments (and delimitation of the chapter)

31 The issue of recognition and enforcement of decisions in civil and commercial matters is governed by a wide network of multilateral or bilateral agreements,[56] which generally prevail over unilateral rules. Some are issue-specific, ie, they only focus on judicial cooperation in civil matters, sometimes even restricted to, more specifically, recognition

[53] Below n 100.

[54] Considering the goal of facilitating the circulation of decisions inspires all conventional instruments on the matter, it could be argued that no explicit *favor recognitionis* clause is necessary. However, this may be contested where the instrument, through the use of the *shall* form, imposes a denial of recognition or enforcement under certain circumstances: below, 'Checking the conditions', paragraph 125 ff. Also, where an instrument includes compatibility clauses, but none on *favor recognitionis*.

[55] Among the legal texts examined for the purposes of this Chapter, this could be the case of the Riyadh Arab Agreement for Judicial Cooperation of 1983 signed in the city of Riyadh on 23 Jumada al-Thani 1403 AH, corresponding to 6 April 1983, according to its Art 30 in fine: 'The judicial authority which considers the implementation request in accordance with this Article, may take into account the legal rules of its country.' On a different opinion, at least partially, see infra n 194.

[56] On a different level, mention should be made to 'arrangements' entered into by courts of two or more States, deprived of binding effect, stating (rather than setting) the criteria and procedures they would apply when asked to recognize and enforce a decision of a foreign judiciary. See for instance the Exchange of Letters on cross-border enforcement of money judgments between Singapore International Commercial Court and Supreme Court of Victoria (Commercial Court), 20 March 2017 and 24 March 2017; or the Memorandum of Guidance on Recognition and Enforcement of Money Judgments in Commercial Cases, signed by the Chief Justices of the Supreme Court of Singapore and the Supreme People's Court of China on 31 August 2018.

and enforcement;[57] others are of a wider scope and just allocate some provisions to the matter.[58]

32 Bilateral conventions have traditionally been considered as an important source of the law on the recognition and enforcement of foreign judgments in particular in Europe[59] and Latin American countries.[60] By the 1930s, not only civil law jurisdictions but also common law ones had concluded numerous bilateral treaties regulating recognition and enforcement; multilateral conventions first became important for the recognition and enforcement problem after the Second World War.[61] In this latter context, for obvious reasons, the works of The Hague Conference deserve specific mention, although only two conventions out of 39 are exclusively devoted to recognition and enforcement in civil and commercial matters.[62] The adoption of the Hague Convention 2019, after the failure of the negotiations for a convention on exequatur of a universal scope, represents a milestone in the history of the Conference. No explanation is required to include the instrument for the purposes of Part II of the present study despite its limited material scope,[63] and, above all, the limited number of ratifications. Currently, the convention is in force only in the EU Member States and in Ukraine; it will enter into force in Uruguay as of October 2024, and in the UK in January 2025. In this sense, it must be remembered, on the one hand, that the penetration of The Hague work in some geographical areas,[64]

[57] See for instance the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter, Hague Convention 2019).

[58] See for example Art 31 Convention on the Contract for the International Carriage of Goods by Road (CMR), done at Geneva on 19 May 1956 (Art 31).

[59] Michaels (n 9) 9, refers to France as the first country to enter into such treaties with Swiss communities in 1715 (Renewal of the Alliance between France and the Catholic Swiss Cantons and Valais, signed at Soleurs, 9 May 1715). Dating back to the nineteenth century, see for instance the Spanish-Swiss Treaty to facilitate the execution of sentences in civil and commercial matters, of 19 November 1986; or the above mentioned Convention between Belgium and France on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments, signed at Paris on 8 July 1899. Many bilateral conventions were concluded between the colonies and the metropolis in the aftermath of the independence of the former: see the French case in relation to Africa, with agreements on judicial cooperation in civil matters with Algeria, Benin, Burkina-Faso, Cameroun, Chad, Djibouti, Gabon, Ivory Coast, Madagascar, Mali, Morocco, Mauritania, Nigeria, Central African Republic, Senegal.

[60] Already at the end of the nineteenth century, Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela prepared a draft international private international treaty, the outcome of which was the Treaty of Lima of 1878.

[61] A T von Mehren, 'Recognition and Enforcement of Foreign Judgments: A New Approach for The Hague Conference?' (1994) 57(3) Law and Contemporary Problems 271, 274-275.

[62] Quoted above n 57.

[63] See Art 2 paragraph 1 Hague Convention 2019.

[64] Or, from a different perspective: only 13 out of 54 Commonwealth States are members of the Hague Conference.

particularly Africa, but also in Asia, is traditionally limited[65] (although becoming a contracting party to a Hague Convention is not necessarily conditional upon membership). On the other hand, as regards the 2019 Convention, its open nature can work against it.[66]

33 At the continental or regional level, the European Union provides the most advanced regulatory model of recognition and enforcement of a decision of a (Member) State in another (Member State); thus the inclusion of the Brussels I bis Regulation in Part II of this chapter. The origins of the model go back to 1968, where a Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters was adopted under (then) Art 220 of the Treaty establishing the European Community, accompanied by a Protocol entrusting a common court (currently, the Court of Justice of the European Union, CJEU) with its uniform interpretation. Art 65 of the Treaty of Amsterdam[67] conferred upon the European Union genuine legislative competences in the field of judicial cooperation in civil and commercial matters. Since then European regulations have been adopted not only replacing almost completely the Brussels Convention, but also pushing forward the 'Europeanization' of international civil procedure.[68] The CJEU contributed to it through the interpretation of the European rules upon request for preliminary rulings from the Member States,[69] but also with opinions endorsing the end of the Member States' freedom to enter into international agreements to the extent they could affect the application of European law.[70] In the field of civil and commercial matters, the Lugano Convention 2007[71] illustrates the consequences of this limitation, while providing (together with the Hague Convention 2019) a common regime of the 24 EU Member States for the recognition and enforcement of decisions of third (ie, non-Member) States, namely Switzerland, Norway and Iceland.

[65] See R F Oppong and P N Okoli, 'The HCCHs development in Africa' in T John, R Gulati and B Koehler (ed), *The Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020) 52; and Y Nishtani, 'The HCCHs development in the Asia-Pacific region' in T John, R Gulati and B Koehler (ed), *The Elgar Companion to the Hague Conference on Private International Law* (Elgar 2020) 61.

[66] Above Brand (n 38) and n 39.

[67] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJC 340 of 10 November 1997 (EU).

[68] B Hess, *Europäisches Zivilprozessrecht* (2nd edn, De Gruyter 2021), para 3.1 ff.

[69] Art 267 Treaty on the Functioning of the European Union (Consolidated version), OJC 326 of the 26 October 2012 (EU); for a selection of judgments see Hess (n 44). All decisions are published online at https://curia.europa.eu/jcms/jcms/Jo1_6308/ accessed August 2024.

[70] See Opinion 1/03 of 7 February 2003, on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [ECLI:EU:C:2006:81].

[71] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJL 339 of 21 December 2007 (EU).

34 The case of South America,[72] albeit much less successful in practice, deserves to be recalled as well.[73] Codification of private international law at the inter-American level has been one of the permanent legal activities of the American States since the last decades of the 19th century, giving rise to a long list of international agreements.[74] Regarding the recognition and enforcement of judgments, the following are worth mentioning: the Montevideo Treaty on International Procedural Law, of 11 January 1889 (reviewed in 1939/40);[75] the Bustamante Code of 20 February 1928;[76] in the framework of the CIDIP,[77] the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards (Montevideo, 8 May 1979),[78] and the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards (La Paz, 24 May 1984),[79] addressing exclusively indirect jurisdiction and supplementing the 1979 Convention in this regard. In the context of the Mercado Común del Sur (Mercosur), the Agreement Protocol of Jurisdictional Cooperation and Assistance in Civil Commercial, Labor and Administrative Matters, done on 27 June 1992, also known as 'Las Leñas Protocol', must be alluded to.[80] The Montevideo Convention 1979 and the 1992 Protocol of Las Leñas are examined in Part II of the chapter.

35 The panorama is quite different in Asia.[81] No convention on judicial cooperation has been drafted under the auspices of Association of Southeast Asian Nations (ASEAN),[82]

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[72] The term is used to distinguish the two Northern States (USA and Canada) from the other States of the American continent.

[73] Recalling in detail the history and evolution of PIL in the region see D P Fernández Arroyo, *La Codificación del Derecho Internacional Privado en América Latina* (Universidad Complutense de Madrid 1993), available online at https://docta.ucm.es/bitstreams/78cbdae3-25c4-4b52-b763-f6d8f8a002f1/download accessed July 2024; D P Fernández Arroyo, 'Derecho Internacional Privado Interamericano: Evolución y perspectivas, Comité Jurídico Interamericano' in Comité Jurídico Interamericano (ed), *Curso de Derecho Internacional XXVI* (1999) 153. Further summarizing the stages until 2015, L Pereznieto Castro, 'Notas sobre el derecho internacional privado en América Latina' (2015) 48(144) Boletín Mexicano de Derecho Comparado 1063.

[74] On the relationship between the initial efforts tending to a codification in the traditional sense of the word, and the (CIDIP's) more pragmatic step preferring conventions focusing on specific points, see Fernández Arroyo in *La codificación…* (n 73).

[75] Ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay, and acceded to by Colombia.

[76] In force since November 1928, and ratified by 17 countries. See Art 423 to 433.

[77] Comisión Interamericana Especializada en DIPr (Inter-American Specialized Conferences on Private International Law), under the aegis of the Organización de Estados Americanos (OEA).

[78] CIDIP II. Ratified by Argentina, Brazil, Bolivia, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela: hereinafter, the 'Montevideo Convention'.

[79] CIDIP III. In force between Mexico and Uruguay.

[80] In force in Argentina, Brazil, Paraguay and Uruguay. See in particular Chapter V, Art 19 (transmittal of applications by rogatory letters); Art 20-23 (conditions); Art 24 (procedures).

[81] Weller (n 1) 189, talks about 'far reaching differences'; at 188, of a 'long story and tradition of ASEAN States to preserve national sovereignty'.

[82] As of 2023, there seem to be only two bilateral conventions dealing with recognition and enforcement between the member States: the Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the Lao People's Democratic Republic signed on 6 July 1998; and the Agreement on Legal Assistance in Civil Matters between the Socialist Republic

and nothing similar to CIDIP exists in the region. Attempts to create a common frame for a plurality of states are mostly academic, represented by the Study Group on the Asian Principles on PIL.[83] The Principles, albeit directed at judges, practitioners, legislators and policy-makers in Asia, do not purport to set out a model law, which is the reason why they are not included in this chapter.[84]

36 In relation to Africa, the Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC)[85] appears as the only initiative of economic integration in the region which has produced a common text on judicial cooperation, the Accord de coopération judiciaire entre les États membres de la CEMAC of 2004;[86] it will thus be part of the analysis under Part II. The efforts of OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires),[87] a different endeavour pursuing legal (and not economic) integration among the member states, have mostly concentrated on the recognition and enforcement of arbitral awards, and will thus not be considered here.[88]

37 From a slightly different perspective, it should be recalled that all the States members of the League of Arab States, with the exception of the Comoros, have signed the Riyadh Agreement of 6 April 1983.[89] In turn, the Commonwealth of Independent States (CIS),

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of Vietnam and the Kingdom of Cambodia signed on 21 January 2013. See L Kiraly and E Papp, 'Potential Nexus Between the Enforceability of Foreign Judgments and the Quality of Civil Justice in ASEAN' in K Drličková, R Malachta, P Provazník (ed), *COFOLA International 2022. Current Challenges of Resolution of International (Cross-Border) Disputes* (Masarykova univerzita 2022) available online https://munispace.muni.cz/library/catalog/chapter/2196/796 accessed August 2024.

[83] In September 2020, the Asian Business Law Institute, based in Singapore, released a book comprising the Asian Principles for the Recognition and Enforcement of Foreign Judgments. The publication comprises 13 overarching principles that underpin the recognition and enforcement of foreign judgments in the 10 ASEAN States, plus three Northeast Asian countries (China, Japan, South Korea); one South Asian country (India) and one Oceanian country (Australia).

[84] A Chong, 'Moving towards harmonisation in the recognition and enforcement of foreign judgment rules in Asia' (2020) 16(1) Journal of Private International Law 31, 37, describes the Principles as an attempt to state the law and to propose the ways in which it ought to develop regionally. They illustrate common principles and suggest compromise solutions for the differences.

[85] Cameroon; Central African Republic; Congo; Chad; Equatorial Guinea; Gabon.

[86] Available at (2016) 21(1) Uniform Law Review, 145–153. The Agreement is not limited to the recognition and enforcement of judgments in civil and commercial matters. For the purposes of this Chapter, see Title V, 'Exequatur'.

[87] Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo.

[88] According to Art 33 paragraph 2, of the Uniform act on simplified debt collection procedures and enforcement proceedings, adopted at Libreville (Gabon) on 10 April 1998 (Journal Officiel de l'OHADA n° 6, June 1, 1998), final foreign court decisions which have been granted *exequatur* according to national laws constitute writs of execution for the purposes of the act. As noted by Weller (n 1) 277, there is therefore no uniformization as regards recognition or enforcement.

[89] The Convention has been ratified by Algeria, Bahrain, Egypt, Irak, Jordan, Libya, Morocco, Mauritania, Oman, Palestine, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. It is intended to replace the 1952 Arab League Convention on the Enforcement of Judgments and Arbitral Awards in the relations between the States Parties to both Conventions. The English text is available here: https://www.refworld.org/legal/agreements/las/1983/en/39231 accessed August 2024.

set up in 1991, adopted already on March 1992[90] the Kiev Convention on the Procedure for Settling Disputes Connected with Commercial Activity,[91] and, one year later, the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.[92] The existing studies on the Riyadh Agreement have allowed for its inclusion in the comparison,[93] while the Kiev and Minsk conventions remain much more remote. Nonetheless, because they represent the first attempts towards judicial cooperation between Post-Soviet States,[94] and, in addition, they seem to be working well,[95] it has been decided to include them in Section II of the chapter too.

38 Finally, a specific mention of the Commonwealth community and the recently adopted Commonwealth Model Law on the Recognition and Enforcement of Foreign Judgments ('CML 2017'), seems noteworthy. There is no international Agreement or Convention of the Commonwealth countries on recognition and enforcement. By contrast, the community is characterized by the great influence of approaches and solutions in force in the UK, which has historically resulted in a convergence of solutions (from which, over time, some countries depart). In this context, a study commissioned in 2005 by the Commonwealth Secretariat on the status quo regarding intra-Commonwealth legal arrangements on the recognition and enforcement of foreign judgments in civil and commercial matters led to conclude there was need for reform. Discussions took place on the occasion of meetings of the Commonwealth Law Ministries between 2007 and 2014. The final text of the Model Law was endorsed in 2017.[96]

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[90] The CIS was created in 1991.

[91] See Art 7 to 10. Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan are parties to the Treaty. The Treaty is only open to CIS members.

[92] See Chapter III. The convention was originally signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan; it is not restricted to CIS countries.

[93] Other Arab organizations have adopted agreements as well with the aim to promote judicial cooperation. A convention on Legal and Judicial Co-operation between Egypt, Iraq, Yemen and Jordan was concluded on 16 June 1989 in the framework of the Arab Cooperation Council, an organization which disappeared in 1990, ie, just one year after it was created; the convention itself does not seem to apply any longer. In December 1995 the Member States of the Arab Gulf Cooperation Council adopted a Convention on the Enforcement of Judgments, Letter Rogatory and Judicial Notice, with a chapter on the recognition and enforcement of judgments. The convention has only six signatories, and four of them have ratified the Riyadh Agreement as well; the texts largely match too, thus the decision to address only the latter in this chapter.

[94] One specific in the field of recognition and enforcement (the Kiev Treaty), and the other more general (the Minsk Convention). A third CIS convention also comprising rules on the recognition and enforcement in civil matters – the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, done on 7 October 2002 in Chisinau - entered into force in 2020. In respect to civil matters the provisions of both conventions are substantially identical.

[95] See B Hess, 'History and Evolution (Actors, Factors and Debates)' (2024) Comparative Procedural Law and Justice pt XIV ch 2 https://www.cplj.org/publications/14-2-history-and-evolution-actors-factors-and-debates (last accessed August 2024) 33.

[96] For an in-depth explanation of the history and draft of the Model Law see Commonwealth Secretariat, 'Improving the recognition of foreign judgments: model law on the recognition and enforcement of Foreign Judgments' (2017) 43 Commonwealth Law Bulletin 545.

39 The CML 2017 is designed to assist the Commonwealth member States in modernizing their approach to the recognition and enforcement of foreign judgments in civil and commercial matters. It abolishes the common law action on a judgment debt created by a foreign judgment: where adopted, it would therefore put an end to the dual approach to enforcement present in most Commonwealth countries.[97] It also waives the reciprocity requirement underpinning the existing statutory acts on recognition and enforcement. Regarding the conditions to be met by a foreign decision, the text can be described as 'eclectic' in that it combines solutions common to the Hague Convention 2019 (at the time, still a draft) and also EU instruments,[98] with practices known in Commonwealth States and some novelties.[99]

40 The CML 2017 has not yet been enacted in any Commonwealth country. However, to the extent it represents an attempt to improve the existing settings in a uniform manner, simultaneously getting them closer to other (global or regional) systems for the recognition and enforcement of foreign judgments, it is taken into consideration in Part II of this chapter.

2.1.3.2 National rules

41 In the absence of a supranational or a conventional regime, recognition and enforcement will not happen at all in some jurisdictions,[100] or they will according to national rules (statutory or else). It is worth noticing that two of the largest economies in the world, namely Japan and the US, are neither parties nor signatories to any bilateral or multilateral treaties specifically devoted to the reciprocal recognition and enforcement of foreign judgments, including the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[101]

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[97] See below para 58.

[98] Compare, for instance, Clause 5 (1) (b), on jurisdiction of the State where the defendant, not being an individual, was incorporated, exercised its central management or had its principal place of business, with Art 4 of the Brussels I bis Regulation in combination with its Art 63.

[99] This would be notably the case of some heads of jurisdiction under Clause 5, such as the one based on the ordinary (and not the habitual) residence of the defendant, or the one for proceedings concerning product liability: see Clause 5(1), (a) and (k).

[100] In 2021, after conducting a survey of 108 national jurisdictions, Yeo Tiong Min asserted that less than 8% (8 out of 108) of them will not recognize or enforce foreign judgments under national law without a treaty: see T M Yeo (Speaker), 'The Changing Global Landscape for Foreign Judgments', Yong Pung How Professorship of Law Lecture 2021, 6 https://site.smu.edu.sg/yong-pung-how-professorship-law-lecture-2021, accessed July 2024).

[101] The primary legal sources for recognition and enforcement in Japan are Art 118 Code of Civil Procedure (Act No 109 of 1998) and Art 24 Civil Execution Act (Act No 4 of 1979); for an explanation addressing as well the role of the courts see B Elbati, 'Foreign Judgments Recognition and Enforcement in Civil and Commercial Matters in Japan' (2019) 66 Osaka University Law Review 1; also, K Nishioka and Y Nishitani, *Japanese Private International Law* (Hart Publishing, 2021) Chapter 4. In the US there is no uniform law or regime for recognition and enforcement. Still, a high degree of convergence has

42 Diversity characterizes the national rules of recognition and enforcement from many points of view, starting with their visibility and degree of sophistication: they may be enacted or codified in specific regulations, but this is not necessarily always the case. While notable reforms and updates aiming at modernizing, clarifying and easing the import of foreign decisions have taken place in the last two decades in some jurisdictions,[102] others remain untouched despite the opening up of the respective national economy to cross-border relations, or the increase in the number of foreigners on the territory.[103]

43 Both technically and regarding contents, the rules can be quite different even among States of the same geographical region. Belonging to the same legal family – common law, civil law- is not a guarantee of similitude, nor does belonging to a regional organization tend to promote economic integration. Scholars refer to the 'patchy legal framework among the ASEAN Member States',[104] but contrasts are identifiable as well among the Member States of the Europe Union when it comes to the recognition and enforcement of decisions from third States. Compare, for instance, the very restrictive attitude towards decisions of third States in Denmark or Finland, where recognition and

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been achieved de facto thanks to shared common law roots (with the exception of Louisiana), on the one hand side, and voluntary implementation in many states of provisions following the US 1962 Uniform Foreign Money-Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act. It should be noted that the US signed the Hague Convention 2019 in 2022, and that ratification seems to be under serious consideration: see J F Coyle, 'Recent Developments Concerning the Hague Judgments Convention and COCA' (2024) Transnational Litigation Blog https://tlblog.org/recent-developments-concerning-the-hague-judgments-convention-and-coca/ accessed August 2024.

[102] See section 6 of Chapter I of the Belgium Code de droit international privé, adopted on 16 July 2004; in the Czech Republic, Chapters III and IV in Part II of the 91/2012 Coll. Act, dated 25 January 2012, governing private international law; the Spanish Law 29/2015, July 30, of International Legal Cooperation in Civil Matters; or Book IV of the 2022 French Draft Private International Code. Referring to Asia, Reyes (n 1) 323, acknowledges that only some States have fully developed national laws. Others are still in the process (Myanmar, p 318), 'in a state of flux' (Vietnam, p 317), or 'likewise uncertain' (Cambodia, id loc), or have not even started to rule on the matter (Indonesia, Thailand). In Singapore, the amended Reciprocal Enforcement of Foreign Judgments Act entered into force on 3 October 2019.

[103] This would be the case of Chile, one of the few Latin American countries that is a member of the OCDE. The efforts to modernize private international law, including the rules of recognition and enforcement, remain so far academic: see the Anteproyecto de Ley de Derecho Internacional Privado, drafted in 2020 by the Dean of the Faculty of Law of the University of Chile and the President of the Chilean Association of Private International Law (ADIPRI), submitted to the Ministry of Justice, so far unsuccessfully. Argentina still devotes to the matter three provisions of the Código Procesal Civil y Comercial de la Nación, adopted in 1967. The reform of the code in 2015 updated other private international law rules and left those untouched, in spite of the amendments foreseen in the preparatory drafts: D P Fernández Arroyo, 'A new autonomous dimension for the Argentinian private international law system' (2014-2015) 16 Yearbook of Private International Law 411, fn 4.

[104] Weller (n 1) para 201. ASEAN member countries can be classified into two groups, depending on whether they follow the civil law model (Laos, Cambodia, Vietnam and Indonesia) or the common Law one (Myanmar, Malaysia, Singapore, Brunei and the Philippines). Such classification fails to catch the further influences existing on each legal system for historical, political, and cultural reasons. For a brief summary, see S Phanwichit, 'Legal Execution in Accordance with Rulings of Foreign Courts among ASEAN Member Countries' (2018) 5(1) International Journal of Crime, Law and Social Issues 81, 90 ff.

enforcement is very limited in the absence of a treaty,[105] and Belgium, Germany, Italy or Spain, with much more liberal national rules.

44 In the literature, authors seem to find it easier to group common law countries together than civil law ones.[106] Indeed, common law countries draw originally from the same source - the English model-, whereas there is no one single root for civil law jurisdictions. As already indicated, lacking an international convention or treaty some of the latter would not enforce a foreign decision, nor recognise it as *res iudicata*: the judgment will only be accorded evidentiary value.[107] In practice, courts may find ways to avoid the waste of resources this represents. A good example is provided by the Dutch Supreme Court on the interpretation of Art 431 of the Dutch code of civil procedure. According to it, unless a national or international rule so establishes, neither decisions rendered by foreign courts nor authentic instruments drawn up outside the Netherlands can be enforced in the Netherlands; in this situation, the case can be heard and settled again in the Dutch court. Following a Supreme Court ruling of 1924, completed by another one of 2014, the Dutch judge is allowed to follow the foreign decision upon conditions similar to the ones required for recognition – in fact, the mechanism is labelled 'masked exequatur procedure'.[108]

45 To enforce a foreign decision, civil law countries tend to subject them to recognition and exequatur, which are granted upon conditions. The requirements under national law are often more restrictive than those in conventions or international agreements; sometimes, they are inspired by the wish to protect the nationals or residents of the receiving State.[109] Almost invariably, the competent court or authority in the requested State will review the international jurisdiction of the foreign court, with particular stress on respect for its own exclusive jurisdiction; it will also check that there has been no infringement of the rights of the defence; and assess the compatibility of recognition with its public policy. Without claiming to be exhaustive, scholars[110] mention further

[105] Outside the conventional frame, the Danish Minister of Justice is authorised to implement regulations granting recognition and enforceability (sections 223a and 479, Administration of Justice Act). However, it seems that this authorisation has never been exercised. In Finland, the foreign judgment will be accorded evidentiary value; it can hence be used to obtain a new Finnish decision.

[106] Chong (n 84) referring to Laos, Cambodia, Thailand, Vietnam and Indonesia: 'They are therefore less amenable to a pithy summation'. A Briggs and T Domej, 'Recognition and enforcement of judgments (common law)' in J Basedow, G Rühl, F Ferrari, P de Miguel Asensio (ed), *Encyclopedia of Private International Law* (Elgar 2017) 1479, 1483 allude to 'a number of approaches' and to the absence of an 'overarching principle'.

[107] Fn 105. In Asia, this seems to be the case as well of Indonesia (supra n 11), Thailand and Laos.

[108] F Fernhout, 'Enforcing Foreign Titles Regarding Monetary Claims in the Netherlands' in V Rijavec, K Drnovsek, R van Rhee (ed), *Cross-Border Enforcement in Europe: National and International Perspectives* (Larcier Intersentia 2020) 153, 165; also alluded to in Hess (n 95) 37.

[109] For instance, in view of the indirect grounds for jurisdiction in the Swiss Private International Law Act, it can be concluded that many foreign judgments against a Swiss resident will only be recognised and enforced if he or she voluntarily submitted to the foreign jurisdiction: see A Dutta and T Domej, 'Recognition and enforcement of judgments (civil law)' in J Basedow, G Rühl, F Ferrari, P de Miguel Asensio (ed), *Encyclopedia of Private International Law* (Elgar 2017) 1471,1475.

[110] Briggs and Domej (n 106) 1483.

additional constraints relating to how the foreign court has approached questions of choice of law,[111] and reciprocity. Review on the merits is usually forbidden.

46 While formally very similar, the conditions may prove actually quite different in their implementation. There are, for instance, several paths to assess the foreign court's jurisdiction.[112] Some legal systems provide for a list of indirect grounds for jurisdiction: the solution can be found in the Swiss PIL. China, Taiwan, Japan,[113] possibly following Germany,[114] prefer instead the 'mirror' or 'Spiegelbildprinzip' principle: the jurisdiction of the State of origin will be accepted if a court of the requested State would have assumed adjudicatory jurisdiction under the same factual circumstances. Where this kind of control applies, a further question is whether the standard required to establish one's own jurisdiction, and for reviewing purposes, is the same. Finally, in some systems no fixed rule exists; the receiving authority or court examines, on a case by case basis, whether the jurisdiction of the court of origin fits the principles underlying the own national rules, even if the actual ground for jurisdiction does not squarely correspond to those conferring jurisdiction on the national courts. This appears to be the Spanish solution.[115]

47 Virtually all Commonwealth countries follow a 'double-track' approach to recognition and enforcement. First, it is possible to enforce a foreign monetary judgment from any country in the world through the common law action on judgment debt: here, the judgment creditor applies for summary judgment by producing the foreign judgment as proof of debt owed by the judgment debtor; the judgment debtor may oppose summary judgment. Secondly, in almost all Commonwealth countries enforcement of foreign judgments is made possible by a statute based on one of two UK Acts of, respectively, 1920 and 1933.[116] Under the statutory regime, the judgment creditor applies for registration; the judgment debtor may apply for registration to be set aside. The track is only available for judgments from designated Commonwealth countries with which there is an arrangement for reciprocity. These countries are usually listed in an annex to the statute.[117]

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[111] The requirement is usually for equivalence between the law applied to the merits in the originating State and the law that would have been applied by the courts of the requested State, had they been seized of the matter. It is more common for judgments on family and personal status matters.

[112] Dutta and Domej (n 109) 1474-1475.

[113] See respective chapters in Reyes (n 1).

[114] Sec 328(1) German ZPO.

[115] Art 46, paragraph 1, indent c), of the Ley 29/2015, de 30 de julio, de Cooperación Jurídica Internacional.

[116] The Administration of Justice Act 1920, providing for discretionary registration between the UK and each colony, as well as willing dominions; and the Foreign Judgments (Reciprocal Enforcement) Act 1933, meant to facilitate trade with the neighbouring European States.

[117] Stamboulakis (n 1) Chapter 4, refers to this as 'Commonwealth Model', and stresses its complex implementation. On the current status of the reciprocal regime in the Commonwealth, country by country, see the table drafted by Yekini (n 1) 88 ff.

48 In terms of the conditions to be met by the foreign decisions, scholars describe the common law approach as based on a presumption in favour of giving effect to foreign judgments. Said presumption can be rebutted in the case of breach of due process or of natural justice in the foreign proceedings; or if giving effect to the foreign decision conflicts with the public policy of the enforcing State. Scholars acknowledge that, in spite of the initial similarity, 'there remains potential for a significant degree of latitude and variation in the way in which different common law States handle recognition and enforcement'.[118] What the acceptable categories of jurisdiction (of the State of origin) are appears to be the most significant difference.[119]

3 SECTION II

3.1 'Importing' Procedures

3.1.1 Recognition v Enforcement

49 Judgments are capable of a variety of procedural – *res iudicata*, enforceability- and substantive effects – such as the creation or modification of rights or legal relationships. In general, the rules on recognition and enforcement usually concern only the former; whether they should apply as well to the latter is disputed.[120]

50 The reception in one State of a judgment of another usually requires its recognition or a declaration of enforceability. Recognition is associated with *res iudicata*: a recognized foreign decision will prevent re-litigating in the requested State the issue or matter that has already been decided elsewhere. Enforcement is linked to execution: the term 'enforcement' is used with the meaning of 'declaration of enforceability or registration for enforcement', and not of 'execution', the latter meaning, in turn, the legal procedure by which the competent authorities of the requested State ensure that the judgment debtor abides by the foreign judgment.[121]

51 Subjecting a foreign decision to a procedure for it to unfold its effects in another State is not uncommon. Such a procedure, as an intermediate step, serves the purpose of checking whether the decision meets some requirements, and/or the absence of obstacles preventing its import. In fact, automatic enforcement of a foreign judgment,

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[118] Stamboulakis (n 1) 111 ff.
[119] Ibid 111-112.
[120] See Dutta and Domej (n 109) 1474.
[121] Admittedly, the borderline between what pertains to enforcement and to execution is sometimes blurred: see for instance the CJEU's judgment in C-379/17, Al Bosco, on whether a time limit set under a national provision headed 'Order for enforcement; time limit for enforcement' is part of the phase of exequatur, or of enforcement *strictu sensu* (execution). The difference is nonetheless important: the objections that can be raised against the reception of a foreign decision for its enforcement, and against enforcement itself, vary. The distinction is not always easy to put into practice, especially where the assessment of the grounds for refusal of enforcement and of the objections to execution take place in the same procedure.

without any kind of procedure in the requested State, is exceptional,[122] even in contexts such as the EU presided by mutual trust: the attempt to do completely away with an intermediate stage to get leave to enforce did not succeed under the Brussels I bis regulation.[123] Automatic, also called incidental, *de plano* or *de iure*, recognition, ie, recognition without any special procedure being required,[124] seems to be easier to accept and more common.[125]

52 Cross-border enforcement used to be a matter of judicial assistance between the courts of two jurisdictions. The old mechanism of letters rogatory through Central Authorities or judicial authorities has been mostly given up. It is nonetheless still the tool[126] for requesting the recognition and enforcement of foreign judgements under the Las Leñas Protocol of 1992;[127] possibly, also in the frame of the Montevideo Convention[128] and the Riyadh Agreement.[129] Whether the mechanism applies as well under the CEMAC Agreement is unclear.[130] Under the Minsk Convention, the application for recognition and enforcement must be submitted to the destination State, but the Convention offers as well the option to file the application through a court of first instance of the issuing State.[131]

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[122] On the discussion regarding the abolition of *exequatur* under the CIS Kiev Treaty see the document 'The Relationship Between the Judgments Project and Certain Regional Instruments in the Arena of the Commonwealth of Independent States' (2005) Permanent Bureau of the HCCH, 7-8.

[123] See nonetheless above para 29 for other Regulations. Summarizing the arguments for and against giving up *exequatur* within the Brussels I bis Regulation, prior to its enactment, see G Cuniberti and I Rueda, 'Abolition of Exequatur - Addressing the Commission's Concerns' (2011) 75(2) Rabelszeitschrift für ausländisches und internationales Privatrecht 286.

[124] Thus with a minimum control of a few formal conditions of the foreign decision, from which no explicit declaration of recognition follows. An interesting, and not common, conventional rule on what recognition *tout court* entails is Art 9 of the Treaty on International Procedural Law, Montevideo, 19 March 1940.

[125] Examples are Art 14 of the CEMAC Agreement, Art 52 Minsk Convention, Art 37, paragraph 1 Brussels I bis Regulation or Clause 6(1) CML 2017.

[126] Or *one* tool, since Art 19 of the Protocol was amended in 2002 in the sense of allowing direct requests for recognition or enforcement: see Enmienda al Protocolo de Cooperación y Asistencia Jurisdiccional en Materia Civil, Comercial, Laboral y Administrativa entre los Estados Partes del Mercosur (MERCOSUR/CMC/Dec. Nr 07/02). On the other hand, other mechanisms such as the diplomatic channels may be used as well between contracting parties having ratified the Inter-American Convention on Letters Rogatory, Panama, 30 January 1975.

[127] See Art 19. The provision has been interpreted in Brazil in the sense that rogatory letters replace the homologation procedure, removing the need of the judgments creditor's initiative: see N de Araujo 'Dispute Resolution in MERCOSUL: The Protocol of Las Leñas and the Case Law of the Brazilian Supreme Court' (2001) U. Miami Inter-Am. L. Rev. 25, 45-46, with further references.

[128] According to R Viñas Farre, 'El reconocimiento y la ejecución de decisiones extranjeras en Latinoamérica' in Y Gamarra Chopo (ed), *La idea de América en el pensamiento ius internacionalista del siglo XX: estudios a propósito de la conmemoración de los bicentenarios de las independencias de las repúblicas latinoamericanas* (Instituto Fernando el Católico 2010) 165, 170, this is how the absence of rules on the Montevideo Convention is to be understood.

[129] See Art 34: 'The authority requesting recognition of the judgement to any other contracting party shall submit the following […]'.

[130] The scope of application of Art 8 of the Agreement not being itself clear.

[131] Art 53.

53 In the remaining instruments, it is for the judgement creditor to apply for recognition or enforcement in the requested State, and (in principle)[132] for the person against whom such recognition or enforcement is sought to oppose or to apply to have the decision granting recognition or enforcement set aside. Many systems subject recognition and enforcement to a largely common procedural regime: where recognition does not work *de plano*, the procedure to obtain it will often be the one for the reception of foreign decisions for enforcement purposes. Besides, the conditions for recognition and enforcement are partially the same, if only because enforcement requires previous recognition: by way of consequence, a judgment not entitled to recognition will not be eligible for enforcement [133] This close relationship between recognition and enforcement is often coupled with the lack of appropriate distinctions between recognition and enforcement in the legal texts: together, such facts may explain the still existing confusion between them.[134] Title V of the CEMAC Agreement is simply 'De l'exequatur';[135] judging from its heading, Part V of the Riyadh Agreement alludes exclusively to recognition;[136] the official title of the Montevideo Convention avoids mentioning one or the other.[137] Chapter V of the Las Leñas Protocol refers nominally to 'recognition *and* enforcement';[138] just like in the Montevideo Convention, it is not completely clear whether the provisions therein comprised apply indistinctly to both. The same doubt arises in relation to the Kiev convention.[139] Arts 29, 32 and 34 of Riyadh Agreement prefer the conjunction 'or'. More sophisticated, Chapter III of the Brussels I bis Regulation devotes separated sections and subsections to recognition and to enforcement, thus conveying the message of each being associated to a different procedural effect.

[132] See below para 125 ff.

[133] See for instance Clause 7 CML 2017, for money judgments, and Clause 16(2) (b) of the same instrument for non-monetary judgments.

[134] See by way of example B Elbalti's post 'Dubai Courts on the Recognition of Foreign Judgments: "Recognition" or "Enforcement"? – that's the Problem!' (2023) Conflict of laws.net https://conflictoflaws.net/2023/dubai-courts-on-the-recognition-of-foreign-judgments-recognition-or-enforcement-thats-the-problem/ accessed August 2024, on a decision of the Dubai Supreme Court.

[135] There is no doubt the chapter regulates recognition as well. It is unclear, though, whether the conditions set out in the different provisions apply only to recognition or only to exequatur, or to both.

[136] 'Recognition of Judgments Pronounced in Civil, Commercial, Administrative and Personal Statute Actions'.

[137] 'Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards'. See also Preamble and Art 2.

[138] Chapter V of Las Leñas Protocol is entitled 'Reconocimiento y ejecución de sentencias y laudos arbitrales'; see also Art 5, 6 and 7 Hague Convention 2019.

[139] Art 8 to 10 are literally limited to enforcement. The Minsk Convention is better drafted in this regard, devoting Art 52 to recognition, Art 53 and 54 to enforcement, and Art 55 to both. The same applies to Art 5, 6 and 7 Hague Convention 2019.

3.1.2 Types of Procedures

54 The intermediary mechanisms or procedures typically set for the reception of foreign decisions with a view to their recognition and enforcement are exequatur; [140] registration; and transformation.

55 As the name 'exequatur' itself indicates, this procedure relates to the (forced) enforcement of a foreign judgment.[141] By granting exequatur, a State acknowledges the enforceability of a foreign decision and orders its enforcement on the territory. Exequatur is one of the mechanisms referred to in Art 13 of the Hague Convention 2019, which contemplates as well registration, leaving it to the law of the contracting States to decide which procedure is to be used.

56 For a long time, exequatur was required for the circulation of decisions within the EU. Under the Brussels I bis Regulation, all judgments enforceable in a Member State are automatically enforceable in the rest: Art 39 waives the need for a declaration of enforceability; however, Art 46 grants the judgment debtor a right to oppose the enforcement of a foreign judgment on the basis of specific grounds, in a kind of 'inversion du contentieux'.[142]

57 According to Clauses 9(1) and 15 (1) of the CML 2017, the enforcement of a foreign judgment, for money or non-monetary, requires its registration in a local court.[143] Registration follows a petition or an application usually accompanied by an affidavit of identification of the judgment debtor together with an authentic copy of the judgment. The judgment debtor must be given notice of the registration of a money-judgment pursuant to Clause 10(2); within 30 days of receipt, he may apply for said registration to be set aside. In the case of non-monetary judgments, following Clause 15(2), he shall be given notice of the application made for the registration; in this way, he has the opportunity to convince the court to refuse it.

58 With the non-technical term 'transformation' we refer to a specific solution given in some States to the issue of enforcement of foreign judgments, whereby the foreign

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[140] In Italian '*delibazione*'; '*Vollstreckung*', in German.

[141] *Exequatur* means leave for enforcement. Etymology (Merriam-Webster): 'Latin exequatur, exsequatur, 'let him perform', 3rd person singular present subjunctive of exequi, exsequi to perform, execute'.

[142] See above (n 122), on whether *exequatur* has been abolished as well under the Kiev Convention.

[143] The solution follows the statutory regime of common law jurisdictions: see in the UK, the Administration of Justice Act 1920, and the Foreign Judgments (Reciprocal Enforcement) Act 1933; the Australian Trans-Tasman Proceedings Act 2010; the Canada-United Kingdom Civil and Commercial Judgments Convention Act R.S.C., 1985, c. C-30; the Reciprocal Enforcement of Judgments (UK) Act*, RSO 1990, c R.6 (Ontario); the* Reciprocal Enforcement of Judgments Act*,* CCSM, c J20 (Manitoba); or, in New Zealand, the Reciprocal Enforcement of Judgments Act 1934, for foreign judgments from non-Commonwealth countries with which New Zealand has a reciprocal agreement.

decision is transformed into a new domestic one;[144] the latter – not the former- is enforced. None of the legal texts chosen for examination in this chapter contemplate this mechanism. Examples of it can be found in the UK and other Commonwealth countries for money-judgments under the common law regime (as opposed to the statutory one): [145] the foreign judgment creditor files a claim against the judgment debtor for a debt corresponding to the one owed under the foreign decision, in order to obtain a new local judgment to be enforced by execution.

59 To a large extent, the design of the exequatur, registration and transformation procedures is left to the national lawmaker. All three procedures are expected to be quick,[146] uncomplicated, and affordable. In practice, their cost is usually related to the need to translate the foreign decision, especially if the translation must be sworn, and even more if it covers all the documents attached to the decision, as is the case under Art 2 (b) Montevideo Convention.[147] In an effort to overcome the difficulties and costs linked to language, the request for recognition or enforcement is limited to the most relevant parts of the foreign judgment under Art 32 Riyadh Agreement. An alternative solution consists of resorting to templates or forms, drafted in the languages of all contracting parties or Member States, where the essential data of the decision to be recognized or enforced are collected. The use of such forms is only recommended under the Hague Convention 2019.[148] By contrast, it is compulsory under Art 53 of the Brussels I bis Regulation, where it actually works as a certificate of enforceability.[149]

3.1.3 Procedural Requirements

60 Like any other procedure, the one for recognition or enforcement is subject to requirements such as jurisdiction, standing, representation by counsel, service, etc, as well as to time limits; appeal remedies, or even cassation may be foreseen. As already hinted, while international conventions or instruments may include some relevant rules, these are not exhaustive[150] but need to be completed by those in force in the jurisdiction

[144] More exactly, it provides for a cause of action independent of the original claim.

[145] Virtually all Commonwealth countries follow a 'double-track' approach to recognition and enforcement: registration is one of them; transformation, the other. The latter possibility has been borrowed also in other jurisdictions, such as Lichtenstein, above (n 35).

[146] Expeditious acting may even be compulsory: see Art 13, paragraph 1, in fine Hague Convention 2019.

[147] See, for instance, under Art 2 (b) Montevideo Convention.

[148] See Art 12, paragraph 3, Hague Convention 2019. A 'recommended form' confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention is available at the Conference website.

[149] See *BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v Gradbeništvo Korana d.o.o*, Case C-579/17 (CJEU), Judgement 28 February 2019 [ECLI:EU:C:2019:162]; because of its function, scholars have baptised it as 'judicial passport': Hess (n 68) 379 ff. The form can be accessed on line (https://e-justice.europa.eu/273/EN/judgments_in_civil_and_commercial_matters_forms accessed July 2024).

[150] Generally, the degree of procedural harmonization is very limited. All instruments under examination refer to the documentary requirements of the application for recognition and enforcement. They seldom address other issues: see nonetheless Art 16 of the CEMAC Agreement, on appeal; and the more detailed but equally partial rules of the Brussels I bis Regulation.

where recognition or enforcement is sought.[151] By way of consequence, the procedural design varies from jurisdiction to jurisdiction.

61 Possibly because of their technical nature and the very fragmented state of the regulation, the above-mentioned procedural aspects are seldom dealt with. What follows addresses jurisdiction, time limits, and documents accompanying the application.

3.1.3.1 Jurisdiction

62 The interest of a judgment creditor in importing a decision from one State to another is related to the effects attached to such a decision. Having it recognized or declared enforceable, as the case may be, will prevent the reproduction of the process, allow to proceed to forced execution or provide a title for that purpose, even if it is not immediately used. By way of consequence, is only justified trying to 'export' a decision to a jurisdiction where it can actually deploy the desired effects. Otherwise, the application for its recognition or enforcement can be understood as an attempt on the side of the creditor to put pressure on the judgment debtor. It seems thus reasonable to ask whether an application for recognition or enforcement of a foreign judicial decision requires some connection between the decision and/or the judgment debtor and her assets, and the requested State.

63 The practical significance of the question became clear at a global level as a result of the Chevron saga in Canada, particularly after the decision of the Supreme Court of Canada in *Yaiguaje v Chevron Corporation*.[152] The plaintiffs sought to enforce a USD 9.51 billion Ecuadorian judgment in Ontario against Chevron Corporation, who was a judgment debtor in the Ecuadorian case, and Chevron Canada Limited, a non-party to the Ecuadorian case and seventh-level indirect subsidiary of Chevron. The Ontario court's jurisdiction over Chevron Corporation was challenged on the basis that there was no connection between either the defendant or the underlying action and the province. The Supreme Court of Canada rejected the argument, holding, essentially, that there were

[151] See Art 6 Montevideo Convention; Art 19 and 24 Las Leñas Protocol; Art 41, paragraph 1, Brussels I bis Regulation; Art 31 (B) Riyadh Agreement (which could nevertheless be understood as referring only to *execution*); Art 13, paragraph 1, Hague Convention 2019. The Kiev Convention merely states, under Art 7 *in fine*, that 'Judgments rendered by a competent court of one CIS Member State which provide for execution to be levied upon the debtor's property shall be enforced on the territory of another CIS Member State by authorities appointed by a court or determined in accordance with the laws of this State'.

[152] *Chevron Corp. v Yaiguaje*, Case 35682 (Supreme Court, Canada) Judgement 4 September 2015 [2015 SCC 42].

no jurisdictional limitations for actions to enforce a foreign judgment, not even the presence of assets in the jurisdiction. [153]

64 Among the instruments under examination in this chapter only the Hague Convention 2019 addresses the question of where to apply for recognition or enforcement (without nonetheless establishing a rule on jurisdiction):[154] following Art 13, paragraph 2, the court of the requested State shall not refuse the recognition or enforcement of a judgment under the Convention on the ground that they should be sought in another State. None of the remaining instruments includes rules or references to international jurisdiction regarding an application for the recognition or the exequatur of a foreign title. This may be understood as absence of any requirement for connection between the foreign judgment and the forum,[155] except where rules on venue come to impose (indirectly) such a requirement; or an issue to be determined by each contracting party to the convention or agreement at stake.[156]

3.1.3.2 Time Limits

65 A further issue deserving attention is the one of the time limits to apply for the recognition or enforcement (as a step prior to execution *sensu stricto*) of a foreign judgment.[157] Such limits correspond to the obvious need for legal certainty.

66 According to Art 9 (e) Kiev Treaty, the enforcement of a foreign judgment will be refused if requested after a three-year limitation period. Art 55 (f), of the Minsk Convention allows for a refusal of enforcement if 'the term for coercive execution' as foreseen in the requested State has expired. The CLM 2017 endorses a mixed solution: a judgment creditor may seek enforcement in the requested State while the judgment is enforceable according to the law of the State of origin; however, she will be precluded from doing so

[153] The only procedural condition was that the defendant had been validly served with notice of the proceedings, which was not contested. The Court chose not to address whether Chevron Canada Limited's assets could be considered to be Chevron Corporation's assets for the purposes of satisfying the Ecuadorian judgment. That question was answered in the negative in later proceedings: *Yaiguaje v Chevron Corporation* (Supreme Court, Canada), Judgment 20 January 2017 [2017 ONSC 135], confirmed on appeal 2018 ONCA 472 and leave to appeal to the Supreme of Canada denied (2019 CanLII 25908).
[154] See Explanatory Report, paragraphs 316-319.
[155] Depending on the national system of the contracting party or Member State, the mere interest of the judgment creditor to have the decision enforced in that jurisdiction may suffice; alternatively, some real prospects of successful execution or other proper purpose may be required.
[156] Or imply the connection exists: see Art 16 CEMAC Agreement, Art 53 paragraph 1 Minsk Convention.
[157] At least in theory, the question is different from the one on the limitation period to ask for the actual execution of the foreign decision. Where the distinction exists, it begs the question of whether the starting point of the time limit for the latter should be the date the decision was handed down in the State of origin, or the one when *exequatur* (or registration) was granted in the requested State.

after 10 years since the day the judgment become enforceable in the requested State, and this, even if the judgment continues to be so in the originating State.[158]

67 No rule on time limits to apply for the recognition or enforcement of a foreign judgment is set in the remaining instruments. The lack of a specific indication does not necessarily allow for the application to be filed at any time. On the one hand, it may be that the issue has been deliberately left to be governed by the law of the requested State, just like many other procedural questions not addressed in the conventions or supranational instruments.[159] On the other hand, as far as enforcement is concerned, it should be recalled that in principle courts can only execute a foreign judgment which is already enforceable in its country of origin, as long as it can still be enforced there. This is clear under Art 20 (e) Las Leñas Protocol, Art 31 (A) Riyadh Agreement and Art 39 of the Brussels I bis Regulation;[160] also according to Art 4, paragraph 3, Hague Convention 2019, enforcement in the requested State depends on the judgment being enforceable in the State of origin. It can thus be said that, *de facto*,[161] under those instruments the limitation period to file an application for the enforcement of a foreign judgment depends on the law applicable to the foreign judgment in its country of origin. A longer period established under the requested State will not extend the enforceability of a foreign judgment that is no longer enforceable in the State of origin – by contrast, enforceability may become shorter due to the expiration of the time limit to file said application in the requested State.[162]

3.1.3.3 The Application (Documents to be Produced)

68 When applying for recognition of enforcement of a foreign decision, the applicant[163] will be asked to produce some documents attesting, in an official way,[164] to the existence of the foreign judgment, its contents and its capability to produce the desired effect, and, depending on the system, documentary evidence related to other aspects as well. In addition, if only for practical reasons[165] she will normally be asked to provide a

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[158] Clause 9 (4) and 16 (4). According to the Explanatory text, the 10 years-time follows the Canadian Uniform Law, although the latter is only in force in a single Canadian province. The number of years may be adapted if appropriate in other Commonwealth countries.

[159] See for instance Art 13, paragraph 1 Hague Convention 2019.

[160] It may be inferred from the condition of finality under Art 2 (g) Montevideo Convention.

[161] *De iure*, the requested declaration of enforceability will be refused 'on the merits' because the foreign decision is no longer enforceable, and not because of the claim being inadmissible.

[162] See *Società Immobiliare Al Bosco Srl,* C-379/17 (CJEU), Judgment 4 October 2018 [ECLI:EU:C:2018: 806] para 39; Art 13, paragraph 1 Hague Convention 2019 and Explanatory Report, para 310, 311.

[163] Art 17 CEMAC Agreement; implicitly, Art 3 Montevideo Convention; Art 21 Las Leñas Protocol; Art 8 Kiev Treaty; implicitly, Art 53 Minsk Convention; Art 37 and 42 Brussels I bis Regulation; Art 12 Hague Convention 2019.

[164] A priori, according to the law of the State of origin, that is to say, the rule *locus regit actum* which traditionally applies to formal requirements of documents.

[165] Translation and transliteration may also serve the right to due process of the party against whom recognition and execution is requested, in that they allow her to defend herself against the claim to the effect: see Art 43, paragraph 2, Brussels I bis Regulation.

translation of the decision, ordinarily a sworn one, together with proof of the identity and of the official capacity of the person signing the document through authentication or legalization. An authority cannot grant recognition or order the execution of a decision it does not understand, or whose authenticity it is not convinced of.

69 Which documents are to accompany the application and which formalities they must comply with depends on the system. Under the Brussels I bis Regulation, a standard certificate must compulsorily be attached to the decision;[166] in principle, only the certificate needs translation.[167] Applicants must supply a translation of the foreign judgment in the remaining legal texts with the exception of the CEMAC Agreement, possibly because French is the common official language of the contracting States. While the CML 2017 does not go into the details of the application, it explicitly requires the translation into English, at least for enforcement purposes. In almost all texts the translations must be certified.[168] Transliteration appears to be a concern only for the European Union.[169] Legalization (and the like) is given up under the Kiev Treaty, the Minsk Convention, the Brussels I bis Regulation, and Las Leñas Protocol (for documents transmitted via Central Authorities); there is a partial dispense under the Riyadh Agreement.[170]

70 Most instruments (but neither the Brussels I bis Regulation nor the CML 2017) ask for proof of timely service of the original claim to the defendant: only in case she did not appear,[171] or without distinctions.[172] Some, but not all, require documentary proof of the *res iudicata* effect attached to the foreign decision, of its enforceability in the State of origin, and of finality.[173]

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[166] Above *Gradbeništvo Korana (*n 149).

[167] Except if the authority in the requested Member State cannot proceed without a translation of the judgment: Art 37, paragraph 2; Art 42, paragraph 2.

[168] The foreign decision must be 'duly' translated under Art 2 (b) Montevideo Convention and Art 20 (b) Las Leñas Protocol, which possibly means 'sworn'. Art 53, paragraph 3 Minsk Convention requests the 'authorized' translation, either to the language of the destination State or to Russian. According to Art 57, paragraph 3 Brussels I bis Regulation, the translations asked for under Art 42, paragraph 3, shall be done by a qualified person; Clause 10(1)(b) and Clause 15(2)(b) CML 2017 require a certified translation. According to Art 12, paragraph 4, Hague Convention 2019, the translation needs not be a certified one if the law of the requested States provides otherwise.

[169] See Art 37, paragraph 2; Art 42, paragraph 3; Art 54.

[170] Art 6, paragraph 1 Kiev Treaty; Art 13 Minsk Convention; Art 26 Las Leñas Protocol, Art 61 Brussels I bis Regulation. A partial dispense exists under Art 34, *in fine* of the Riyadh Agreement. Of course, a dispense may apply also for contracting parties of other instruments as a consequence of a convention on legalization in force between them.

[171] Art 17, paragraph 4 CEMAC Agreement, for enforcement applications; Art 8 Kiev Treaty ; Art 55, paragraph 2 (b) Minsk Convention ; Art 12, paragraph 1 (b) Hague Convention 2019.

[172] Art 3 (e) Montevideo Convention; 20 (d) Las Peñas Protocol; Art 34 (C) Riyadh Agreement.

[173] For instance, neither the Montevideo Convention nor the Kiev Treaty ask for a proof of the enforceability of the decision in the originating State. By contrast, the application must provide evidence of the res iudicata effect according to Art 3 (c) Montevideo Convention and to Art 8 Kiev Convention. On finality, see Art 17, paragraph 3 CEMAC Agreement; Art 3 (c) Montevideo Convention ; Art 34 (B) Riyadh Agreement.

71 For the purposes of this chapter, it should be noted that under some of the instruments the formal and documentary requirements alluded to work as requisites for recognition or enforcement, at the same level as the conditions regarding the merits or the procedure leading to the adoption of the foreign decision.[174] A possible explanation may be that the latter conditions are often checked on the basis of the documents accompanying the application: in other words, the lack of the document is immediately equated to the absence of the condition itself.[175] However, failure to present documents, or missing formalities, should in principle only affect the admissibility of a request, but not its success on the merits.[176]

3.2 Requirements for Recognition and/or Enforcement

72 The success of an application for the recognition and enforcement of a foreign decision depends on the fulfilment of a number of conditions which, from a formal point of view, tend to be very similar across systems. This high degree of convergence allows for a presentation of said conditions grouped according to whether they refer to the decision itself (its nature), to the process leading to its adoption, or to its substance. The classification works as well for the instruments chosen for analysis in this chapter, making it possible to compare and assess the similarities among them, as well as to discover the extent of their differences. For the purposes of the analysis, the conditions are examined as if they were uniformly understood and applied in the contracting or Member States.[177] To date, only the European Union has set up a mechanism – the preliminary reference before the Court of Justice-[178] intended to achieve this goal in practice.

3.2.1 Requirements Related to the Decision

3.2.1.1 A Foreign Judgment

73 Recognition and enforcement relate to foreign judgments. What a 'foreign judgment' is becomes therefore of the essence. In this regard, it is worth noticing that some legal texts provide an autonomous definition aimed primarily at delimitating their scope of

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[174] Art 2 (a), (b), (c), of the Montevideo Convention; Art 20 (a) and (b) Las Leñas Protocol.
[175] Very clearly, Art 20 *in fine* Las Leñas Protocol.
[176] Clearly, Art 17 CEMAC Agreement ('à peine d'irrecevabilité'). The same idea underpins Art 12, paragraph 2 Hague Convention 2019.
[177] This fiction corresponds with the legislative aim: see for instance Art 20 Hague Convention.
[178] Art 267 TFEU. Neither the Court of the Eurasian Economic Union nor its predecessor, the Economic Court of the Commonwealth of Independent States, are endowed with comparable functions: see A Zamaria, 'Court of the Eurasian Economic Union' in H Ruiz Fabri, R Wolfrum (ed), *Max Planck Encyclopedia of International Procedural Law* (2019) and A Douhan, 'Economic Court of the Commonwealth of Independent States' (last update 2017) Max Planck Encyclopedia of International Procedural Law. In the frame of Mercosur, the Protocol of Olivos for dispute settlement of 2002 set up the Permanent Revision Tribunal, which, among other, can issue consultative opinions with an aim to ensure the uniform application of the common rules. So far, it has issued no opinion regarding judicial cooperation.

application.[179] By way of consequence, a foreign judgment not matching the definition may still be imported into the requested State, but under another international convention or agreement, or according to national law. Interestingly, one and the same feature determines sometimes the exclusion of a foreign judgment from the scope of an instrument, while being shaped as a condition for the recognition or the enforcement under another. Interim measures are excluded from the Riyadh Agreement following its Art 25 (C), and from the Hague Convention 2019 pursuant to its Art 3, paragraph 1 (b): they may therefore still benefit from recognition or enforcement under a different regime. Provisional measures are equally outside the CML 2017, according to the accompanying Explanatory text. By contrast, the interim nature of provisional measures prevents their recognition and enforcement under other regimes which do not explicitly exclude them, but require the foreign decision to be final, or to have been rendered in adversarial proceedings.[180]

74 In principle, the 'foreign' nature of a decision is a given the moment it has not been handed down by an authority of the destination State. The condition should not be mistaken with a different issue, namely the internationality of the underlying dispute. Only the Hague Convention 2019 refers explicitly to the latter as a condition of the recognition and enforcement of a foreign decision the contracting States may add by way of declaration according to Art 17.

75 Whether a decision is a 'judgment' for the purposes of recognition and enforcement depends primarily upon two factors: who has taken it, and its nature. By contrast, the national denomination in the originating State is immaterial. This is explicitly recalled by Art 25 (A) Riyadh Agreement, Art 2(a) Brussels I bis Regulation, Art 3, paragraph 1 b) Hague Convention 2019, or Clause 2(1) CML 2017.

76 A judgment involves the exercise of the jurisdictional function, ie, dispute determination in adversarial proceedings. In some domestic systems, authorities other than judges or courts are vested with such functions. This possibility is taken into account under Art 1 Montevideo Convention, Art 51 (a) Minsk Convention, Art 3 Brussels I bis Regulation or Art 25 (A) Riyadh Agreement. By contrast, the Hague Convention 2019 espouses a formalistic approach and limits recognition and enforcement to court decisions.[181] Literally, the CML 2017 requires as well that the judgment be delivered by a court. However, according to the Explanatory Text there are other reasons for the specific allusion to courts under Clause 2. The inclusion of decisions by notaries should therefore

[179] Art 2 (a) Brussels I bis Regulation; Art 25 Riyadh Agreement (A) and (C); Art 3, paragraph 1 (b) Hague Convention 2019; Clause 2(1) CML 2017.
[180] As in the Brussels I bis Regulation.
[181] Art 3, paragraph 1 (b); but see the Explanatory Report at para 102 that refers to authorities within a judicial system that exercise judicial functions.

be possible, provided said notaries are functionally equivalent to judges or courts in the legal system of the State of origin – and in the specific case at hand.

77 The substance of the decision matters as well. To start with, only judgments relating to the parties' substantive rights and obligations can be recognized and enforced. On the contrary, orders aiming at the organization of the judicial proceedings in the State origin do not fall within the scope of these rules. The question is, of course, one of characterization.[182] This probably explains why, while none of the legal instruments analysed establishes a general exclusion of procedural measures, some of them do refer to decisions on the costs and expenses of the proceedings for them to be characterized as 'judgments' for the purposes of recognition and enforcement.[183]

78 Both money-judgments and non-monetary judgments can be recognized and enforced. In other words, there is nothing intrinsic to the latter that would justify excluding them from the outset from the possibility of being recognized or enforced. A different issue is that their enforcement may prove particularly cumbersome: first, it may occur that the relief ordered by the court of origin simply does not exist as such in the receiving State. Additionally, non-monetary decisions impose specific burdens on an enforcing court (for instance, supervising compliance with an injunction to do or not do something). Such difficulties may trigger the decision not to have them covered by an international text: for instance, under Art 1 Montevideo Convention, contracting parties may make a reservation limiting the application of the text to compensatory awards. They seem to be included in the remaining instruments without further ado.[184] However, the CML 2017 reflects the complications associated to the enforcement of non-monetary judgments, devoting to it Clauses 15 and 16. Art 54 Brussels I bis Regulation goes in the same lines.[185]

79 As a rule, foreign decisions recognizing other foreign decisions are not 'judgments' capable of being recognized in turn elsewhere. The *exequatur sur exequatur ne vaut* principle is so deeply rooted that it does not need to be put into words: it is, however, in Clause 4(1)(f) of the CML 2017. It is worth noticing that a recent development in the

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[182] Antisuit-injunctions, ie, injunction against a natural or legal person, prohibiting her from starting or continuing with proceedings in a court or tribunal outside of the jurisdiction, were not excluded from the Brussels Regulation because of their procedural nature, but rather due to their incompatibility with overarching principles of the European Union system: see among other *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, Case C-159/02 (CJEU), Judgment 27 April 2004 [ECLI:EU:C:2004:228]. In *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH*, Case C-456/11 (CJEU), Judgment 15 November 2012 [ECLI:EU:C:2012:719], the ECJ took the position that a dismissal for lack of jurisdiction must be recognised under the Brussels I Regulation.

[183] Art 2 (a) Brussels I bis Regulation; Art 3, paragraph 1, b) Hague Convention ; Clause 2(1) CML 2017.

[184] Las Leñas Protocol refers explicitly to its application to orders for the return of goods handed down in criminal proceedings. It can be inferred that non-monetary judgments by civil courts are included *eo ipso*.

[185] Below para 138 ff. The inclusion of non-monetary judgments was discussed at The Hague; however, the focus was not on the points alluded to but on the fate of the monetary measures (penalties) that often accompany non-monetary decisions, to force compliance. See Explanatory Report, at 96, 97.

case law of the CJEU may imply departing from the above-mentioned principle, not only for decisions of the Member States, but also for those originating from third States.[186]

3.2.1.2 A Final Judgment

80 If the judgment whose recognition and enforcement is requested is revoked or amended in the State of origin, a decision recognizing or declaring its enforceability in the receiving State will become moot. To avoid such a situation, it is not uncommon that only final foreign judgments, which have become *res iudicata* in the State of origin, are eligible to be recognized and enforced elsewhere. The solution has been espoused by some of the instruments under analysis here.[187] Alternatively, others offer the possibility of staying the recognition or enforcement proceedings while the foreign decision is being appealed, or can still be appealed in the State of origin. Such possibility exists under Art 38 (a), and Art 52, paragraph 1, Brussels I bis Regulation,[188] as well as under Clause 13 and 16(3) CML 2017.[189] In both cases, it is for the court of the requested State to decide on the length of the stay and its terms.

81 Art 4, paragraph 4 Hague Convention 2019 leaves it open for the contracting parties to decide whether the appropriate solution is to postpone recognition and enforcement, or to refuse it. The provision makes it clear that the condition only affects the admissibility of the application, hence a refusal does not prevent recognition once the foreign judgment becomes final.

82 While a (relative) agreement exists thus on the treatment deserved for non-final foreign decisions, the same cannot be said as to what a final decision is. In a broad meaning, 'final' is the opposite of 'interim': appealable decisions are not final, and neither are provisional measures nor decisions called to be modified if circumstances change, as is the case with support orders in family law. From a narrower perspective, finality relates to appeal. In this latter regard, there is no unanimity as to which appeal prevents finality, even where reference is made to 'ordinary', as opposed to 'extraordinary' appeal. Depending on the system, finality may be denied to decisions which may still be reconsidered by the delivering court, but accorded to those that may be contested

[186] *J v H Limited*, Case C-568/20 (CJEU), Judgment 7 April 2022 [ECLI:EU:C:2022:264]. Scholars have been critical of the decision and propose a clarification against it be made on the occasion of the recast of the Regulation: see B Hess, D Althoff, T Bens and N Elsner, 'The Reform of the Brussels Ibis Regulation - Academic Position Paper (May 22, 2024)', available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4853421 (accessed August 2024) 22 ff.

[187] See Art 14 (3) CEMAC Agreement on Judicial Cooperation; Art 2(g) Montevideo Convention; Art 20 (c) Las Leñas Protocol; Art 25 (B) Riyadh Agreement. Judging from Art 53, paragraph 2 (a) Minsk Convention, foreign provisional judgments may be enforced.

[188] Where, pursuant to recital 31, the court may grant enforcement subject to limitation or the provision of security.

[189] Clauses 13 and 16 (3). The Model law only applies to 'final judgments'. However, according to Clause 2 (2), a foreign judgment is to be treated as final notwithstanding that in the courts of the state of origin: (a) an appeal is pending against it; or (b) the time within which such an appeal may be made or leave for appeal requested has not expired.

before a higher court; or only to those that may not be contested at all any longer. An additional related problem is that of the law applicable to the final character of a decision. The instruments under examination in this chapter do not address such issues, or do it only to an extent insufficient to eradicate the uncertainties.[190] In the absence of a uniform rule, each contracting party or Member State will apply its own national solution.

3.2.1.3 A Judgment having Effects, or Enforceable

83 To be recognized or enforced elsewhere, a judgment must first have effects or be enforceable, as the case may be, in the State of origin. Such conditions acquired at the national level need to be established before the authority or court in the requested State. To this purpose, documentary evidence in the form of a certificate or similar is usually asked for.[191]

84 The loss of enforceability in the originating State entails it is also immediately lost in the requested State. It would thus be only logical that, in the State of destination, the provisions of the originating State on limitation periods for execution are considered already at the stage of assessing the admissibility of the application for exequatur or registration. However, as already seen this is not necessarily the prevailing solution.[192]

3.2.2 Requirements Related to the Procedure Leading to the Judgment

3.2.2.1 Jurisdiction of the Court of Origin

85 As a rule of universal value, recognition and enforcement of a foreign judgment is conditional upon the rendering court having had (acceptable) international jurisdiction: in other words, some connection is required between the adjudicating court and the parties and/or the dispute. Under the majority of systems, what matters is not whether the courts of origin applied correctly their own rules on jurisdiction,[193] but whether those rules fit the standards of the requested State. Although rare, sometimes the requirement will be for the cumulative respect of both.[194]

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[190] See n 189, on an autonomous definition of 'finality' for the purposes of the CML 2017. Art 51, paragraph 2 of the Brussels I bis Regulation, explains that 'Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1'.

[191] Above para 68 ff.

[192] Above para 65 ff.

[193] An approach which would make sense if the jurisdiction of the court in the originating State was only required to ensure the judgment will not be annulled in that State.

[194] This double control seems to be the solution in a number of Arabs countries: the jurisdiction of the originating court is first examined under its own system, but it is only accepted if, in addition, the receiving court does not claim jurisdiction over the subject matter. Scholars posit that the situation is

86 The rationale for, and the scope of the assessment of the jurisdictional grounds vary even if, as a starting point of today's recognition and enforcement, a fundamental rights-centered approach focused on the right to a due process of the defendant has come to replace to a large extent the traditional public international law perspectives on the exercise of adjudicatory jurisdiction in cross-border cases.[195]

87 A general divide can be drawn between systems following respectively a common law and a civil approach: the instruments analysed in this chapter, including the CML 2017,[196] tend to be modelled on the latter. The traditional common law approach focuses on whether the defendant before the foreign court was present within the territory when the proceedings were instituted or submitted to said court.[197] Service in the jurisdiction of the rendering court and consent have thus been the traditional jurisdictional grounds for the purposes of enforcement under English law (common law regime – as opposed to the statutory one).[198]

88 In systems following a civil law approach foreign judgments are considered acts of foreign judicial adjudication. As a rule, there will be a distinction between between exclusive and non-exclusive heads of jurisdiction. Where the requested State claims exclusive jurisdiction over a subject matter, it intends to guarantee the respect, on the territory, of substantive policy choices made regarding that field; no foreign court can pretend to have concurrent jurisdiction, and, as a consequence, no foreign decision on such subject matter will be recognized or enforced. Beyond those cases, the originating court will usually be deemed to have had international jurisdiction over a dispute either as the court of the domicile or residence of the defendant, or where it was fair and reasonable, in terms of proximity and foreseeability, to summon the defendant to appear and defend in the originating country. The underlying idea is to protect

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different under the Riyadh Agreement: K Balz and A Shahoud Almousa, 'The Recognition an Enforcement of Foreign Judgements and Arbitral Awards under the Riyadh Convention (1983). Thirty Years of Arab Judicial Co-Operation' (2014) International Journal of Procedural Law 273, 281-282.

[195] A trend in the lines of the 'paradigm shift' alluded to by Hess (n 95) 44, as one of the salient developments of international civil procedural in the last 50 years.

[196] See Clause 5.

[197] A Briggs, 'Recognition and enforcement of judgments (common law)', in J Basedow, G Rühl, F Ferrari, P de Miguel Asensio (ed), *Encyclopedia of Private International Law* (Elgar 2017) 1479, 1483-1484, which explains this choice as 'probably a reflection of the principles of comity and respect for territorial sovereignty'.

[198] To these, further bases have been added in other countries belonging to the common law tradition. In India, a foreign court is considered internationally competent if the debtor was a national of the jurisdiction and, possibly, also if he owned immovable property, in respect of which the cause of action arose, in the territory of the foreign court: Jolly and Saloni (n 1) under II.B, referring to case law. Canada common law provinces, which used to apply the English solution, departed from it in the 1990s with the Supreme Court decision *Morguard Investments v De Savoye*, Case 21116 (Supreme Court, Canda), Judgment 20 December 1990 [1990 3 SCR 1077], further confirmed in *Beals v Saldanha*, Case 28829 (Supreme Court, Canada), Judgment 18 December 2003 [2003 SCC 72] adding a new rule based on a 'real and substantial connection' to the action in the rendering forum. Several grounds for indirect personal jurisdiction in the US are listed under section 5 (a) of the 2005 Uniform Foreign-Country Money Judgments Recognition Act. The list is not intended to be exclusive.

defendants against exorbitant grounds of jurisdiction.[199] The test can have a general scope (ie, apply to all defendants), or be limited to specific categories of defendants deemed to be in a position of structural inferiority, such as consumers in disputes against professionals, or employees in proceedings against their employer.

89 From a technical point of view, several approaches are used to carry out the review of the jurisdiction of the originating court. Some legal systems provide for a list of indirect grounds for jurisdiction: the jurisdiction of the State of origin will be accepted if a court of the requested State would have assumed adjudicatory jurisdiction under the same factual circumstances. In turn, in some systems no fixed rule exists and the receiving authority or court examines, on a case-by-case basis, whether the jurisdiction of the court of origin fits the principles underlying their own national rules. Finally, the review of the jurisdiction may be restricted or even given up if the State of origin and the requested State have concluded a so-called 'double convention' where common grounds of direct jurisdiction are agreed upon - provided it can be presumed that all judges in both jurisdictions apply them correctly. In such cases, there is no need for a second check at the stage of recognition.

90 All instruments examined in this chapter make recognition and enforcement conditional upon the international jurisdiction of the foreign court. The rules differ, however, in many respects. To start with, pursuant to Art 14(1) CEMAC Agreement the rendering court must have had international jurisdiction according to its *own* laws, and not those (or the standards) of the receiving State.[200] In a way, this is as well the solution adopted by the Brussels I bis Regulation, the Kiev Treaty and the Minks Convention, with the relevant difference that those are double-conventions, which is not the case of the CEMAC Agreement. Besides, and precisely thanks to the existence of direct grounds of jurisdiction, under the Brussels I bis Regulation the jurisdiction of the court of the State of origin cannot be checked at the stage of recognition and enforcement, except for

[199] Even if the same legal system would accept them to ground its own international jurisdiction. It could be claimed that foreign judgments are thus discriminated. The underlying rationale may be giving advantages to own nationals: an exorbitant ground for jurisdiction accords them easy access to justice as claimants in the territory; its exclusion as acceptable indirect ground provides a shield against foreign decisions. The prototypical example of this attitude was the French general ground for jurisdiction under Art 14 Civil Code until the *Prieur*, Case 857 (Cour de Cassation, Chambre civile 1), Judgment 23 May 2006 [04-19.099]; G Cuniberti, 'The Liberalization of the French Law of Foreign Judgments' (2007) 56(4) Int'l & Comp L Q 931.

[200] This would also be the solution under the Las Leñas Protocol according to a minority opinion: see on the debate A Mendoza Peña, 'La necesidad de facilitar la circulación de decisiones judiciales en el ámbito del Mercosur' (2010) 2 Revista Derecho y Ciencias Sociales (Instituto de Cultura Jurídica y Maestría en Sociología Jurídica) 132, 139; and openly critical, also in relation to Art 2(d) Montevideo Convention, E Tellechea Bergman, 'La jurisdicción internacional como condición para el reconocimiento del fallo extranjero, necesidad de una nueva regulación en el ámbito interamericano' (2016) 49(146) Boletín Mexicano de Derecho Comparado 205, 210-213, 217-219.

some specific, particularly sensitive subject matters.[201] This is likely the solution as well of the Minsk Convention: although it establishes no express ban on the jurisdictional review, pursuant to Arts 52 and 55 (d) the recognition of decisions from other contracting States may be refused if the case relates to the exclusive competence of the judiciary of the requested State.[202] By contrast, full control remains according to Art 9 of the Kiev Treaty.

91 None of the remaining instruments is a double convention, although the Las Leñas Protocol may work as such for contracting parties having ratified other international agreements providing for direct jurisdictional grounds.[203] Under Art 2 (d) Montevideo Convention, the assessment of jurisdiction is to be made in accordance with the law of the requested State.[204]

92 The situation is complex under the Riyadh Agreement. In light of Art 25 (B), which requires that 'the courts of the contracting party [which made said judgments] are competent under the provisions of the rules of jurisdiction in force in the requested party', and that 'the legal system of the requested party does not retain for its courts or the courts of another party the exclusive competence to make such judgments', it could be nonetheless be understood that the system is (at least partially) one of double control.[205] In addition, the Agreement lists indirect grounds for jurisdiction in Arts 26 to 28. Scholars posit that 'The rendering court is deemed to be competent when its jurisdiction is based on one of them or if it is competent according to the rules of international jurisdiction applied in the enforcing State', but acknowledge that 'the Convention may cause a dilemma' when the rendering court has followed one criterion which clashes with the other one.[206]

93 Clause 5 of CML 2017 establishes as well a list of indirect heads for jurisdiction. In her application for registration of monetary and non-monetary judgments, the judgment creditor shall indicate which one or more of those heads are being relied on to claim that

[201] Those on which the requested State may claim exclusive jurisdiction, and some of the grounds for the protection of weaker parties to contracts: see Art 45, paragraph 1, (e). Keeping the control at the stage of recognition and enforcement is possibly a way to stress the need to apply carefully the rules on direct jurisdiction in those matters.

[202] In principle, only proceedings about property rights and other material rights on real estate justify exclusive jurisdiction: see Art 20, paragraph 3, and Art 21, paragraph 1.

[203] See Art 14 of the Buenos Aires Protocol on International Jurisdiction in Contractual Matters of August 5th, 1994, Decision of the Council of the Common Market Nr 01/94, and Art 12 of the Santa María Protocol on International Jurisdiction in Matters of Consumer Relations, of 17 December 1996, Decision of the Council of the Common Market Nr 10/96.

[204] Except for those countries (so far: Mexico and Uruguay) having signed as well the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards, La Paz, 24 May 1984; on the relationship between the conventions see J Samtleben, 'Neue interamerikanische Konventionen zum Internationalen Privatrecht' (1992) *Rabels Zeitschrift* 1, 19.

[205] Above Balz and Shahoud Almousa (n 194), on a different view in academia.

[206] H Mohd and S Al Mulla, 'Conventions of Enforcement of Foreign Judgments in the Arab States' (1999) 14(1) Arab Law Quarterly 33, 48.

the court of the State of origin had jurisdiction: in the case of monetary judgments, this information is given both to the court and to the judgment debtor.[207] The judgment debtor may contest the assertions in her application for registration to be set aside.[208] Judging from Clause 6, recognition of a foreign decision is not dependent on the court of origin having had international jurisdiction.

94 At The Hague Conference, reaching an agreement on the adequacy of grounds of jurisdiction for the purposes of recognition and enforcement proved to be a difficult task, to the point that a first attempt to have a universal convention on exequatur failed due to the impossibility to agree on the matter.[209] Currently, grounds for international jurisdiction work as 'eligibility' requirement of the foreign decision according to Art 5 of the Convention. Where the jurisdiction of the court of origin corresponds to one of these heads, its judgment will be one eligible for recognition or enforcement, although it may be that these are still refused for lack of jurisdiction, but only in two situations. The first one is failure to respect the exclusive basis for jurisdiction for rights *in rem* in immovable property: pursuant to Arts 6 and 15, such failure entails compulsorily a denial of recognition or enforcement.[210] The second situation is established in Art 7, paragraph 1 (d): refusal is allowed, albeit not mandatorily, where the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin.

95 The 'privileged' rank accorded to party autonomy by the Hague Convention is shared by the Minsk Convention,[211] but not by the remaining instruments studied here.[212] The agreement to submit to the court of origin as well as submission by appearance to that court are commonly accepted grounds for indirect jurisdiction, just as many others. However, the exact meaning of each of the circumstances providing for jurisdiction and, as already hinted, their respective place in a given system, vary from one to another to different degrees. By way of example, there is no exclusive jurisdiction of the State of origin for proceedings concerning real property located in that State under Clause 5(1) CML 2017, in contrast to the Minks Convention, the Brussels I bis Regulation, the Riyadh Agreement and the Hague Convention 2019. The Brussels I bis Regulation prefers 'domicile' to residence of the defendant in the originating State as indirect head for jurisdiction. Residence has to be 'habitual' under Art 5 Hague Convention 2019, but not in other regimes such as the Riyadh Agreement, Art 28 (A). The CML 2017, Clause 5(1)(d), requires that the judgment debtor be 'ordinarily' resident in the State of origin: according to the Explanatory text, 'residence' is not enough; judging from scholars'

[207] Clauses 10 (1) (c), and (2) (a); and 15 (2) (c).
[208] Clauses 12 (2) (a), and 16 (2) (a).
[209] For a short summary of the first Hague Judgments Project, Yekini (n 1) 158-161.
[210] Except where the matter arose merely as a preliminary question: see Art 2 (2) and 8.
[211] See Art 53 (d) and 55 (e).
[212] Very clear as regards the Brussels I bis Regulation *"Gjensidige" ADB v „Rhenus Logistics" UAB and „ACC Distribution" UAB*, Case C-90/22 (CJEU), Judgement 21 March 2024 [ECLI:EU:C:2024:252].

writing, it is unclear whether the requisite corresponds to the 'habitual residence' under the Hague Convention 2019.[213] The comparison of the instruments shows further interesting differences regarding as well other heads for jurisdiction: for instance, among the Riyadh Agreement, the Hague Convention 2019, the CML 2017, on the one hand, and the Brussels I bis Regulation (as interpreted by the CJEU) on the other, for only the Regulation admits the place where the damage occurred as a valid head for jurisdiction in torts. In spite of the apparent similarities, it would hence be inaccurate to describe the setting as 'harmonized'.

96 Further divergence can be identified regarding the scope of the examination of the factual support for jurisdiction: in other words, whether the factual findings of the court of origin are binding on the authority or court in the requested State or not. Suffice it to compare Art 45, paragraph 2, Brussels I Bis regulation, whereby, for the purpose of the jurisdictional test, the court in the destination State is bound by the findings of facts on which the court of origin based its jurisdiction, with Art 29 Riyadh Agreement, according to which 'The courts of the contracting party requested to recognise or implement a judgement, when considering the basis of the jurisdiction of the courts of the other contracting party, shall have regard to the facts included in the judgement, unless the judgement is made in absentia.'

3.2.2.2 A Fair Trial

97 In all instruments, a judicial decision of a contracting party or Member State resulting from an unfair trial does not deserve recognition or enforcement elsewhere. What a 'fair trial' entails for such a purpose is nevertheless differently understood.[214]

3.2.2.2.1 Service

98 If the defendant in the original proceedings was not properly served, or at all, she would not have been given the opportunity to properly defend herself. Hence, the subsequent decision should not be entitled to recognition or enforcement in another forum.[215]

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[213] Yekini (n 1) 109-110.

[214] We refer here to the divergence in shaping the condition in each of the legal texts under examination, and not to the different understanding of a 'fair trail' in each of the contracting parties or Member States. In this respect, analysing the CEMAC Agreement, E A T Gatsi, 'L'Espace Judiciaire Commun CEMAC en Matière Civile et Commerciale' (2016) 21(1) Unif. L. Rev. 101, 109, posits that the absence of a common due process culture among the signatories of the CEMAC Agreement will complicate the application of the condition.

[215] The practical relevance of the principle is indisputable. In the context of the European Union, 'after fifty years of practice, it has been observed that this provision [Art 45 (2) Brussels I bis Regulation] relating to defaulting defendants constitutes the most used provision to refuse recognition of foreign judgments': J T Novak and V Richard, 'Article 45' in M Requejo Isidro (ed), *Brussels I bis Regulation. A Commentary on Regulation (EU) No 1215/2012* (Elgar 2022) 45.12. Fictitious service and service by

99 While the principle is universally shared, the specifics are shaped differently depending on the text under consideration. When the application for recognition or enforcement concerns a decision by default, some instruments among those analysed here, but not all, require the applicant to prove that the act that introduced the proceeding was timely served or brought to the notice of the defaulting party. Documentary evidence of timely service of the claim on the defendant is not asked for under the Kiev Treaty; it is under Art 17, paragraph 4 CEMAC Agreement, Art 3 (b) Montevideo Convention, Art 20 (d) Las Leñas Protocol, Art 53, paragraph 1 (2) of the Minsk Convention, and Art 12, paragraph 1 (b), Hague Convention 2019. Some of the latter instruments specify even the type of proof to be produced.[216] The Brussels I bis Regulation alludes to documentary evidence of service only for enforcement applications of provisional measures: because such measures are often taken in non-adversarial proceedings, the stress is placed on the service of the judgment.[217]

100 There is no consensus on the law applicable to the service of a claim or of the standards required to be met for service to be considered properly done at the stage of the recognition and enforcement of the subsequent decision.[218] Because the Riyadh Agreement contains a separate chapter on summonses, service in accordance to it should be accepted for the purposes of recognition and enforcement of a judgment.[219] Art 7, paragraph 1 (a), Hague Convention 2019 goes into some detail as to how service ought to have been done and what must have been served.[220] Other instruments are silent: Art 14 (4) CEMAC Agreement only requires that 'la décision a été prononcée à la suite d'un procès équitable offrant des garanties de représentation des Parties'. Art 20(d) of Las Leñas Protocol and Art 55(b) Minsk Convention are equally imprecise. The wording of Clause 6(3)(c) CML 2017, whereby a foreign judgment will not be recognized if rendered in proceedings that 'were conducted contrary to the principles of procedural

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public notice are particularly problematic, as is the question of the language of communication. Once again, the European Union offers an advanced model of supranational regulation intended to provide enhanced protection to the rights of the addressee which, at the same time, improves and expedites the transmission and service of judicial and extrajudicial documents between the Member States: see Regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), 2020/1784 of 25 November 2020 (EU).

[216] According to Art 17 (4) CEMAC Agreement, a 'copie conforme par le greffier de la juridiction dont émane la décision', in addition to all documents capable to establish service was made in due time. Art 20 Las Leñas Protocol requires that the evidence arises from the copy of the decision itself.

[217] Art 42, paragraph 2.

[218] For an in-depth analysis of the different perceptions concerning service of proceedings abroad see F de Andrade and G van Calster, 'Due Process - Protecting the Right to Fair Trial of Foreign Defendants in Cross-Border Proceedings: Comparing Practices, Investigating Conflicting Principles, and Searching for Common Standards' (2024) CPLJ, pt XIV ch 5 https://www.cplj.org/publications/14-5-due-process-protecting-the-right-to-fair-trial-of-foreign-defendants-in-cross-border-proceedings-comparing-practices-investigating-conflicting-principles-and-searching-for-common-standards accessed August 2024.

[219] Art 6 *in fine*; see nonetheless Art 30 and paragraph 101 below on the doubts it raises.

[220] 'The document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim'.

fairness and natural justice' leaves no doubt about service being a prerequisite of the import of a foreign decision, but sheds no light as to its assessment.

101 Art 2 (e) Montevideo Convention requires that the defendant has been summoned 'in due legal form substantially equivalent to that accepted by the law of the State where the judgment (…) is to take effect': literally, the provision requires a double check. In principle, the Riyadh Agreement leaves the decision to each contracting party, for, according to Art 30 *in fine*, the judicial body examining the request for recognition *may* observe the rules in force in its own country: it is unclear whether this would allow to ask for an exact coincidence in the service methods of the originating and requested States. In any event, both instruments seem to espouse a formal approach. By contrast, other regimes put the accent on whether the defendant was or was not made aware in a timely manner of the claim brought in the State of origin, rather than on whether certain legal rules on notification have been followed: the test is factual, more than technical.[221] Art 7, paragraph 1 (a) (i) Hague Convention 2019, as well as the Brussels I bis Regulation,[222] follow this pattern.

102 While the service requirement is usually linked to the right of defense, notification having effectively reached a defendant may still be considered unacceptable for the purposes of recognition or enforcement due to other reasons. Under Art 7, paragraph 1 (a) (ii) Hague Convention 2019, recognition or enforcement may be refused if service was made on a defendant in the requested State 'in a manner that is incompatible with fundamental principles of the requested State concerning service of documents'. According to the Explanatory Report, the provision reflects the understanding of some States in the sense that service of documents instituting proceedings is a sovereign act: unauthorized service of foreign documents in the territory constitutes an infringement of sovereignty, thus a cause for refusing recognition or enforcement of any subsequent decision.[223] No similar provision is to be found in the other instruments.

3.2.2.2.2 Further Procedural Requirements. The Public Policy Defence

103 In almost all regimes on recognition and enforcement, a public policy defence or a similar clause[224] exists as a ground to deny recognition or enforcement: the Kiev Agreement and the Minsk Convention are exceptional in this regard. It is not always easy to discern the scope of such clauses, in particular where they are drafted with no indication as to whether they refer to procedural or to substantial public policy and, as it happens under some of the instruments under examination, recognition and enforcement is conditional upon the respect of specific aspects of the right to due process. Reference has already

[221] E A T Gatsi, 'Coopération judiciaire entre les états de la CEMAC : vers un espace judiciaire commun?' (2016) 2 Revue de Droit International et de Droit Comparé 159, 160-164, 169, claims that this is also the case under Art 14 (4) CEMAC Agreement.
[222] See Novak, Richard (n 215) 45.20 and ff.
[223] At para 253.
[224] The reference is to 'principles of procedural fairness and natural justice' in Clause 6 (3) (c) CML 2017.

been made to service of process. In addition, Art 14(4) CEMAC Agreement insists on 'representation', which probably means legal professional assistance, for a foreign decision to be accorded recognition.[225] According to Art 2 (f) Montevideo Convention, both parties to the dispute must have been given the opportunity to present their defence in the State of origin. Halfway between procedure and substance, Art 30 (C) Riyadh Agreement imposes the refusal of recognition if the laws of the requested contracting State applicable to legal representation of ineligible persons, or of persons of 'diminished eligibility', were not taken into consideration. Pursuant to Art 7, paragraph 1 (b) Hague Convention 2019, recognition and enforcement may be denied if the judgment was obtained by fraud.[226]

104 These explicit mentions create a problem of interpretation of the public policy clause where the international instrument provides no indication as to its scope. Art 7, paragraph 1, (c) Hague Convention 2019, for instance, works clearly as a catch-all mechanism to cover procedural failures in the State of origin and amounting to a breach of the right to due process in the eyes of the destination State. By contrast, the rules alluded to above in other texts may be understood as simply stressing minimum procedural requirements all foreign decisions must meet to circulate between contracting or Member States, but also as meaning that no other procedural failure amounts to a valid ground for denying recognition and enforcement. The latter interpretation would permit the recognition and enforcement of decisions in spite of an excessive length of the proceedings, partiality or lack of independence of the court in the case at hand, or even systemic lack of compliance with due process.[227] The issue is not banal: in Europe, it caused a debate finally settled by the Court of Justice in the sense of including fundamental procedural guarantees as part of public policy for the purposes of recognition and enforcement.[228]

105 Assuming that the unspecific public policy or public order clause in the remaining instruments is not limited to substantive infringements, it should be noted that what

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[225] Gatsi (n 214) 109, defends a large understanding of the provision, so as to encompass the whole 'ordre public procédural'.

[226] According to the Explanatory report, para 256, 257 both fraud in connection with the procedure and related to the substance are comprised.

[227] A ground existing under the US 1962 Uniform Foreign Money-Judgments Recognition Act as well as in the 2005 Uniform Foreign-Country Money Judgments Recognition Act, therefore in the states which have adopted them – and subject to scholar's criticism, see W S Dodge, 'Against Systemic Review of Foreign Judgments' (2023) 28 Southwestern Journal of International Law 367; for a practical example, see *Shanghai Yongrun Inv. Mgmt. Co. v Kashi Galaxy Venture Capital Co.* (Supreme Court, New York), Judgment 9 December 2021 [2021 N.Y. Slip Op. 75700]. In the European Union, cooperation may be denied for that reason in criminal matters, but (so far) not in civil ones: see nonetheless https://eapil.org/2023/07/04/the-supreme-court-of-poland-reacts-to-concerns-on-the-rule-of-law-and-independence-of-judiciary-in-poland/?utm_source=mailpoet&utm_medium=email&utm_campaign=new-contents-on-the-eapil-blog_2 accessed July 2024. In the Hague Convention, Art 29 could be used to exclude the Convention regarding States whose judicial systems lack absolutely integrity or Independence: Stamboulakis (n 1) 123.

[228] *Krombach*, Case C-7/98 (CJEU), Judgment 28 March 2000 [EU:C:2000:164].

pertains to procedural public policy remains for each national jurisdiction to decide. By way of consequence, the defence may be applied to the same foreign judgment with a different outcome in each contracting party or Member State. In the European context, a certain degree of harmonization is achieved thanks to the intervention of the CJEU setting outer limits to the public policy defence. Still, within such limits, each Member State remains free to decide on the correctness of the foreign procedure in light of its own due process standards.[229]

106 Under most of the instruments under examination here, the breach of procedural rights must render recognition or enforcement *manifestly* incompatible with public policy for it to impede recognition or enforcement. This is however not the case under the CEMAC Agreement nor the Riyadh Agreement - at least, literally.

3.2.3 Requirements Relating to the Merits

107 Recognition and enforcement of foreign decisions is often conditional upon tests concerning the substance of said decision. In general terms, it can be asserted that an evolution has taken place regarding the extent of the scrutiny: as a rule, a whole review of the merits, looking for any error of law or fact, does not take place any longer. The opposite is in fact a general principle of recognition and enforcement, both in the treaties, where it appears sometimes explicitly,[230] and under national law.[231]

108 The abandonment of the requirement makes sense bearing in mind the foreign decision is assessed in terms of due process: if no problem is found there, it can legitimately be assumed that the parties had an opportunity to present and to discuss any issue regarding the merits in the originating State. Still, because traditions, values and policies vary, sometimes widely, from one jurisdiction to another, some checks remain that may lead to denying recognition or enforcement on the basis of how the substance of the original dispute was handled by the rendering court. The assessment is usually limited to the compatibility with the forum's public policy, and/or the absence of fraud. A broader check leading to a denial of recognition based on a choice-of-law test, i.e., on

[229] Among many other, cases *Dieter Krombach v André Bamberski*, Case C-7/98 (CJEU), Opinion 23 September 1999 [EU:C:2000:164] para 22; *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Case C-420/07 (CJEU), Judgment 28 April 2009 [EU:C:2009:271] para 56; *Rudolfs Meroni v Recoletos Limited*, Case C-559/14 (CJEU), Judgment 25 May 2016 [EU:C:2016:349] para 34; or *Charles Taylor Adjusting Limited and FD v Starlight Shipping Company and Overseas Marine Enterprises INC*, Case C-590/21 (CJEU), Judgment 7 September 2023 [ECLI:EU:C:2023:633] para 33, 34.

[230] See Art 54, paragraph 3 Minsk Convention; Art 32, paragraph 1 Riyadh Agreement; Art 52 Brussels I bis Regulation; Art 2, paragraph 2 Hague Convention 2019 ; Clause 6 (2) CML 2017. Not, by contrast, in the CEMAC Agreement, Las Leñas Protocol, the Montevideo Convention or the Kiev Treaty.

[231] In the literature, Philippines is still proposed as a rare example of review on the merits, as a judgment debtor may claim that the judgment should not be recognized due to a clear mistake of law or fact. It is unclear though whether, in practice, the defense really allows to a re-opening and discussion of substantive matters: Reyes (n 1) 319.

divergences regarding the law applied to the merits (or the outcome of such application), is less common.

109 Finally, most systems subject the import of a foreign decision on a test which looks into its merits not for the purpose of assessing it, but to ensure it does not collide with another (national or, as the case may be, of a third State) judgment. National or international coherence is thus at stake.

3.2.3.1 Substantive Public Policy

110 Contrariness of the foreign decision to public policy of the receiving State is a traditional ground justifying denial of recognition or enforcement. Under many legal systems, it is practically the only substantive objection left for a judgment debtor to resist recognition and enforcement, once the review as to the merits has been given up. Today, it serves mostly the purpose of protecting fundamental rights (of substantive content), and/or of safeguarding fundamental principles of the requested State. In one way or another, [232] it is present in almost all national systems. On the basis of mutual trust, it has been removed from some EU regulations.[233] It appears neither in the Kiev Treaty nor in the Minsk Convention.

111 Just like with procedural public policy, the international or supranational instruments under study here do not define what substantive public policy is but leave it for each contracting party or Member State to decide on its contents: thus the usual reference to the public policy of 'the requested State', 'the State where recognition or enforcement is sought', or of the 'Member State addressed'. Art 30 (A) of the Riyadh Agreement, elevating the principles of Islamic Sharia to a standalone basis for refusing recognition and enforcement of a foreign decision, may be considered exceptional in this regard.[234] On the contrary, Art 7, paragraph 1 (c) Hague Convention 2019, pointing to 'situations involving infringements of security or sovereignty of that State' as part of the public policy test, is to be understood as an example of aspects that may, but must not, be covered under the clause. It should be noted that foreign decisions encroaching on national security or sovereignty are likely to be excluded from the scope of application of the international agreement or regulation from the outset as not

[232] The Indian CPC does not explicitly include the contravention of public policy as a ground to deny recognition or enforcement of a foreign judgment. Instead, section 13 (c) and (f) prevent said recognition and enforcement when the foreign decision has been founded on an incorrect view of international law; where Indian law should have not been applied but was not; or if it sustains a claim based on a breach of any law in force in India.

[233] Not from the Brussels I bis Regulation, though: see Art 45, paragraph 1, a).

[234] Balz and Almousa (n 194) 283-285. Not surprisingly, the 1995 Arab Gulf Cooperation Convention for the Execution of Judgments, Delegations and Judicial Notifications referred to above (n 93) contains an identical provision under Art 2 (A). On the difficulties to assess the scope of the clause in both conventions see Mohd and Mulla (n 206) 41.

pertaining to 'civil or commercial matters'.[235] The public policy defence will thus not be needed to resist recognition or enforcement - besides, it will usually be for the court itself to raise the point *ex officio*.

112 All texts tend to be explicit about the scope of the control to be carried under the public policy defence. As a rule, the foreign decision shall not infringe, or be contrary to the public policy of the requested State; only Art 14(5) CEMAC Agreement requires *conformity*, which probably means nothing different. In addition, contradiction with the forum's public policy does not impede, as a rule, the recognition or enforcement of a foreign judgement if it is not apparent ('manifest', or 'clear'[236] – the adjective does not appear though in the CEMAC Agreement nor the Riyadh Agreement[237]).

113 In practice, due to the shared tendency to a restrictive application of the public policy clause, the defense is rarely effective as a means to oppose recognition or enforcement of a foreign judgment in civil or commercial matters. The infringement of EU law by a Member State is not enough to justify denial of recognition or enforcement of a decision in another Member State.[238] In the past, the clause has been used against punitive damages awards.[239] Although the situation may be changing, punitive damages remain a little bit of a battlefield, which explains why Art 10, paragraph 1 of the Hague Convention 2019, is devoted to them, allowing for recognition or enforcement of a judgment to be refused if, and to the extent that, the judgment awards non-compensatory damages. In a similar vein, according to Clause 14 CML 2017, it is possible to limit the enforcement of non-compensatory damages judgments, but also of compensatory ones deemed to be excessive, to the amount the requested court would have awarded itself under the same circumstances. It should be noted, though, that public policy is not considered to be here at stake.[240]

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[235] See Art 25 (C), first indent, Riyadh Agreement, which, according to Balz and Almousa (n 194) 280, should be understood as excluding as well from the scope of the Agreement the *commercial* acts of the government. *Acta iure imperii* fall outside the scope of the Brussels I bis Regulation. The legislative story of Regulation creating a European Enforcement Order for uncontested claims, 805/2004 of 21 April 2004 (EU), confirms the relationship between the deletion of the public policy defence and the delimitation of the scope of application of the instrument.

[236] Art 2 (h) Montevideo Convention; Art 20 (f) Las Leñas Protocol; Art 45 (1) (a) Brussels I bis Regulation; Art 7, paragraph 2, c) Hague Convention 2019; Clause 6 (3) (d) CML 2017.

[237] Scholars claim the interpretation should nevertheless be construed narrowly: Mohd and Mulla (n 206) 40, 41.

[238] *Diageo Brands BV v Simiramida-04 EOOD*, Case C-681/13 (CJEU), Judgment 16 July 2015 [ECLI:EU:C:2015:471].

[239] The enforcement of foreign judgments ordering the payment of gambling debts incurred in foreign casinos has traditionally met resistance too.

[240] According to the Explanatory text, the solution has been incorporated to the text to avoid the public policy doctrine, which would lead to a complete refusal of recognition, and thus, of enforcement of the foreign decision.

3.2.3.2 Choice-of-law Test

114 Nowadays, it is uncommon to make recognition or enforcement in civil and commercial matters[241] conditional upon a choice-of-law test. Whether the originating court followed a legal reasoning similar to the one that a local one would have applied or has reached a substantive outcome identical or equivalent to the one a local court would have reached, used to be a requirement in the past, but its relevance shrank progressively until it became immaterial. Under Art 27, paragraph 4, of the Brussels Convention 1968, recognition could be denied if the court of the rendering State, in order to arrive at its judgment in a civil or commercial matter, had decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State. The condition was not taken up in the following texts - Regulation Brussels I and Regulation Brussels I bis. The situation is similar at The Hague, where the already limited Art 7 of The Hague Convention 1971 has no parallel under the 2019 Convention.

115 It can be fairly said that, under many systems, the choice-of-law assessment has been subsumed in the jurisdictional one and does not exist independently any longer. Besides, that the rules on the merits in the originating State differ from those that would have been applied in the requested State, or that a diverging outcome has been reached, does not *per se* amount to a violation of the forum's public policy in civil and commercial matters.

116 The requirement may nonetheless still be found under some systems and work as an independent obstacle to the recognition or enforcement of a foreign decision in civil and commercial matters either. This is the case of Art 30 (C) Riyadh Agreement, imposing the denial of recognition if the law of the requested State in relation to legal representation of incapables has not been respected.[242]

3.2.3.3 Internal Consistency - Conflicting Judgments

117 Consistency and legal security forbid the simultaneous existence of conflicting decisions under one and the same legal system. A foreign decision contradicting a judgment already given in a dispute in the State where recognition or enforcement is sought may therefore not be recognized nor enforced there. The rule is expressly stated in most of the instruments under examination: it does not exist as such, however, under the

[241] Of a patrimonial nature, such as those examined here.
[242] Mohd and Mulla (n 206) 51, additionally deploring the lack of authorization to enforce should the same result been achieved through the application of a different legal system.

Montevideo Convention. The absence begs the question of whether the public policy clause will then be interpreted so as to prevent the requested recognition.

118 The defence is not equally phrased everywhere; the differences in formulation are not without consequences. By way of example, pursuant to Art 9 Kiev treaty, Art 55 (c) Minsk Convention and Art 30 (D) Riyadh Agreement, no irreconcilability is needed for a national judgment to prevent the recognition of a foreign one: its mere existence seems to be enough. Meanwhile, incompatibility is required under Art 14 (2) CEMAC Agreement,[243] Art 22, first paragraph, of Las Leñas Protocol, Art 45, paragraph 1 (c) and (d) Brussels I bis Regulation, Art 7, paragraph 1 (e) and (f) Hague Convention, as well as under and Clause 6(3)(b) CML 2017.

119 Where 'irreconcilability' is required, a decisive issue to identify it is that of the preclusive effect accorded to a foreign judgment: that is to say, whether it covers only the dispositive holding or also the factual and legal conclusions, and whether the foreign judgment is accepted with the same effects it produces in the State of origin, or is rather assimilated to domestic decisions. None of the instruments provides a written rule on those aspects.

120 In a somewhat redundant way,[244] in some of the texts under examination the judgments at stake do not only have to be mutually incompatible, but also to overlap. Again, diversity exists regarding what the overlapping items should be. Art 9 (b) Kiev Treaty focuses on the parties, the subject matter, and the grounds of the judgment. According to Art 55 (c) Minsk Convention, a match is needed between the case, the parties, the subject and the grounds of the decisions. Art 22 Las Leñas Protocol opts for a triple identity requirement: same parties, same facts, same object. The Hague Conference 2019 demands the identity of the parties for the purposes of Art 7, paragraph 2 (e); under f), both decisions must have dealt as well with the same subject matter. The same distinction exists between Art 45, paragraph 1 (c) Brussels I Regulation, and letter d) of the provision.

121 Further differences worth noticing are the following. Under Art 7, paragraph 1 (e), Hague Convention 2019, there is no requirement of finality of the domestic judgment for it to

[243] The scope of this provision and its operation in practice is quite unclear, if one is to follow academic comments such as those of Gatsi (n 214) 109.

[244] But not completely. It is important to bear in mind that the precedential value of judgments varies from jurisdiction to jurisdiction. This is why the mere contradiction between the grounds or the operative part of the decision to be recognized and a local one may not be enough to prevent the recognition of the former. This has been clearly stated for the Brussels I bis Regulation by the CJEU decision in *Beverage City & Lifestyle GmbH and Others v Advance Magazine Publishers, Inc,* Case C-832/21, Judgment 7 September 2023 [ECLI:EU:C:2023:635] para 28 y ss: 'In order for judgments to be regarded as irreconcilable, it is not sufficient that there be a divergence in the outcome of the disputes, but that divergence must also arise in the context of the same situation of fact and law'. The provision at stake was not Art 45, but Art 8, paragraph 1 of the Regulation: the common wording of the provisions suggests the interpretation applies to Art 45 as well.

prevent the recognition of the foreign one; finality is not asked for either by Clause 6(3)(b) CML 2017. By contrast, only a final decision has impeditive effect according to Art 9 (a) Kiev Treaty, Art 55 (c) Minsk Convention and Art 30(D) Riyadh Agreement; whether it is so as well for the CEMAC Agreement is uncertain. The same provision of the Hague Convention, now under f), allows for a refusal of recognition based on a competing judgment of a third State provided it was handed down earlier and fulfils the conditions necessary for its recognition in the requested State; this is the solution of Art 45, paragraph 1 (d) Brussels I bis Regulation, too. On the contrary, Art 9 (b) Kiev Treaty and Art 30 (D) Riyadh Agreement impose no priority in the time of delivery of the competing decision; however, said decision must have been recognized already in the requested State for it to prevent the recognition of any other. In other words, time matters under all three instruments, but it applies differently. Under Clause 6(3)(b) CML 2017, no priority in time is expressly needed for a foreign decision to prevent the recognition in the forum of another, equally foreign one.

122 The pendency of local proceedings may work as a ground against recognition and enforcement in some systems but not in others:[245] sometimes in an absolute manner; a more lenient, but less common rule, allows for a prudent postponement of recognition and enforcement.[246] The respective starting dates of the procedures are taken into account, meaning that the local proceedings prevail only in case the court of the requested State was seised earlier than the court of origin: this is so according to Art 22, paragraph 2, Las Leñas Protocol, Art 30 (E) Riyadh Agreement; Clause 6(3)(a) CML 2017. The rule is meant to deter parallel proceedings, countering in particular multiple litigation intended to put pressure on the other party to the dispute. However, its rationale is not always clear outside systems where a rule on parallel proceedings and *lis pendens* imposes on the court second seised the duty to put an end to the proceedings (or refuse to start them): at the stage of recognition, the preference for the on-going, but prior litigation, mirrors the *lis pendens* solution.[247] Otherwise, it is difficult to explain why local proceedings prevail in spite of the fact they are taking longer than the foreign ones.[248] The Hague Convention 2019 escapes the criticism to the extent that Art 7, paragraph 2, does not lean exclusively on priority in time, but makes the denial (or postponement) of recognition contingent upon a close connection between the dispute and the requested State.[249]

[245] It does not according to the CEMAC Agreement, the Montevideo Convention, the Kiev Treaty or the Brussels I bis Regulation.
[246] Such possibility exists under Art 7, paragraph 2 Hague Convention 2019.
[247] This could be the situation under the Minsk Convention: see Art 22, paragraph 1 and Art 55 (c) *in fine*.
[248] Predilection for one's own judiciary could of course account for the solution.
[249] See nonetheless a different explanation in the Explanatory Report, at 275.

3.2.3.4 Further Conditions?

123 Some of the instruments surveyed in this chapter make recognition or enforcement conditional upon requirements different from the above mentioned. Sometimes, the additional conditions appear as simple clarifications or specifications of others; by way of consequence, it can be said that they exist as well in other instruments, in a more general form. This is certainly what happens with the condition of fraud in Art 7, paragraph 1 (b) Hague Convention 2019, and Clause 6(3) (e) CML 2017, although it is not completely clear whether only fraud in relation to procedural matters is meant. [250] In the remaining instruments, fraud is not separately referred to, but it can be legitimately assumed that, where a decision is grounded on a fraudulent behaviour, its recognition would be contrary to the public policy of the requested State. In a similar way, the possibility of denying recognition and enforcement to punitive damages awards according to Art 10 Hague Convention 2019 is likely to be covered by the public policy defence under other regimes. The same can be said regarding Clause 14 CML 2017, although it sets a slightly more sophisticated mechanism, halfway between denial of enforcement, partial enforcement and adaptation.[251]

124 Convergence through interpretation is nonetheless not always possible. Obviously, this is the situation when the requirement reflects a regional particularity, as in Art 30 (A) Riyadh Agreement, with the explicit exclusion from recognition of judgments infringing stipulations of the Islamic Sharia. In a similar way, what under a certain regime qualifies as a ground to deny recognition or enforcement may be simply an element to delimit the material scope of application of another. [252] Here, the divergence cannot be reconciled through interpretation: excluding a decision from the scope of an instrument means nothing in terms of recognition or non-recognition; it simply entails the application, from the outset, of another legal regime (conventional, or autonomous).

3.3 Checking the Conditions

125 According to some legal texts, foreign decisions shall be recognized and enforced provided they meet certain conditions; pursuant to others, recognition and enforcement shall (or may) be refused in the presence of specific obstacles. While the outcome may seem equivalent, the preference for one or the other formula may not be innocent in terms of conveying the message that granting recognition or enforcement is a rule and not an exception, or the other way around. The choice reflects a conceptual approach supportive of recognition and enforcement, or the opposite. Consequences regarding

[250] This is the understanding of Yekini (n 1) 135, in light of the Explanatory text accompanying the Model Law.
[251] Above n 240.
[252] Above n 235.

the burden of proof of the requirements to be met, or of the absence of hindrances, could derive from such an attitude.

126 Of the instruments examined in this Chapter, the CEMAC Agreement, the Montevideo Convention, and the Las Leñas Protocol have opted for the first approach. The Kiev Treaty, the Minsk Convention, the Riyadh Agreement, the Brussels I bis Regulation and the Hague Convention 2019 follow the second one. Nonetheless, all instruments have been adopted to promote mutual judicial cooperation among a given group of States. In principle, it seems safe to claim that the requirements recognition or enforcement depend upon should be interpreted and applied in the way that supports a positive outcome of an application for them to be granted.

127 At the same time, the choice of words of a given text cannot be ignored. In this context, it is worth noticing that in the instruments espousing the first approach, the fulfilment of all conditions is necessary for recognition or enforcement to be granted.[253] By contrast, in the text preferring the second approach the presence of one or even several of the hindering circumstances does not always render denial mandatory. Under the Kiev Treaty and the Minsk Convention, recognition and enforcement *may* be refused, but (at least, literally) not compulsorily; [254] it is nevertheless unclear what the use of the verb means exactly, and whether it intends to bestow the authorities in the requested State a discretionary power. According to the Hague Convention 2019, a denial of recognition and enforcement is very seldom mandatory; an application likely to fail under the Convention can still succeed if an international instrument or the national law of the requested State would allow it.[255] On the contrary, where one of the grounds of Art 45 Brussels I bis Regulation is met, recognition or enforcement *shall* be refused; this is the case as well under the CML 2017.

128 Further relevant points relate to the respective roles of the authority seized of an application for recognition and enforcement, and the parties; and, regarding the latter, to who carries the burden of proof.

129 To the extent that the recognition or enforcement of a foreign decision in civil and commercial matters implies its continuity outside the territory of origin, it could be argued that the usual principles governing civil and commercial proceedings on the merits also apply: by way of consequence, the proof of the conditions or of the lack of obstacles should fall exclusively on the parties. That this is the solution in the instruments analysed in this Chapter cannot be taken for granted. Most require the

[253] Should one condition fail, the foreign decision will not be recognized or enforcement. Such an outcome may be countered if the international instrument includes a *favor recognitionis* clause. This is the case of Las Leñas Protocol 1992, according to the wording of Art 35 as amended by the Mercosur Decision CMC 07/02 (above n 126).
[254] See Art 9 Kiev Treaty, Art 55 Minsk Convention.
[255] See Art 7, Art 15.

applicant to append some documents to its application:[256] it could be expected that the authority seized in the requested State confines itself to a purely formal check of said documents, and that it is for the person against whom enforcement is sought to raise objections or defences.[257] However, the 'import' of a foreign decision can entail consequences beyond the sphere of the parties to the original dispute. This is likely to be the case where recognition or enforcement runs against the public order of the forum or creates systemic internal inconsistencies if a domestic decision already exists; also, of a decision on a subject matter the requested State considers of its own exclusive jurisdiction. Still, none of the instruments under analysis requires explicitly an *ex officio* assessment of those requirements. By contrast, under the CML 2017, most of the actions of the requested court need an application by any party to be triggered. The very design of the recognition or enforcement procedure may imply that all reviews are dependent on the judgment debtor's initiative: this would be the case of the Brussels I bis Regulation, as no intermediate exequatur proceeding exists any longer.[258] This may be as well the situation under the Kiev Treaty, in light of its Art 9. The stress some texts put on the restricted activity of the authority in the requested State, such as Art 54, paragraph 2 Minsk Convention, or Art 32, paragraph 1 Riyadh Agreements, suggests a similar outcome. However, such provisions may as well have no incidence whatsoever on the issue, and be meant only to exclude that any of the contracting States add further requirements to those established by the international agreement. As hinted above, it could eventually be claimed that the question, being a procedural one, follows no common rule and is left to each contracting Party to decide.

3.4 Effects of Recognition and Enforcement

130 The reception of a judgment in a forum other than the one where it has been delivered may have consequences on said decision. Indeed, the ban on a merits review is generally accepted: however, this does not always entail that the judgment, as a 'product' delivered in one State, will deploy identical effects in another.

3.4.1 Extend or Assimilate

131 To which extent the procedural effects of a judgment can be relied upon in a State other than the one of origin is a disputed issue. Two basic approaches can be identified: according to the first one, the foreign judgment is accorded the same effects it would

[256] Above para 68 ff.

[257] Following the procedural track established to the effect under the instrument itself, or by the requested State. For instance, under the CML 2017 she will apply for the registration of money-judgment to be set-aside (Clause 12), or contest the permission to register a non-monetary judgment (Clause 16).

[258] Recital 29, Art 45. This was already the situation under the Brussels I regulation: the authorities of the State in which enforcement is sought had to confine themselves to a purely formal check of the documents mentioned above: see *Prism Investments*, Case C-139/10 (CJEU), Judgment 13 October 2011 [ECLI:EU:C:2011:653] para 28 to 30; *Società Immobiliare Al Bosco Srl,* Case C-379/17 (CJEU), Judgment 4 Ocotber 2018 [ECLI:EU:C:2018:806] para 24.

deploy in the originating State; following the second, it is treated as if it was a domestic one. A combination of both approaches is also possible: a foreign judgment is given the effects accorded to it in the jurisdiction of origin, to the extent they are known in the requested State.

132 The pros and cons of each position are well known, and none seems to be completely convincing. Granting a foreign judgment the effects it is given in its home State requires inquiring and understanding foreign law on that particular point, which is often an obscure subject matter. Assimilation to domestic judgments seems an easier option, which, however, may prove unfair to the parties. Having in mind the differences among jurisdictions regarding the effects of domestic judgments,[259] the issue is of the outmost relevance in practice. However, it is seldom addressed expressly. A decision not to do it was consciously taken at the Hague Conference regarding the Hague Convention 2019.[260]

133 Called to interpret the predecessor of the Brussels I bis Regulation, the CJEU has ruled that recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were delivered, adding immediately that, nonetheless, there is 'no reason for granting to a decision, when it is enforced, effects that a similar decision given directly in the Member State in which enforcement is sought would not have'.[261] It seems thus that the mixed approach prevails in the context of intra-European recognition and enforcement of judgments.

134 The situation is uncertain regarding the remaining texts under examination in this Chapter.[262] Some inferences could be drawn from the provisions allowing a denial of recognition because of incompatibility between the foreign decision and a local (or a third jurisdiction) one.[263] Indeed, it would make no sense to require that both decisions overlap as to the cause of action, the parties, the facts and the grounds, if the foreign judgment is not considered as binding in relation to one or several of those aspects.

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[259] By way of example, considering only procedural effects: under English law a judgment creates an estoppel *per rem iudicatam*, precluding the reconsideration of the same cause of action and of any issue of fact or law that the court determined as a necessary part of its decision, as well as, in general, preventing a party from raising causes of action or issues which she failed to raise in the previous proceedings when it was possible. In civil law countries, *res iudicata* effects usually apply only to the operative part of a judgment, but not to the factual determinations upon which the judgment is based.
[260] Explanatory Report, para 114-115.
[261] *Società Immobiliare Al Bosco Srl,* Case C-379/17 (CJEU), Judgment 4 October 2018 [ECLI:EU:C:2018: 806] para 40.
[262] According to Gatsi (n 221) 169, the CEMAC Agreement espouses the extension of effects approach.
[263] Above para 117 ff.

135 In addition, some instruments assert that, after a declaration of enforceability, a foreign judgment is to be enforced as if it were a domestic judgment.[264] The statement could mean foreign judgments are accorded the same objective and subjective scope and effects as a local one. It may however be intended to enable the national courts or authorities to exercise coercive power to ensure compliance in spite of the foreign origin of the title, without requiring the equation of its effects to those of a national one.

3.4.2 Partial Recognition

136 Partial recognition or enforcement of a foreign judgment, rather than a complete rejection, is usually accepted, although an explicit provision to the effect may be needed. It exists in Art 16 *in fine* CEMAC Agreement, Art 4 Montevideo Convention, Art 23 Las Leñas Protocol, Art 32 *in fine* Riyadh Agreement, Art 9 Hague Convention 2019 and Clause 3 CML 2017; by contrast, the possibility does not appear under the Brussels I bis Regulation.

137 Because the ban of a review on the merits precludes the receiving court from modifying the substance of the foreign decision, the part of it to be recognized or enforced alone must be *per se* severable from the rest. In the instruments here examined, such requirement is only explicit under the Hague Convention 2019 and the CML 2017.

3.4.3 Adaptation of the Judgment or of Remedies

138 Where the judgment or a remedy granted in the originating State is not known in the receiving State,[265] the question arises whether, due to the ban of the review on the merits, the requested court is bound to refuse the enforcement of the foreign decision. The answer is uncertain for most of the texts under examination. Only the Brussels I bis Regulation and the CML 2017 provide for a flexible solution, enabling the court or authority in the receiving State to adapt the order or measure to a national one (Art 54, paragraph 1 Brussels I bis Regulation), or to modify a non-monetary judgment as may be required to make it enforceable (Art 16, paragraph 1, a) CML 2017). Both instruments acknowledge the limits of the operation: according to the Brussels I bis Regulation, the adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin. Under the CML 2017, where the foreign judgment is not susceptible of modification to make it enforceable, the court shall refuse to permit its registration. The texts differ, though, in that modification is only made on application of a party under the Model Law, whereas it may (possibly) be done by the court or authority on its own motion under the Brussels I bis Regulation.

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[264] See Art 32 Riyadh Agreement, Art 41, paragraph 1, Brussels I bis Regulation and Clause 9 (1) CML 2017, for money-judgments. Art 14 Hague Convention 2019 takes up one aspect of it. No similar rule can be found in the remaining legal texts examined.

[265] Also, when the foreign judgment imposes the payment of legal interest but does not state them explicitly.

139 The amendment of the foreign decision may still be possible under the remaining instruments in spite of the absence of explicit authorization. A decision not to include any provision to the effect was deliberate regarding the Hague Convention 2019.[266] However, the Explanatory Report also indicates that 'the contracting States should apply the enforcement measures available under their internal law in order to give as much effect as possible to the foreign judgment'.[267] The instruction is simply a consequence of the *favor recognitions* philosophy underlying the Convention. It can be claimed that it corresponds as well to the purpose of the other conventions or agreements, and that, as a consequence, all possible ways should be explored before denying recognition or enforcement to a foreign decision for lack of familiarity with the remedies it grants.

140 Midway between partial recognition and adaptation,[268] Clause 14 CML 2017 allows to limit the enforcement of money-judgments awarding punitive, exemplary, multiple, but also compensatory damages far in excess of those considered appropriate in the requested State, to the amount that would have been awarded in that State.

3.5 Conclusion

141 This chapter examined selected rules relating to the cross-border portability of judicial decisions in civil and commercial matters. In order to provide a broad overview, it focused on and compared international or supranational legal instruments chosen as representative of the political will for cooperation among States from various regions of the globe.

142 The analysis concentrated on the wording of instruments intended to facilitate the mutual recognition and enforcement of foreign judgments through standardized tools and conditions. The decision to address the black letter of the law is not without downsides: the comparison works with incomplete data and the outcome is consequently partial. This chapter should therefore be taken as a first step in a more in-depth investigation, still to come, featuring the application of each legal instrument in practice, thus in context (political, social and cultural). Once accomplished, such a study will make it possible to measure the real extent of the similitude and divergence among the instruments.

143 As it stands, the comparison confirms that, at first glance, all the legal texts reviewed are very similar. Also, that already at the formal level (ie, the wording), convergence waters down when going into detail.

144 Against the factual background of unremitting, presumably increasing cross-border civil and commercial exchanges, the apparent identity of the rules on recognition and

[266] Explanatory Report, para 118.
[267] Ibid.
[268] See above n 240, on the deliberate choice not to use the public policy doctrine to this purpose.

enforcement of foreign judgments is a dangerous mirage, likely to create expectations that could be disappointing in practice. The fragmentation and diversity of the solutions, on the other hand, is often presented as well under a negative light. At the very least, it generates uncertainty and costs capable in turn to discourage economic actors from venturing into transnational economic enterprises, for disputes require rapid and effective responses (the trade-off of 'competition between legal systems' probably does not compensate for these problems).

145 Based on what happens in the world of international arbitration, some scholars believe that the solution to these problems lies in a universal convention:[269] thanks to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an arbitral award issued in a contracting State may (allegedly) be easily recognized and enforced in no less than 157 States. In fact, whether this constantly repeated assertion corresponds to reality has recently been questioned by other scholars.[270] And, in any event, the experience of the Hague Conference has clearly shown the difficulties in reaching a consensus of significant material and territorial scope. The capacity of a convention to improve the current situation depends indeed on three factors not easy to put together: a broad material scope; the agreement on conditions and procedures truly favourable to recognition and enforcement; and a number of ratifications that allow said convention to become, both *the iure* and *de facto*, the *ius comune* of recognition and enforcement.

146 Be it as it may, it would be short-sighted to believe that the barriers to the mutual recognition and enforcement of foreign decisions stem from the instruments of international procedural law alone. In reality, these only mirror an underlying mistrust of each jurisdiction towards the unknown and foreign. At a time when, as a rule, the review on the merits of foreign judgments has been given up, said distrust falls above all on the judiciary and the procedural rules of the issuing State. A finding that confirms – if it were necessary – the added value of a project such as CPLJ, to which this chapter modestly contributes.

[269] Among other, Bonomi (n 26) 391.
[270] Reyes, 'Conclusion' in Reyes (n 1) 310.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Art/Arts
ASEAN	Association of Southeast Asian Nations
BGH	*Bundesgerichtshof* (Federal Court of Justice) [Germany]
BID	*Banco Interamericano de Desarrollo* (Inter-American Development Bank)
CEMAC	*Communauté Economique et Monétaire de l'Afrique Centrale*
CEPEJ	*Conseil de l'Europe Commission européenne pour l'efficacité de la justice* (Council of Europe European Commission for the efficiency of justice)
cf	*confer* (compare)
ch	chapter
CIDH	*Corte Interamericana de Derechos Humanos* (Interamerican Court of Human Rights)
CIDIP	Inter-American Specialized Conference on Private International Law
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
EAPIL	European Association of Private International Law
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	*exempli gratia* (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)

ibid	*ibidem* (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	*id est* (that is)
IIDP	*Instituto Iberoamericano de Derecho Procesal* (Iberoamerican Institute of Procedural Law)
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
OEA	*Organización de Estados Americanos* (Organization of American States)
OHADA	*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (Organization for the Harmonization of Business Law in Africa)
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
TFEU	The Treaty on the Functioning of the European Union
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	*Institut international pour l'unification du droit privé* (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank
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LEGISLATION

International/Supranational

Accord de coopération judiciaire entre les États membres de la Communauté Economique et Monétaire de l'Afrique Centrale 2004

Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the Lao People's Democratic Republic 1998

Agreement on Legal Assistance in Civil Matters between the Socialist Republic of Vietnam and the Kingdom of Cambodia 2013

Agreement Protocol of Jurisdictional Cooperation and Assistance in Civil Commercial, Labor and Administrative Matters 1992 (Las Leñas Protocol)

Buenos Aires Protocol on International Jurisdiction in Contractual Matters 1994

Bustamante Code 1928

CEMAC Agreement (1994)

Civil and Commercial Judgments Convention Act 1985

Commonwealth Model Law on the Recognition and Enforcement of Foreign Judgments 2017 (CML)

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Tables of equivalences

Convention between Belgium and France on jurisdiction and the validity and enforcement of judgments, arbitration awards and authentic instruments (1899)

Convention entre la Belgique et la France sur la compétence judiciaire, sur l'autorité et l'exécution des décisions judiciaires, des sentences arbitrales et des actes authentiques (1899)

Convention internationale sur le transport de marchandises par chemin de fer, signée à Berne (1890)

Convention on Legal and Judicial Co-operation between Egypt, Iraq, Yemen and Jordan 1989

Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 2002

Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956 (CMR)

Council Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (EU).

Decision 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network (EU).

Decision 94/1/EC of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (EU).

Economic and Monetary Community of Central Africa 1994 (CEMAC) (Central Africa)

Enforcement of Foreign Judgments Laws and Regulations 2024 (Liechtenstein)

Erneuerung der Allianz zwischen Frankreich und den katholischen Schweizer Kantonen und dem Wallis (1715)

European Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007

Framework of the Comisión Interamericana Especializada en DIPr 1975 (CIDIP)

Gulf Cooperation Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996(GCC)

Hague Convention 2019

Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards 1979 (CIDIP III)

Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards 1984 (CIDIP III)

Inter-American Convention on Letters Rogatory 1975

Kiev Convention on Settling Disputes Related to Commercial Activities 1992

Kiev Convention on the Procedure for Settling Disputes Connected with Commercial Activity 1992

Letter from the Supreme Court of Victoria regarding cross-border enforcement of money judgments 2017 (Exchange of letters on cross-border enforcement of money judgments between Singapore International Commercial Court and Supreme Court of Victoria, Commercial Court).

Letter from the Singapore International Commercial Court regarding cross-border enforcement of money judgments 2017 (Exchange of letters on cross-border enforcement of money judgments between Singapore International Commercial Court and Supreme Court of Victoria, Commercial Court).

Memorandum of Guidance on Recognition and Enforcement of Money Judgments in Commercial Cases 2018 (Memorandum by the Chief Justices of the Supreme Court of Singapore and the Supreme People's Court of China)

Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters 1993

Protocol on International Jurisdiction in Matters of Consumer Relations of 17 December 1996 (Santa María).

Regulation 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (EU).

Regulation 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (EU).

Regulation 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (EU).

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (EU), OJ 2012 L 351/1

Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (EU).

Regulation 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (EU).

Riyadh Arab Agreement for Judicial Cooperation of 1983

Spanish-Swiss Treaty to facilitate the execution of sentences in civil and commercial matters (1986)

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts

Treaty of Lima (1878)

Treaty on International Procedural Law 1889 (reviewed in 1939/40)

Treaty on the Functioning of the European Union 2012

National

Act Governing Private International Law 2012 (Czech Republic)

Administration of Justice Act 1920 (UK)

Administration of Justice Act 2008 (Denmark)

Agreement Protocol of Jurisdictional Cooperation and Assistance in Civil Commercial, Labor and Administrative Matters 1992 (Las Leñas Protocol) (Brazil)

Anteproyecto de Ley de Derecho Internacional Privado 2020 (Code of Private International Law) (Chile) (draft)

Civil Execution Act 1979 (Act No 4) (Japan)

Code Civil 2024 (France)

Code de droit international privé 2004 (Code of Private International Law) (Belgium)

Code of Civil Procedure 1998 (Act No. 109) (Japan)

Codice Civile 1865 (Italy)

Código Procesal Civil y Comercial de la Nación 2015 (Argentina)

Commonwealth of Australia Constitution Act 1900 (Australia)

Constitution of the United States 1789 (USA)

Enforcement of Canadian Judgments Act 1998 (ECJA) (Canada)

Exekutionsordnung 1986 (Enforcement Act) (Austria)

Exekutionsordnung 1971 (Enforcement Act) (Liechtenstein)

Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK)

International Legal Cooperation in Civil Matters 2015 (Spain)

Ley 29/2015 de Cooperación Jurídica Internacional 2015 (Spain)

Ley de Enjuiciamiento civil 1889 (Code of Civil Procedure) (Spain)

Loi belge sur la compétence (1876) (Belgium)

Private International Code 2022 (France) (draft)

Reciprocal Enforcement of Foreign Judgments Act 2019 (Singapore)

Reciprocal Enforcement of Judgments Act 1934 (New Zealand)

Reciprocal Enforcement of Judgments Act 1987 (Manitoba)

Reciprocal Enforcement of Judgments Act 1990 (UK)

Riyadh Agreement 2019 (Saudi Arabia)

Swiss Private International Law Act 1987 (Switzerland)

Trans-Tasman Proceedings Act 2010 (Australia)

Uniform Foreign Money-Judgments Recognition Act 1962 (USA)

Uniform Foreign-Country Money Judgments Recognition Act 2005 (USA)

Zivilprozessordnung 2023 (ZPO) (Germany)

Zivilprozessordnung 1913 (Code of Civil Procedure) (Liechtenstein)

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Krombach, Case C-7/98 (European Court of Justice), Judgment 28 March 2000 [ECLI:EU:C:2000:164].

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Apostolides, Case C-420/07 (European Court of Justice, Grand Chamber), Judgment 28 April 2009 [ECLI:EU:C:2009:271].

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