The Hague Academy of International Law's Advanced Course in Hong Kong – 2nd Edition

Judgments Convention

Contemporary approaches to the recognition and enforcement of foreign judgments

A comparative overview

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Outline

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   2.5 when and how a defence may be raised against the R&E of a judgment?
3. Where does the Hague Judgments Convention sit in the global R&E landscape?

1. A possible taxonomy of R&E rules

- A word of caution on taxonomies (including this one!)
- The source of R&E rules
  - domestic rules, written and non-written
  - international rules: bilateral and multilateral conventions
  - regional / supranational rules (EU legislation)
- The operational context of (non-domestic) R&E rules
  - R&E rules featured in 'double' instruments, i.e., texts that also deal with (direct) jurisdiction
  - R&E rules featured in texts that are solely concerned with R&E
- The nature and effects of the judgments that R&E rules aim to regulate
  - judgments that (purport to) have *res judicata* effects
  - judgments that are rather meant to address situations with an inherently evolving character

1.1 The source of R&E rules

- Domestic rules / international rules
  - domestic rules (DRs) generally address *all* issues relevant to R&E, whereas international rules (IRs) generally limit themselves to imposing some requirements, notably by providing that, where certain conditions are met, R&E must be granted, save for designated exceptions
  - DRs may accordingly complement IRs: DRs will govern issues (e.g., procedural) that IRs fail to address (but cannot frustrate the *effet utile* of IRs) **[1]**, and, unless the applicable IRs are 'complete' and mandatory, they may provide for the R&E of judgments that do not qualify for R&E under the relevant IRs **[2] [3]**
- International rules / supranational rules
  - aimed as they are to support regional integration, SRs tend to facilitate R&E to an extent that is rarely seen in other contexts: they serve a policy that the States concerned regard as particularly important, and build on a very high degree of mutual trust + they benefit from the parallel operation of other SRs: on jurisdiction, applicable law, even substantive rules

Some illustrations

[1] International Convention on Civil Liability for Oil Pollution Damage (1969)

- Article X: '(1) Any judgment given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin ... shall be recognized in any Contracting State ... (2) A judgment recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be re-opened'.

[2] Hague Judgments Convention (2019)

- Article 15: 'Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law'

[3] Hague Child Support Convention (2007)

- Article 52: '(1) This Convention shall not prevent the application of an agreement ... between the requesting and the requested State ... that provides for – (a) broader bases for recognition ...'

1.2 The operational context of R&E rules

- A 'simple' convention / instrument
  - is concerned with R&E (and possibly assistance in the taking of evidence and/or the service of documents etc.), but does not include rules on direct jurisdiction
  - insofar as R&E is contingent on an assessment of the jurisdiction of the court in the State of origin, simple conventions often determine the standards against which the latter assessment must be carried out: this is normally done by establishing 'jurisdictional filters' **[1]**
- A 'double' convention / instrument
  - deals at once with (direct) jurisdiction and R&E, in a coordinated fashion
  - often provides that R&E presupposes that the court of origin had jurisdiction in accordance with the rules on direct jurisdiction laid down in the convention / instrument itself **[2]**
  - texts exist, however, that do not require (at least as a rule) any assessment in this respect **[3]**
  - the relationship between R&E and jurisdiction will be further explored later in this lecture

Some illustrations

[1] 1970 Hague Divorce Convention

- Article 2: 'Such divorces and legal separations shall be recognised in all other Contracting States, subject to the remaining terms of this Convention, if, at the date of the institution of the proceedings in the State of the divorce or legal separation (hereinafter called "the State of origin") (1) the respondent had his habitual residence there; or ... (3) both spouses were nationals of that State; or ...'

[2] 2000 Hague Protection of Adults Convention

- Article 22: '(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. (2) Recognition may however be refused – a) if the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II ...'

Some illustrations

[3] Regulation (EU) No 1215/2012 (Brussels I *bis*)

- Article 36: '(1) A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required ...'
- Article 45: '(1) On the application of any interested party, the recognition of a judgment shall be refused: ...

  (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

  (e) if the judgment conflicts with: (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or (ii) Section 6 of Chapter II. ...

  3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction ...'

1.3 The effects of the judgments concerned

- R&E rules on judgments that produce *res judicata* effects compared with others
  - substantive rights can be protected by courts in various manners, depending on the nature of the rights concerned and the circumstances: some call for a protection in the form of a judicial statement that the right exists (i.e., that the plaintiff's claim is founded), coupled, as the case may be, by an order for payment, for restitution etc.; other rights rather require that the seised court assesses an inherently evolving situation and adopts measures for the 'management' of the situation with the understanding that they may need to be modified or revoked
  - R&E rules that apply to judgments of the former group tend to be different, in some respects, from those applicable to judgments in the former group
  - for instance, while R&E rules relating to judgments with *res judicata* effects are designed to avoid the risk of conflicting judgments, R&E rules applicable to the other group of judgments generally permit for the R&E of judgments that depart from existing judgments on the same situation insofar as they reflect a reassessment of the situation

2. Five key questions on R&E

- R&E rules, despite their variety, ultimately deal with the same basic questions
- These include
  - what do 'recognition' and 'enforcement' entail, precisely?
  - what types of judgments are eligible for R&E?
  - subject to which conditions may a judgment be recognised and enforced?
  - what steps, if any, must be taken to have a judgment recognised and enforced?
  - when and how a defence may be raised against the R&E of a judgment?
- How are those questions answered by the various R&E rules?
- What do the answers teach regarding the underlying logic of such rules?

2.1 What do R&E entail, precisely?

- Depending on the applicable R&E rules, recognition may be understood as
  - a process whereby the effects of a foreign judgment are *extended* in such way that they can also be relied upon in the requested State **[1]**
  - a process whereby a foreign judgment is *assimilated* to a judgment given in the requested State, meaning that the persons concerned can benefit from the practical advantages of the judgment to the extent to which a local judgment of comparable content would provide
- Enforceability and enforcement
  - some R&E rules exclude that a foreign judgment can be declared enforceable *as such* and rather provide that such a judgment can serve as a ground for a local (enforceable) decision
  - R&E rules based on the extension model tend to follow that approach also with enforceability (the judgm. must be enforceable in the St. of origin to be enforceable in the St. requested)
  - however, the effects that a foreign judgment may be permitted to produce, in the State requested, may in no case go beyond those contemplated in the requested State **[2]**

Some illustrations

[1] European Court of Justice, *Hoffmann* v *Krieg* (1988)

- Para. 11: 'a foreign judgment which has been recognized by virtue of [the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments] must in principle have the same effects in the state in which enforcement is sought as it does in the state in which judgment was given'

[2] European Court of Justice, *Apostolides* v *Orams* (2008)

- Para. 66: 'the enforceability of the judgment in the Member State of origin is a precondition for its enforcement in the State in which enforcement is sought ... In that connection, although 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 given ..., there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin ... or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have'

2.2 The types of judgments eligible for R&E

- States generally make room for R&E of final money judgments
- R&E may instead be excluded at the outset in the absence of one of those features
  - finality is generally regarded as a necessary pre-condition, but the requirement is not understood in the same manner everywhere: under some rules judgments that may still form the object of an ordinary appeal may in no case be recognised or enforced
  - R&E rules that provide for the R&E of judgments that are still subject to ordinary appeal do not necessarily go as far as to provide for the enforcement of provisional measures (e.g., freezing orders); if they do, they normally provide for special, more stringent, requirements **[1]**
  - several legal systems fail to distinguish, as a rule, between money and non-money judgments
  - the case of rulings on jurisdiction **[2]**
  - the case of rulings on R&E ('exequatur sur exequatur ne vaut') **[3]**

Some illustrations

[1] Regulation (EU) No 1215/2012 (Brussels I *bis*)

- Article 2(a): for the purposes of R&E rules, the term 'judgment' includes provisional measures ordered by a court with jurisdiction as to the substance of the matter; it does not include, however, a measure ordered by such a court 'without the defendant being summoned to appear, unless the judgment ... is served on the defendant prior to enforcement'

[2] European Court of Justice, *Gothaer* v *Samskip* (2012)

- Para. 43: 'the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of [that] judgment ... – regarding the validity of that clause'

[3] European Court of Justice, *J* v *H Limited* (2022)

- Para. 47: 'an order for payment made by a court of a Member State on the basis of final judgments delivered in a third State constitutes a judgment and is enforceable in the other MSs if it was made at the end of adversarial proceedings ... and [is] enforceable [there]'

2.3 The conditions for R&E

- Some general remarks, by way of introduction
  - no State is required, as a matter of general int'l law, to give effect to another State's judgments
  - rather, States give effect to foreign judgments (and even undertakes to do so) where they consider, based on their own standards, that they *deserve* to be recognised and enforced
- What 'qualities' must a judgment feature to deserve R&E?
  - a judgment is an expression of sovereignty > it must present itself as a reasonable expression of the sovereignty of the State of origin (it must come from the 'right' State, etc.)
  - a judgment is a 'concrete' rule, i.e., a binding statement that a right exists + an order, as the case may be, aimed to enforce it > it must qualify as substantively just (or not obviously unjust)
  - a judgment is meant to bring certainty > it should not be given effect if to do so would undermine certainty
  - a judgment is the outcome of judicial proceedings > it must be the result of fair proceedings

2.3 The conditions for R&E (continued)

- The concern for the 'right provenance': the issue of 'international' jurisdiction
  - the various ways in which the appropriate origin of a judgment can be assessed: whitelists, blacklists, (flexible) reliance on the rules of direct jurisdiction of the requested State, etc. **[1] [2]**
  - in any case, not a review of the assessment made in the State of origin
  - what role do jurisdictional immunities play in this assessment?
  - R&E rules that dispense from assessing the jurisdiction of the State of origin **[3]**
- The concern for the 'right provenance': the issue of reciprocity
  - in some domestic systems, R&E are generally subject to reciprocity, i.e., that the judgments of the requested State would be recognised and enforced in the State of origin
  - the assessment of reciprocity may take different forms depending on whether it is carried out by the judicial authorities of the requested State on a case-by-case basis, or by the requested State's political bodies in general terms (e.g., through a whitelist of States of origin) **[4]**

2.3 The conditions for R&E (continued)

- Reciprocity (continued)
  - in other domestic systems reciprocity plays no role, often on the assumption that: (1) civil judgments matter essentially for the parties concerned: international relations should not prevent them from enjoying the benefits that R&E (legal certainty, cross-border continuity of entitlements, etc.); (2) the assessment of reciprocity is difficult unless it's done in general terms; (3) reciprocity prompts a defensive attitude and undermines the efforts to improve R&E globally
  - IRs and SRs do not mention reciprocity, but they essentially rest on a logic of reciprocity
- The concern for the appropriateness of the judgment as to its substance
  - a requirement that several R&E rules either limit significantly, or exclude altogether: the widespread inclusion of general rules that prohibit any review of the merit
  - a milder alternative: the control of the law applied in the State of origin to rule on the matter
  - an even milder one: the parallel harmonisation of R&E rules and rules on conflicts of laws **[5]**
  - the substantive leg of the public policy defence

Some illustrations

[1] Code of Private International Law 2004 (Belgium)

- Article 25(1): 'A foreign judgment shall not be recognized ... if ... (7) Belgian courts had exclusive jurisdiction; (8) the jurisdiction of the foreign court was based exclusively on the presence of the defendant or his assets in the State of origin without any direct relation with the dispute ...'

[2] Statute on Private International Law 1995 (Italy)

- Article 64: 'Foreign judgements shall be recognised in Italy ... when: (a) the foreign court that gave the judgement had jurisdiction in according to the Italian principles on direct jurisdiction ...'

[3] Regulation (EU) No 650/2012 on matters of succession

[4] Foreign Judgments Act 1991 (Australia)

- Section 5(6): 'If the Governor General is satisfied that ... substantial reciprocity of treatment will be assured in relation to the enforcement in that country of ... judgments given [in Australia] the regulations [that complement the Act] may provide that this Part extends [to that country] ...'

Some illustrations

[1] Regulation (EC) No 4/2009 on maintenance obligations

- The Regulation establishes two different R&E regimes: the first, which makes R&E extremely easy, applies to decisions given in EU Member States that are also parties to the 2007 Hague Protocol on the law applicable to maintenance obligations; the second, more cautious, is for decisions. originating in Member States that are not bound by the Protocol

2.3 The conditions for R&E (continued)

- The concern for certainty, and for the avoidance of conflicting judgments
  - foreign judgments conflicting with local ones
  - foreign judgments conflicting with judgments rendered in a State other than the requested State, but effective there
  - a concern that some States seek to address preventively, through the rules on lis pendens, the rules on the limitation of proceedings
- The concern for procedural fairness
  - default judgments and the diversity of the rules on the service of judicial documents
  - the respect for the adversarial principle and the equality of the arms during the proceedings
  - fraud and corruption, lack of independence
  - the treatment of national procedural specificities (e.g., in civil law countries, freezing injunctions operating *in personam*, or disbarment of the defendant held in contempt of court)

2.4 The steps, if any, leading to R&E

- An issue closely linked to the chosen R&E model (extension, assimilation, etc.)
- Option 1: a cautious attitude
  - R&E invariably presuppose a judicial assessment of the prescribed conditions **[1]**
- Option 2: an open attitude, surrounded by safeguards
  - judgments are recognised 'automatically', but a judicial assessment is needed where enforcement is sought (exequatur) and where the conditions for R&E are challenged **[2]**
- Option 3: a very open attitude, surrounded by few safeguards
  - judgments are both recognised and enforced 'automatically', but a judicial assessment is needed where the existence of the conditions for R&E is challenged **[3]**
- Option 4: an even more liberal attitude, with no safeguards in the requested State
  - R&E occur automatically and cannot be challenged (but safeguards exist in the State of o.) **[4]**

Some illustrations

[1] Code of Civil Procedure (Brazil)

- Article 961: 'Foreign decisions shall only be given effect in Brazil after they have undergone homologation or have been declared enforceable, unless otherwise provided by law or treaty'

[2] Regulation (EU) 2016/1103 on matrimonial property regimes (Article 42)

[3] Regulation (EU) No 1215/2012 (Brussels I *bis*)

- Article 39: 'A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other MSs without any declaration of enforceability being required'

[4] Regulation (EU) No 1896/2006 establishing an order for payment procedure

- Article 19: 'A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition'

2.5 The operation of the available defences

- Unless a fresh judgment in the requested State is necessary, a challenge may
  - form the object of dedicated proceedings, i.e., proceedings the object of which consists precisely in determining whether the conditions for R&E are met in the circumstances
  - form the object of an incidental issue raised in the context of proceedings that do not principally concern the conditions for R&E, but rather concern a separate claim, the outcome of which is affected, in principle, by the foreign judgment in question
- Time-limits
  - some R&E rules explicitly state that the effects of a foreign judgment may no longer be relied upon if the interested party fails to invoke them (without any justification) for a given time **[1]**
  - if the relevant R&E rules fail to address this issue, the matter should be decided in accordance with conflict-of-laws rules of the requested State **[2]**

Some illustrations

[1] Code of Civil Procedure (Kazakhstan)

- Article 425(3): 'A decision of a foreign court or arbitration may be submitted for compulsory enforcement within three years from the date of the decision's entry into legal force. A missed period for a valid reason can be restored by the court of the Republic of Kazakhstan in the manner provided in the Article 128 of this Code'

[1] Swiss Federal Supreme Court, ruling of 2 August 2022 (148 III 420)

- A judicially ascertained contractual claims does no longer have its source in the contract but rather arises from the judgment, due of its constitutive nature. Hence, the applicable law is not the law governing the contract (Article 148 of the Swiss Federal Statute on private international law), but rather the law under which the judgment was rendered, i.e., the law of the State of origin, English law in the circumstances (Section 24(1) of the Limitation Act 1980: 'An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable')

3. The place of the Judgments Convention

- An instrument reflecting a range of national, int'l and regional approaches
- An attempt to define a set of contemporary shared standards of R&E
  - thanks to its broad scope, the Convention represents the global 'grammar' of R&E
- A basis for further developments
  - a source of inspiration for domestic legislators
  - a baseline regime for more ambitious bilateral and multilateral conventions
  - a tool for the EU, and other REIOs in due course, to develop their external relations in this field