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Judgments Convention

Judgments on preliminary questions outside the scope of the Convention and judgments that consist of severable parts

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Outline

1. 'Complex' judgments, and the issue of partial recognition
2. Judgments on matters partly within the scope of the Judgments Convention
3. Judgments that only partly fulfil the requirement for R&E under the Convention
4. Judgments that awarded punitive damages

1. 'Complex' judgments

- A judgment consists of the adjudication of a claim (i.e., a *ruling* that the claim is founded, or is not founded), based on the assessment of *issues* of law and fact
- The picture becomes more elaborate whenever
 - a court is asked to rule on *more than one claim*, e.g., because the plaintiff made several claims against the defendant, or the latter submitted a counterclaim or brought a third-party action
 - the issues that the court must address (or even rule upon) include *preliminary issues*: e.g., A sues B for breach of contract, but B submits that the contract was concluded on its behalf by someone lacking the power to do so (say, someone appointed to represent B under a resolution of the board of directors of B whose validity is being challenged): to rule on the claim, the court may need to assess the validity of the decision
- Should the resulting judgment be considered as a unity, or should it rather be split into parts, so that, based on the circumst., it could be granted *partial* recognition?

2. Judgments partly within the scope of the JC

- The above question may arise in different contexts, and warrant different answers depending on the circumstances and the applicable R&E rules
- The Judgments Convention addresses the R&E of ‘complex’ judgments (without using this language, though!) in various scenarios
- The first scenario is where a judgment dealt with several claims, or several preliminary issues, only some of which related to matters within the Convention
- The Convention applies ‘in civil and commercial matters’: an ‘autonomous’ notion that refers, in general, to situations where a State does not act in its sovereign capacity (if a State agency is involved, it is decisive issue is whether the latter acted in the exercise of its governmental authority); ‘revenue, customs or administrative matters’ are explicitly excluded from the material scope of the Convention

2. Judgments partly within the scope of the JC

- Pursuant to Article 2(1), the Convention does not apply, inter alia, to
 - the status and capacity of natural persons, maintenance obligations and other family matters
 - transboundary marine pollution, the carriage of persons and goods
 - the validity, nullity, or dissolution of legal persons and the validity of decisions of their organs
 - privacy and defamation
 - intellectual property
 - the activity of armed forces
 - sovereign debt restructuring through unilateral State measures
 - competition matters, with the exception of disputes concerning agreements or concerted practices where the conduct complained of and its effect both occurred in the State of origin
- Each exclusion should be construed autonomously (and narrowly)
- See also Articles 18 (specific matters) and 19 (matters pertaining to a State)

2. Judgments partly within the scope of the JC

- Article 2(3)
 - ‘A judgment is not excluded from the scope of this Conv. where a matter to which this Conv. does not apply arose merely as a preliminary question [in the St. of origin], and *not as an object* of the proceedings. In particular, the mere fact that such a matter *arose by way of defence* does not exclude a judgment from the Conv., if that matter was not an object of the proceedings’
- Judgments that *ruled* on several claims / that simply *considered* several issues
 - where a judgment consists of various statements, made sequentially (because the logic inherent in the applicable substantive rules so require), one must distinguish between statements that adjudicate one or more discrete object of the proceedings, and statements that merely express a step in the reasoning through which the court reaches its conclusion on the merits of the case
 - the distinction, it is submitted, relates essentially to the purported effects of the statement: an adjudication proper is meant to affect the world outside the proceedings (the substantive relationship); an assessment on a prelim. issue serves an ‘internal’ function in the proceedings

2. Judgments partly within the scope of the JC

- Whether a statement constitutes a *ruling* or merely represents a *step in the court's reasoning* does not purport to shape the substantive situations in dispute depends on whether the statement fits in the object / one of the objects of the proceedings
- In principle, this must be determined against the background of the law of the State of origin (this is inescapable where recognition is understood as a process whereby the judgment's effects are *extended* to the legal order of the St. requested)
 - it is for law of the St. of origin to determine how the object of proceedings should be construed
 - it is for the same law to determine whether, and subject to which conditions, the findings made by the court to reach its conclusion on the object of the proceedings are within the scope of the *res judicata* effects of the judgment and thus constitute a ruling (e.g, under Italian law, a finding that A shall pay B under the price of goods sold entails that all logically necessary premises to that finding – e.g., that the sale exists and is valid – can no longer be challenged; this is broader than issue preclusion under common law, because the premises need not be litigated)

2. Judgments partly within the scope of the JC

- Article 2(3) makes clear, as said, that recourse to the Convention cannot be excluded *only* because a judgment that *ruled* on a 'Convention-matter' also dealt with one or more 'non-Convention matters' (whether to rule on it or just to consider it)
- The provision must be read in conjunction with Article 8 and Article 9
 - Art. 8(1): rulings *on preliminary issues* on 'non-Conv. matters' *do not* enjoy R&E under the Conv. (it is thus immaterial, for this purpose, to determine whether the prelim. issue was ruled or upon or merely considered: that part of the judgment just doesn't travel with the Convention)
 - Art. 9 provides for the R&E 'of a severable part of a judgment ... where ... only part of the judgment is capable of being recognised or enforced under this Conv.' > hence, if the ruling on the 'Convention-matter' is severable, that part of the judgment enjoys R&E under the Conv.
 - Art. 8(2): the St. requested may refuse R&E (this is in addition to the grounds in Art. 7) if the judgment was *based* on a preliminary issue concerning a 'non-Conv. matter' (i.e., if the finding on the prelim. issue was a necessary and sufficient reason for the ruling on the main claim)

2. Judgments partly within the scope of the JC

- One illustration
 - X and Y entered into a license agreement concerning a patent registered in Contracting State R
 - X sues Y in Contracting State F for non-payment of the royalties due under the agreement
 - Y submits that no royalties were due alleging that the patent is invalid
 - the court in F addresses the issue of the validity of the patent and rejects Y's defense
 - the court in F finds that Y is in breach of contract, and orders that Y pays all outstanding royalties, plus interests
- Can X rely on the enforceability of the judgment, which has become final, in Contracting State A (where Y has assets)?
- Y brings proceedings in R seeking a declaration that the patent is invalid: may X raise a defense asserting that, based on the judgment in F, the validity of the patent can no longer be challenged?

2. Judgments partly within the scope of the JC

- Compare Article 8(2) of the JC with Article 10(3) of the 2005 COCA Convention
 - Art. 10(3) COCA: R&E may *only* be refused if, and to the extent that, a preliminary ruling on the validity of an intellectual property right (other than a copyright) is inconsistent with a judgment given in the State under the law of which the intellectual property right arose, or if proceedings concerning the validity of the intellectual property right are pending in that State
 - the rule is designed to discourage the strategic use the invalidity of an IP by way of defence
 - the JC takes a different view, and permits an unrestricted reliance on the IP exclusion
 - one reason for that is that, when the jurisdiction of the court of origin is based on the agreement of the parties (as under the COCA), it is reasonable to limit the defendant's option to invoke the invalidity of a registered intellectual property right by way of defence: the defendant voluntarily assumed this risk; but this is not the case with most filters in the JC
- Note: Article 8 also applies when the preliminary issue relates to an 'Art. 6 matter' and the judgment originates in a State other than the State of the situs



3. Judgments that partly fulfil the JC's requirem.

- The second scenario is where a judgment comes entirely within the scope of the Convention, but *ruled* on more than one claim
- Note: if the judgment involved an assessment of one or more preliminary issues, the remarks made above apply: the findings that relate to preliminary issues are simply not meant to produce effects outside of the proceedings before the court of origin
- Should the R&E analysis be conducted with respect to the judgment considered as a whole, or should it rather be carried out claim by claim?
- It depends on whether
 - the R&E rules that apply in the circumstances are claim-specific, or not
 - the judgment is severable pursuant to Article 9

3. Judgments that partly fulfil the JC's requirem.

- Some rules of the Hague Judgments Convention are claim-specific
 - this is true of some rules on jurisdictional filters (e.g., Article 5(1)(h): 'A judgment is eligible for R&E if ... [it] ruled on a lease of immovable property ... and it was given by a court of the State in which the property is situated') ... [remember that if more filters are available, any filter will do]
 - ... and of some grounds for refusal of recognition (e.g., Article 7(1)(e): 'Recognition or enforcement may be refused if ... the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties')
- Other rules, instead, refer (or *normally* refer) to the judgment as a whole
 - again, this applies to rules on jurisdictional filters (e.g., Article 5(1)(a): 'if ... the person against whom recognition or enforcement is sought was habitually resident in the St. of origin') ...
 - ... and to rules that provide for grounds for refusal (e.g., Article 7(1)(a): '... if ... the document which instituted the proceedings ... was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence')

3. Judgments that partly fulfil the JC's requirem.

- The purpose of the rule on severability
 - like many others in the Convention, the rule on severability translates the general concern for the effective circulation of judgments: R&E should not prove impossible only because the judgment concerned, if severable, fails to meet in all of its parts the Convention's requirements
 - consistent with this understanding, Article 9 provides that severable judgments may be granted partial R&E both where the requirements are found to exist only in respect of some parts, and where such partial recognition is applied for (note: if the requested State provides that R should occur automatically, i.e., by operation of law, the latter option will only be available for E)
- The notion of severability
 - the rule being consonant with the goal of the Convention, it should not be interpreted narrowly
 - it should be interpreted autonomously (Article 20), but a reference to the law of the State of origin (and the law applied to the substance?) appears to be appropriate
 - one should arguably look at the effects of the various part of the judgment (cf. Art. 7(2)(e)-(f))

4. Judgments awarding punitive damages

- The third scenario arises where a court ruled on a single claim and was not concerned with any preliminary issue: the judgment is not 'complex' in itself, but there may be reasons to consider that the judgment consists of separate components *for the purposes of R&E*
- The question, then, is whether, at the R&E stage, one could or should submit such components to a differentiated treatment, where to do so would facilitate R&E
- Judgments awarding both compensatory and punitive damages would appear to fit into this picture, whenever their effects are relied upon in a State that excludes the recognition of judgments that award punitive damages, on grounds of public policy
- Under a differentiated treatment, the judgment would be recognised and enforced only to the extent that it awards compensatory, as distinct from punitive, damages

4. Judgments awarding punitive damages

- Article 10(1) permits such a differentiated treatment
 - R&E 'may be refused if, and *to the extent that*, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered'
- The different views on punitive, or exemplary, damages worldwide
- A public policy issue? If so, why not simply relying on Article 7(1)(c)?
 - because public policy must be interpreted narrowly, and a Contracting State, absent a specific rule to this effect, may fear that, by joining the Convention, it deprives its courts of the possibility of denying R&E of judgments awarding punitive damages > Article 10(1) represents, in this respect, a specification (for the sake of avoiding any doubt) of the public policy exception
 - because under the 'traditional' public policy exception it may be unclear whether the requested State may operate selectively and only exclude the 'excessive' part > Article 10(1) reflects a concern for effectiveness: a balance is struck between the concern of States opposed to punitive damages and the need to ensure the circulation of judgments on (compensatory) damages

4. Judgments awarding punitive damages

- How should one assess, in the requested State, the extent to which the damages awarded cover the actual losses suffered or rather perform a punitive function?
- The Convention merely indicates that the court addressed ‘shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings’
- For the rest, it is for the court addressed to make its own assessment : the indications, if any, found in the judgment are not mandatory in this respect, but should be given considerable weight consistent with the spirit of the Convention
- The Explanatory Report clarifies that the court addressed should not simply resort to its own law of the requested: if it were to do so, it is submitted, the court addressed would in fact come very close to a review of the merits (Art. 4(2))

4. Judgments awarding punitive damages

- The approach adopted in Article 10 reflects a growing practice
 - punitive damages denied for the excess: Supreme Court of Japan, 11 July 1997, Eastern Branch of the Seoul District Court, 10 February 1995, etc.
- Clause 14 of the Commonwealth Model Law on the R&E of Foreign Judgments
 - (1) If the court ... determines that a money judgment includes an amount added to compensatory damages as punitive ... damages ..., it shall limit enforcement ... to the amount of similar or comparable damages that could have been awarded in [the requested State].
 - (2) If the court ... determines that a money judgment includes an amount of *compensatory* damages that is excessive in the circumstances, it may limit enforcement ... but the amount awarded may not be less than that which the court could have awarded in the circumstances.
 - (3) In this section, a reference to damages includes the costs and expenses of the proceedings in the state of origin.