

## Recognition and Enforcement of Foreign Judgments

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### A. Generalities

- 1 The judgments of one State's courts have no force by themselves in another State. This is often unsatisfactory. Parties are interested in transnational legal certainty and in avoiding repeated litigation and conflicting decisions; the general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies; and States have a common interest in promoting inter-State transactions. However, States have valid reasons to deny foreign judgments the same force they grant their own judgments since the foreign procedure may be viewed as deficient, or the outcome of the foreign litigation may be viewed as objectionable. The field of recognition and enforcement of foreign judgments mediates between these competing considerations.
- 2 Recognition and enforcement of foreign judgments is one of the three parts of conflict of laws, besides jurisdiction and → *private international law* (choice of law). This entry is confined to judgments of foreign States. It excludes the → *recognition and enforcement of foreign arbitral awards* and the → *recognition of foreign legislative and administrative acts* as well as the role of international judgments in national law, although there are some parallels in treatment (see also → *International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts*).
- 3 Enforcement is not necessarily confined to money judgments: most countries will also recognize non-monetary orders, and much law exists on the recognition of status decisions. However, enforcement is usually limited to civil and commercial matters. Foreign judgments in public law are rarely enforced, although there is no international law reason against it. In criminal law, States mostly prefer → *extradition* to enforcement—but see Commission of the European Communities Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union (2004) (EC Green Paper 2004). Some law exists regarding the enforcement of other acts than judgments, for example authentic instruments (eg Art. 57 Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I Regulation')), settlements (eg Art. 19 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ('1971 Hague Judgments Convention'); Art. 58 Brussels I Regulation; Art. 12 Hague Convention on Choice of Court Agreements ('2005 Hague Choice of Court Convention')); and cost decisions (eg Art. 15 Convention on International Access to Justice).
- 4 Three possible effects of foreign judgments must be distinguished. First, the foreign judgment presents a *fact*, regardless of its recognition (see eg Art. 14 Convention on the Civil Aspects of International Child Abduction). Second, *recognition* of a foreign judgment precludes re-litigation of the same issues in domestic proceedings. The extent of preclusive effect may be derived from the rendering State (eg between states of the United States) or from the State requested to

recognize the decision (eg Art. 6 (II) Convention concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children ('Child Maintenance Convention')); it may be confined to the extent given by both legal orders (eg under Austrian law), or extended to the extent given by either order. Third, *enforcement* presupposes but goes beyond recognition, and lets the successful plaintiff enforce his judgment in another country; the enforcement procedure is usually left to domestic law and varies greatly among legal systems.

- 5 Several tendencies are observable in the field: (i) the law of recognition and enforcement of judgments is becoming more and more important. In a world in which persons and assets can easily be moved across borders (see also → *Globalization*), the recognition of foreign judgments makes it harder for losing defendants to avoid liability. At the same time, the denial of automatic enforcement can make it less attractive for plaintiffs to bring suit in a State where the defendant has no assets; it can thus make creative forum shopping less attractive. (ii) In response to this growing importance, the number of bilateral and multilateral → *treaties* has grown quickly. However, the failure of → *negotiation[s]* for a worldwide Hague Judgments Convention suggests that international agreement in this area has not become easier. (iii) Both domestic and conventional law have become more and more differentiated. Contemporary laws neither reject nor require generally the recognition of foreign judgments; instead, detailed rules have emerged. (iv) A general tendency goes towards more liberal recognition of foreign judgments—more treaties require it, most exceptions in treaties and domestic laws are interpreted more narrowly. A countertrend is that States appear to rely increasingly on the public policy exception where they regard foreign judgments as incompatible with domestic law (→ *Ordre public (Public Policy)*).

## B. Historical and Doctrinal Foundations

- 6 The recognition and enforcement of foreign judgments is a relatively young topic. In antiquity, local law was applied to foreigners (→ *Aliens*) and foreign judgments were denied any force beyond their territories. By contrast, under the *ius commune*, no clear difference was made between foreign and local judgments; foreign judgments were freely recognized and enforced. This liberal attitude changed with the rise of → *sovereignty*. A duty to enforce foreign judgments was rejected as an undue restraint of sovereignty. In France, Art. 121 Code Michaud (1629) denied foreign sovereigns' judgments all effects; other European countries adopted similarly restrictive positions.
- 7 Once ideas of sovereignty limited the authority of judgments to State → *boundaries*, the recognition of foreign judgments between sovereign States had to be based on new principles. Dutch authors, in particular Voet and Huber, developed two such principles that are still relevant today. The first of these principles is → *comity*, defined much later by the United States Supreme Court in a decision denying recognition to a French judgment as

neither a matter of absolute obligation on the one hand nor of mere courtesy and good will... it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another... (*Hilton v Guyot*).

The other principle is → *reciprocity*, the idea that States will and should grant others recognition of judicial decisions only if, and to the extent that, their own decisions would be recognized. This requirement can create an unwelcome situation in which each country waits for the other to act first; it is problematic also because it punishes private litigants for the omissions of States. The main justification for reciprocity is that it can be used to persuade other countries to enter into conventions. Both comity and reciprocity are principles not of duty but of prudence and politeness. It is polite, as between sovereigns, to treat the judgments of foreign countries with respect and deference, and to enforce them. Moreover, it is prudent to enforce the judgments of foreign sovereigns in the hope that foreign sovereigns would enforce one's own judgments.

- 8 A competing theory, especially influential in the common law, focuses less on the public relations of comity or duty between States and more on the private law relations between the parties. As stated by the English House of Lords in 1870, what is enforced is not a foreign judgment as such but the obligation it produces:

The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce (*Schibsby v Westenholz*).

A parallel theory explains that what is enforced is not the judgment but the vested right it creates. The vested rights theory has since fallen out of favour for choice of law, but these approaches retain force for foreign judgments, though often tacitly or as fictions.

- 9 Unrestricted sovereignty presents undue limits; comity is too vague and reciprocity too hard to determine to provide firm foundations; the theory of obligations or vested rights begs the question of when such obligations or rights have been duly acquired. In response, countries entered into treaties. France was the first country to enter into such treaties with Swiss communities in 1715 (Arts. 11–12 Renewal of the Alliance between France and the Catholic Swiss Cantons and Valais, substituted by the Convention between France and the Swiss Confederation Respecting Jurisdiction and the Execution of Civil Judgments of 15 June 1869, which lost force in 1991 when Switzerland joined the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ('Lugano Convention')), with Sardinia in 1760 (Art. 12 Treaty of Limits between France and Sardinia), with Baden in 1846 (Convention between Baden and France for the Reciprocal Enforcement of Judgments), with Belgium in 1899 (Convention between Belgium and France relative to the Enforcement of Judgments etc). In the 19<sup>th</sup> century, 39 treaties existed between German States, fewer with foreign countries. Early treaties simply provided for comprehensive mutual recognition of any judgment, while modern ones require more detailed conditions such as jurisdiction, timely notice, and compatibility with the enforcing State's public policy. Moreover, the 20<sup>th</sup> century has seen attempts to move beyond bilateral agreements to multilateral conventions.

## C. Sources / Legal Regime

### 1. Domestic Law

- 10 Although countries worldwide recognize and enforce foreign judgments under some conditions, differences are vast. Some countries do not enforce foreign judgments in the absence of a treaty. This is the case for the Netherlands—in theory, because in effect the substance of foreign judgments is not reviewed—and some Scandinavian countries. By contrast, some legal systems recognize foreign judgments more or less to the same degree as domestic judgments. This is the case for the United States, where the generous treatment owed under the Constitution to sister-state judgments is expanded by many states to foreign nation judgments (→ *Federal States*). In 2006, the American Law Institute made a more restrictive proposal requiring reciprocity, in order to improve the country's bargaining power. Between these extreme positions, countries have a variety of domestic rules allowing or mandating enforcement under certain conditions, of which the most important ones will be treated below.

### 2. General International Law

- 11 In the absence of treaty commitments, countries are under no obligation to recognize and/or enforce foreign judgments. Although nearly all countries now do so regularly, this → *State practice* is not considered specific enough to create actual rules of → *customary international law*. The refusal to enforce foreign judgments is no intrusion into another State's sovereignty because it concerns only enforceability abroad, not the judgment itself. The principle of equality among States (→ *States, Sovereign Equality*) requires recognition of foreign States within their boundaries, not within one's own boundaries, so the principle would in turn be violated if one State could force other States to enforce its own judgments. For similar reasons, the → *act of State doctrine* does not bar review of foreign judgments for enforcement purposes. Although court judgments are undeniably acts of States, the respect they are owed under the doctrine is confined to their validity and effect within the country whose courts rendered them. Even if judgments are viewed as property, this does not create a duty to enforce them, because enforcement would go beyond the respect required by international law (→ *property, right to, international protection*). Finally, enforcement is not actually a form of judicial assistance—although it is sometimes regulated in treaties on judicial assistance, since enforcement concerns only effects in the enforcing State, not in the rendering State (see also → *Mutual Legal assistance in Civil and Commercial Matters*; → *Mutual Legal Assistance in Criminal Matters*). Consequently, States are largely free in their treatment of foreign judgments, at least outside of treaties.
- 12 However, the enforcement of foreign judgments can violate international law if the judgment itself is incompatible with international law. Where the assertion of jurisdiction by the rendering court violated international law, the enforcement of the resulting judgment does so as well, whether performed by courts of the same or of another State. Sovereign immunity (→ *Immunities*) may bar recognition of a judgment rendered against a State (Arts. 20, 21 European Convention on State Immunity). Similarly, the enforcement of a judgment that does not conform with → *human rights*, either procedurally or substantively, can be a violation of human rights (*Pellegrini v Italy* paras 40–8), although perhaps the enforcing court cannot be asked to review the judgment completely (*Drozd and Janousek v France and Spain* para. 110; *Prince Hans-Adam II of Liechtenstein v Germany* para. 64). In light of these principles, Art. 35(1) Brussels I Regulation, which bars enforcing courts from controlling the jurisdiction of the rendering court, is problematic with regard to exorbitant bases of jurisdiction that may violate Art. 6(1) → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*.

### 3. *Bilateral Treaties*

- 13 Bilateral recognition treaties usually serve three purposes: they shift the basis from unsure grounds like comity to legal rules, they provide a firm basis for reciprocity, and they expand the scope of recognizable judgments. The → *Institut de Droit international* addressed the issue in its first two resolutions in 1874 and adopted resolutions for bilateral treaties in its sessions of 1878 and 1924; in 1950 it adopted principles for criminal judgments. Around the same time, the → *International Law Association* addressed the issue several times between 1899 and 1924, inspired especially by the 1899 Convention between Belgium and France relative to the Enforcement of Judgments. Bilateral treaties between various countries are too numerous to discuss individually here, but some generalities appear. First, countries with more restrictive domestic rules, particularly those requiring reciprocity, tend to enter into more bilateral treaties: France has close to 40, while the United States has none. Second, treaties typically exist between countries with close relations, for example between France and its former colonies (→ *Decolonization: French Territories*), between various Arab States, and between → *China* and → *Hong Kong*. Third, treaties are more frequent between States sharing similar legal techniques and ideologies, for example between the former Socialist States.

### 4. *Multilateral Conventions*

- 14 Multilateral conventions serve the same three purposes as bilateral treaties, but in addition, they codify and unify the law of foreign judgments and, in the case of so-called 'double' conventions, also that of jurisdiction (→ *Unification and Harmonization of Laws*). They are a more recent occurrence than bilateral treaties: in 1964, the International Law Association adopted a Model Act for the Recognition and Enforcement of Foreign Money Judgments. The relationship to bilateral conventions is a matter of positive regulation and varies from one convention to another: the Brussels I Regulation excludes bilateral treaties (see its para. 17), while other conventions allow for them. Three kinds can be distinguished: potentially global conventions that are dedicated specifically to foreign judgments, regionally confined recognition conventions—frequently within or under the *aegis* of regional international organizations (→ *Regional Cooperation*), and recognition rules within conventions on specific subject matters.

#### (a) *Global Enforcement Conventions*

- 15 In the 20<sup>th</sup> century, there was hope for a global enforcement convention, however, first attempts were unsuccessful. Art. 5 Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (1958) provided for the enforcement of judicial decisions rendered on the basis of jurisdiction agreements or appearance. The convention never went into force. It shares this fate with a 1965 Convention on the Choice of Court that submitted the recognition and enforcement of judgments based on a choice of court merely to the general enforcement rules of the enforcing State. The 1971 Hague Judgments Convention is in force only between Cyprus, the Netherlands, and Portugal—where it is largely displaced by the Brussels I Regulation, (see its para. 17)—and Kuwait. Its biggest shortfall is that it requires countries to enter into additional bilateral agreements. In 1999, negotiations began at The Hague towards a global judgments convention, but a draft of 2001 contained many gaps and proved so unpopular with several Member States that the project, at least in its original conception, was stalled. Instead, these negotiations did lead to a narrower 2005 Hague Choice of Court Convention. That convention regulates jurisdiction in civil and commercial matters based on the exclusive choice of parties and mandates, in its Arts 8–15, the conditions and procedures for the recognition of ensuing judgments. So far, only Mexico has acceded to it; the United States and the European Community signed it in 2009.

#### (b) *Regional Instruments*

- 16 The first successful regional enforcement conventions existed in Latin America. The Treaty of Lima of 1878, supposed to harmonize conflict of laws rules including recognition and enforcement, never became operative. More successful conventions followed, the most important among them being the treaties on international procedural law of Montevideo of 1889 and of 1940, whose respective Art. 5 gives judgments from one State the same force in other countries as they have domestically, provided they fulfil certain requirements. Yet the most important unifying document is the Bustamante Code of 1928, a → *private international law* convention among Latin American countries. Its Articles 423–437 provide for the enforcement of civil and administrative but not criminal decisions. Although some countries refused to sign and others made broad reservations (→ *Treaties, Multilateral, Reservations to*), the Code remains influential even beyond the Member States. In recent times, the Inter-American Specialized Conferences on Private International Law ('CIDIP') created several conventions under the *aegis* of the → *Organization of American States (OAS)*. Art. 2 of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards lays down conditions for enforcement; the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments specifies requirements for the jurisdiction of the rendering court. Whereas the former Convention has been ratified by eight Latin American countries, the latter is in force only between Mexico and Uruguay. No North American Member State has signed. For → *MERCOSUR* countries, Art. 20 of the Protocol of

Las Leñas (Protocolo de cooperación y asistencia jurisdiccional en materia civil, comercial, laboral y administrativa) is almost identical to Art. 2 of the Inter-American Convention of 1979.

- 17 Among Member States of the European Union ('EU'), judgments in civil and commercial matters are enforced under the so-called Brussels I Regulation of 2000, which replaced an earlier 'Brussels' Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters of 1968. Exceptions to enforcement are very limited; in particular, lack of jurisdiction of the rendering court is no defence (Art. 35). In 2003, the EU also implemented the so-called Brussels IIa Regulation (Council Regulation (EC) 2201/2003 of 27 November 2003), replacing an earlier narrower Brussels II Regulation of 2000, dealing with the recognition and enforcement of judgments in matrimonial matters and parental responsibility. Both regulations regulate their relation to other treaties. Uncontested claims and payment procedures become automatically enforceable under two regulations of 2004 and 2006 (Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims; Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 Creating a European Order for Payment Procedure). Judgments opening insolvency proceedings are recognized under Art. 16 of the Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, with the enforcing State's public policy as the only relevant defence (Art. 26); other judgments of the insolvency court are enforceable under the Brussels I Regulation (Art. 25). Denmark opted out of the existing regulations, but a separate agreement with the EU, concluded in 2005, which is in force since 2007, ensures applicability of the Brussels I regulation with minimal amendments. An EC Green Paper of 2004 envisages mutual recognition of criminal judgements.
- 18 The Brussels regime is supplemented for the → *European Economic Area (EEA)* by the 1988 Lugano Convention, revised in 2007—an actual treaty that is, in substance, largely similar to the Brussels I Convention (Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters). In addition, several Nordic conventions exist between Scandinavian countries: one for general civil matters of 1932 that was revised in 1977 and is now superseded between EU Member States by the Brussels I Regulation, and another for marriage, divorce, and guardianship of 1931 that survives the Brussels regime to some extent.
- 19 The most relevant Middle Eastern treaties include the 1952 Agreement as to the Execution of Judgments ('Arab League Judgments Convention'), the 1983 Arab Convention on Judicial Co-operation ('Riyadh Convention'), and the 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council ('GCC Protocol'). A convention project by the Asian-African Legal Consultative Committee in the 1960s never came to fruition. Regional organizations like LAWASIA, → *Association of Southeast Asian Nations (ASEAN)*, and the → *Southern African Development Community (SADC)* have no conventions, though the drafting of a convention has been suggested for each of them.
- 20 No independent judgments conventions traditionally exist among countries of the → *Commonwealth*. Yet there is some uniformity because numerous Commonwealth members, past and present, have acts modelled on the 1933 English Foreign Judgments (Reciprocal Enforcement) Act (c.13 23 and 24 Geo 5), which provides for reciprocal judgment enforcement between England and other countries—thereby broadening the scope of the Administration of Justice Act 1920 (c.81 10 and 11 Geo 5) that was confined to the Commonwealth. The Act provides for enforcement based on simple registration of the foreign judgment, creating a relatively high degree of uniformity. Between the UK and other EU Member States, it is now widely superseded by EU law.

### **(c) Conventions on Specific Substantive Subject Matters**

- 21 Since the 19<sup>th</sup> century, multilateral conventions on substantive subject matters already contain provisions for the enforcement of foreign decisions within their subject matter; such conventions often maintain priority over regional enforcement conventions. One important area is transportation treaties, dealt with in Art. 85 Mainz Rhine Shipping Act 1831 and Art. 40 of its successor, the Mannheim Rhine Navigation Act 1868, and Art. 56 Berne International Convention concerning the Carriage of Goods by Rail of 14 October, 1890, which has now been transformed into Art. 12(1) Convention concerning International Carriage by Rail ('COTIF') in the version of the 1999 Protocol (→ *Railway Transport, International Regulation*). Art. 31 Convention on the Contract for the International Carriage of Goods by Road ('CMR') and Art. 21 Convention on the Contract for the International Carriage of Passengers and Luggage by Road ('CVR') lay down bases of direct jurisdiction, and require the enforcement of judgments rendered by a court with jurisdiction under the provision. All these conventions provide for a relatively undifferentiated duty to recognize foreign judgments.
- 22 Family law conventions, especially at the Hague Conference, lay down more calibrated rules for the recognition of judgments. Conventions that require recognition of a status acquired elsewhere extend this duty to the recognition of status-defining judgments (Art. 8 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating

to Adoptions 1965 ('Hague Adoption Convention'); Art. 1(1) Convention on the Recognition of Divorces and Legal Separations 1970 ('Hague Divorce Convention'); and Convention on Celebration and Recognition of the Validity of Marriages 1978 ('Hague Marriage Convention'). A 1973 Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations ('Hague Maintenance Convention'), replacing an earlier narrower one from 1958, facilitates recognition of foreign maintenance decisions; now, the recognition of judgments is regulated in Arts 19–28 Hague Maintenance Convention. Judgments on protective measures for children or adults must be recognized under Art. 8 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants 1961 ('Protection of Minors Convention'), Arts. 23–28 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation Respect of Parental Responsibility and Measures for the Protection of Children 1996 ('Child Protection Convention'), and Arts. 22–27 Convention on the International Protection of Adults 1999 ('Protection of Adults Convention').

- 23 Foreign decisions for nuclear accidents are made enforceable, with no requirements other than jurisdiction of the rendering court and compliance with formalities, by Art. 13 lit. d Convention on Third Party Liability in the Field of Nuclear Energy 1960 (last amended 2004). Art. 11(4) Brussels Convention on Liability of Operators of Nuclear Ships 1962 requires, in addition, a fair hearing and the absence of fraud; similar rules are found in Art. 10 International Convention on Civil Liability for Oil Pollution Damage (1969) and Art. 10 of the largely similar International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, and in Art. 20 Convention on Civil Liability for Damage Cause during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 1989—with an exception if the judgment is irreconcilable with an earlier judgment. Art. 12 Vienna Convention on Civil Liability for Nuclear Damage 1963, amended 1997, and Art. 16(5) and (6) Convention on Supplementary Compensation for Nuclear Damage 1997 add yet another explicit exception where recognition would violate the requested State's public policy or fundamental standards of justice.
- 24 Orders for costs are enforceable under Art. 15 Convention on International Access to Justice 1980—replacing the largely similar Art. 18 Hague Civil Procedure Conventions of 1905 and 1954. This rule counterbalances the abolition of domestic requirements for foreign parties to provide special securities (Art. 14).

## D. Important Requirements and Exceptions for Recognition and Enforcement

### 1. Jurisdiction

- 25 Recognition of a foreign judgment requires that the rendering court had jurisdiction, but how to determine this is not always clear. Whether jurisdiction exists under the rendering court's own law ('direct jurisdiction') is normally decided with preclusive effect by the rendering court. Exceptions to the preclusive effect exist for default judgments, which are therefore excluded from many domestic and international enforcement regimes. However one State's rules on jurisdiction are not binding on another State's decision to recognize an ensuing judgment since no State can bind another in this regard. Nor should they be binding: whether the assertion of jurisdiction is sufficient for purposes of recognition ('indirect jurisdiction') is a different question both analytically and in terms of the relevant consideration, and the enforcing court addresses it independently. If the enforcing State claims exclusive jurisdiction in an area, recognition of a foreign decision in that area is usually denied. France had long protected the privilege of its own nationals to sue and be sued in France by denying enforceability to judgments rendered abroad against French nationals who had not submitted to the foreign court's jurisdiction; the French Cour de Cassation changed this principle in 2006 (*Prieur v de Montenach*). Where no exclusive jurisdiction is claimed, some States borrow the rules applicable to indirect jurisdiction from their own ordinary jurisdiction rules of the enforcing State ('mirror principle'). Other States, more appropriately, develop specific rules for recognition purposes. However, attempts to determine a 'natural forum' whose decisions must necessarily be recognized have failed because the concept is neither sufficiently specific nor sufficiently well grounded in international law.
- 26 Most enforcement treaties and conventions contain rules on indirect jurisdiction. Older treaties require, non-specifically, that a decision be rendered by the 'natural judge'. Several treaties adopt the mirror principle and require enforcement of judgments resting on a jurisdictional basis that is recognized by the enforcing court (eg Art. 21 Convention relative à l'entraide judiciaire en matière civile entre la République française et la République socialiste du Vietnam 2001). More modern treaties often lay out relatively detailed lists of either required bases: Courts are required to enforce judgments rendered on these bases, provided other requirements are met; or excluded bases: Courts are precluded from enforcing judgments rendered on these bases. Conventions that have rules on indirect jurisdiction only are called 'single' or 'simple' conventions. By contrast, so-called 'double' conventions also regulate direct jurisdiction and thereby relieve the enforcing court of reviewing indirect jurisdiction (1869 French-Swiss Treaty, 1899 Convention between Belgium and France relative to the Enforcement of Judgments etc ('Belgian-French Treaty'), Brussels I Convention, Brussels

I Regulation and Brussels IIa Regulation). The projected Hague Judgments Convention (Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters) would have been a so-called 'mixed' convention, because it contained a third category of jurisdiction beyond required and prohibited, namely permitted. Countries are free to assert permitted bases of jurisdiction, but other States are free to deny recognition to ensuing judgments. The Hague negotiations failed in part because countries realized too late the advantages of having three categories; moreover, they never realized fully that these three categories, combined with the distinction between direct and indirect jurisdiction, would have given them a plethora of analytically different options. Future negotiators may be able to use these experiences for a convention that can calibrate more exactly where agreements exist and where disagreements are too great to overcome.

## 2. *Valid Final on the Merits*

- 27 Both domestic law and conventions usually require judgments to be valid, final, and on the merits, even though these requirements are not always spelled out. (i) Validity is determined for this purpose by the law of the rendering court's State. (ii) Finality means that judgments are usually not recognizable until no ordinary appeals can be launched against them. Exceptions exist in some legal systems (eg § 481 cmt. e Restatement (Third) of Foreign Relations Law of the United States), especially where close legal relations between States enable a regime to account for the consequences of enforcing a judgment that is later reversed (eg Art. 46 Brussels I Regulation for judgments, Art. 31 for preliminary injunctions) or where plaintiffs have a specific interest in speedy enforcement (eg Art. 4(2) Hague Maintenance Convention). (iii) Finally, judgments must usually be on the merits. This excludes, in particular, mere procedural decisions, which are usually not recognized, because each country's courts usually follow that country's own rules of procedure and will therefore not be bound by another court's decision on its own procedural rules.

## 3. *Procedural Requirements*

- 28 The duty to recognize foreign judgments is usually excluded where fundamental procedural principles were violated in the rendering court. If the defendant's human rights or sovereignty rights were violated in the original proceedings, recognition of the ensuing judgment can constitute a new violation of international law (see para. 12). (i) The most important procedural requirements for recognition are that the defendant had adequate notice, was properly served, and had an opportunity to be heard in court (→ *Fair Trial, Right to, International Protection*). As with jurisdiction, the applicable standard is neither necessarily that of the rendering court, nor that of the recognizing court for its own judgments, but rather an autonomous standard. (ii) If the judgment was based on fraud or abuse of process, recognition will usually be denied. However, a party may be precluded from invoking this defence in enforcement proceedings if it had a chance to use them to void the judgment in the rendering State. (iii) A broader defence is that the decision was rendered under a judicial system that is generally not fair. This defence raises problems regarding sovereign equality insofar as it invites judges to render judgments over entire foreign systems. Consequently, it is used only sparingly. (iv) Other procedural defences are rare. French courts long denied recognition to judgments based on a law other than that which would have been applicable under French choice-of-law rules; the French Cour de Cassation abolished this requirement in 2007 (*MX v Avianca*).

## 4. *Public Policy and International and Natural Justice*

- 29 One important foundation of the law of recognition and enforcement is that the requested court will not normally review the foreign judgment either under its own law or some other law (no 'révision au fond'). In consequence, foreign judgments are recognized even when a domestic court would have decided differently. However, there are limits to this liberal approach: all legal systems and virtually all more recent conventions allow States to deny recognition to foreign judgments that violate the enforcing State's public policy. Some regimes contain specific applications of the defence. Some regimes specify the source of the public policy. For example, the Middle Eastern conventions from 1983 and 1995 (see para. 19) allow Member States to refuse recognition to foreign judgments that are contrary to Islamic Law; this can, if read literally, become a broad restriction. Some regimes name specific kinds of judgments that are barred from recognition: for example, many conventions and domestic laws contain specific exceptions to judgments on punitive damages. Finally, some States deny enforcement of judgments regarding vitally important domestic industries, for example South Africa for its mining industry and British Columbia for its asbestos industry. Given that no general duty exists to recognize foreign judgments at all, such exceptions are generally compatible with international law unless treaty law provides otherwise.
- 30 A structurally similar defence concerns international or natural justice. Here, the standard is drawn not from the core of the requested State's domestic legal system, but instead must be established on an international basis. The scope of this principle is quite limited. All that can be said for sure is that judgments that violate international law must not be enforced or even recognized.

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