



# **Transnational civil litigation and International commercial arbitration**

*Recognition and enforcement of foreign judgments*

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# RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

## *Introductory remarks*

- Litigation ends up with a final and binding decision that will resolve the dispute establishing who is right and who is wrong. Decisions in civil judicial proceedings may just have declaratory nature or contain order to do or not do something (most of the times, to pay an amount of money)
- National state courts form part of the judicial system and, as such, they exercise public authority. Because of that, litigation before them leads to domestic judgments whose effects are limited to the territory of the state where they have been rendered and cannot have effects in another state unless that other state sets out specific rules aimed at giving effect to foreign judgments in their territory under certain circumstances
- When we refer to the “**recognition and enforcement**” of foreign judgments, we precisely refer to whether and under which circumstances parties that have obtained a national judgment can rely on it in another state.



# RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

## *Introductory remarks*

- More precisely, we refer to **recognition** as meaning that the *res judicata* effects of a national judgment are extended in a state other than the one when it has been rendered. In simple terms, *res judicata* effects prevent parties from relitigating a claim when it has been already adjudicated in a final decision on the merits of the case.
  - When parties want to invoke these *res judicata* effects in a state other than the one where the final judgment on the merits has been delivered, they are seeking for the **recognition** of that judgment. They are claiming that the judgment must be **recognized** (to some extent, accepted) by this other state.
- The creditor, after having had its claim dismissed by Italian courts, started fresh proceedings before French courts for the same claim. The defendant in this new French case (who is the winning party in the Italian case) may invoke the **recognition** in France of the Italian judgment to prevent the losing party from relitigating the same issue and having a new decision on it.
  - In the example above, the recognition of the foreign judgment is concerned with the preclusive/negative effect of *res judicata*.
    - In broader terms, recognition relates to the acceptance by foreign states of determination of rights and obligation contained in national judgments

# RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

## *Introductory remarks*

- We refer to the **enforcement** of a foreign judgment when its enforceable nature is extended and exported in a state other than the one where it has been rendered.
  - The enforceable nature of a decision means that it can be coercively enforced against the losing party, for instance by seizing and foreclosing his/her house or his/her bank account, if he/she does not want or cannot abide spontaneously by the judgment
- Where the creditor has obtained in State A a judgment which orders the debtor to pay a certain amount of money, the creditor may need to enforce the judgment in State B where the debtor's assets are located
  - To have the assets located in State B attached, State B must accept in its legal system the enforceable effects that the national judgments have in the state where it has been rendered



## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

### *Sources of law provisions on recognition and enforcement*

- **Recognition and enforcement** of foreign judgments can be governed, first, by **national law provisions**.
  - Each state may set out specific provisions that deal with the recognition and enforcement of judgments coming from other states (e.g., **art. 64 Italian Privat International Law n. 218/1995**; **art. 25 Swiss Federal Act on Private International Law of 18 December 1987**)
- **Recognition and enforcement** of foreign judgments can be governed by **international (multilateral or bilateral) convention**
  - **Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Judgment Convention)**, which is entered into force on 1<sup>st</sup> September 2023. The Convention has been signed but not so far ratified by the US. Today, the Convention is binding just between the member states of the EU and Ukraine
  - **Lugano Convention 2007**, which governs recognition and enforcement of judgments with respect to relationships between the member states of the EU, Switzerland, Iceland and Norway

## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS *in civil and commercial matters in EU*

- **Recognition and enforcement** of judgments in civil and commercial matters are governed in the European Union by Regulation EU 1215/2012 (**Brussels I-bis** regulation)
  - Traditionally, law provisions on recognition and enforcement of foreign judgments provided for a system under which the recognition (of the *res judicata* effects) was automatic and the enforcement (the extension to another state of the enforceable nature of a judgment) was conditioned upon the obtaining in that other state of a declaration of enforceability (the so-called *exequatur* proceedings)
  - That was the system in place in the European Union until the entry into force in 2015 of Brussels I-bis regulation
- **Brussels I-bis** regulation provides for an automatic recognition in all member states of both *res judicata* effects and enforcement effects. Pursuant the regulation, both recognition and enforcement are automatic
  - **Automatic** means that in order to have the effects of an Italian judgment in civil and commercial matters extended to another member state, there's no need of any special procedure to be instituted before that other member state (artt. 36 and 39). **Brussels I-bis abolished the *exequatur***
  - Although recognition and enforcement are automatic, it does not mean that they cannot be contested. Brussels I-bis continues to provide for a list of exhaustive grounds for refusing recognition and enforcement



## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS *in civil and commercial matters in EU*

- The recognition and/or the enforcement of a judgment shall be refused (**art. 45 BI-bis**)
  - If such recognition is manifestly contrary to public policy in the Member State addressed
  - Where the judgment was given in default, if the defendant was not served with the document which instituted the proceedings in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so
  - If the judgment was irreconcilable with a judgment given between the same parties in the Member State addressed or with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties
  - If the judgment conflicts (i) with protective rules of jurisdiction where the weaker party was the defendant, and (ii) with rules of exclusive jurisdiction set forth in article 24
- Under Brussels I-bis Regulation, the notion of judgments covers also orders for **provisional and protective nature**

## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS *in civil and commercial matters in EU*

- Parties who are willing to contest the automatic recognition and/or enforcement of a judgment in a Member state other than the one where it's been rendered shall bring proceedings in that member state
  - Procedure for refusal of enforcement shall be governed by the law of the Member State addressed.
    - It is common ground that the party who applies for a refusal of enforcement could rely on other grounds and/or circumstances which exclude the right of the creditor to enforce the judgment (e.g., the debt has been already paid)
    - Under no circumstances a judgment given in a Member State may be reviewed as to its substance in the Member state addressed
- As general principle, a judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in that Member State.
  - Actual enforcement of the judgment is governed by the law of the Member State addressed and must comply with formal and substantive requirements for, e.g., seizing property provided for that national legislation.



## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

### *The 2019 Hague Judgments Convention*

- The 2019 Judgment Convention deals only with **recognition** and **enforcement** of judgments (it does not contain any provision on jurisdiction, thus differing from Brussels I-bis)
  - The convention applies in civil and commercial matters and contains a list of matters that are expressly excluded from the scope of its application (**art. 2**)
  - Provisional and protective measures are expressly excluded from the scope of application of the Judgment Convention (**art. 3**)
- The convention provides for a system in accordance with which parties must seek for a declaration of recognition and enforceability in other contracting state
  - The convention provides for a exhaustive list of:
    - Conditions that must be met for having the decision recognized and declared enforceable (**art. 5**)
    - Grounds for refusing recognition or enforcement (**art. 7**)

# RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES

## *an overview*

- The United States has not ratified any international convention or treaty that governs the recognition or enforcement of foreign judgments. There is also no federal law in the United States that governs this issue. Thus, the recognition and enforcement of foreign judgments in the United States is a matter of individual state law
  - “**sister-state judgment**” refers to a judgment rendered by a State of the U.S. court that is subject to mandatory recognition in all other States under the Full Faith and Credit Clause of the U.S. Constitution
- US courts recognize foreign civil judgment that are final, conclusive, and enforceable
  - **Conclusive** means that the judgment contains the determination of parties’ legal rights and obligations.
  - **Enforceable** means that the foreign judgment can be enforced in the country where it was rendered.
    - The **finality** requirement is not usually interpreted by US courts to mean that the foreign judgment is no longer subject to any appeals in the foreign jurisdiction.