

**RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS  
AND ARBITRAL AWARDS:**

**REPORT**

(Presented by Dr. Ruth Stella Correa Palacio)

**I. Background**

At its 90<sup>th</sup> regular session, held in Rio de Janeiro in March 2017, the Inter-American Juridical Committee decided on its own initiative, pursuant to the power conferred on it under Article 12.c of its Statutes, to undertake a study of the situation within States regarding "Enforcement of foreign judgments and arbitral awards," with a view to determining the internal procedural mechanisms established for the recognition and enforcement of judgments handed down by the courts of another State and the efficacy of those mechanisms.

Initially, the study was also to cover the judicial decisions taken in another State by arbitration tribunals, that is to say, by individuals temporarily vested with power to administer justice.

The preliminary report presented at the 92<sup>nd</sup> regular session, held in Mexico City, included a summary of international regulations on the subject, which highlighted the following instruments: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 —the "New York Convention"— applicable to awards by arbiters appointed for specific cases and to awards by permanent arbitration tribunals; 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;" the Inter-American Convention on International Commercial Arbitration, signed in Panama on January 30, 1975, and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo Convention") of May 8, 1979.

The report also described domestic regulations on the recognition and enforcement of foreign judgments found in several countries that are signatories to the Montevideo Convention, namely: Argentina, Bolivia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Colombia.

A preliminary conclusion of the report underscored that domestic procedures tend to be more demanding when it comes to recognition and enforcement of judgments handed down by courts of another country than in the case of awards by arbitration tribunals.

During the 92<sup>nd</sup> regular session, there was also a meeting with experts on private international law, who stressed the importance of the topic and referred to the need to get rid of the "specter" of multiple formalities and of such distinctions as that between judgments handed down on commercial or non-commercial matters; between international contracts or business versus domestic business; and the principle of reciprocity as the basis for recognition of judgments handed down by a tribunal of another State. The experts also underscored the merits of using (information) technology instead of authentication/legalization (in the recognition process).

At that meeting, the Committee decided, on the one hand, to check out the work being done by the Hague Conference since 1992 on the Recognition and Enforcement of Foreign Judgments, so as to decide

whether it would be useful for this Committee to address the same subject and whether this study should deal only with judgments handed down by courts of another State, omitting arbitration awards.

## **II. Introduction**

The purpose of this work is to investigate whether current international regulations on the subject of recognition and enforcement of judgments handed down in another State are sufficient to guarantee the fundamental right of access to justice and its natural sequel: effective judicial protection.

Access to justice as a fundamental right recognized in Article 8 of the Universal Declaration of the Rights and Duties of Man, adopted by the General Assembly of the United Nations on December 10, 1948, and in Article 25 of the American Convention on Human Rights, means that everyone can have recourse to administration of justice and obtain from it a substantiated response on the merits, rooted in law and addressing his or her claims, that is adopted autonomously, independently, impartially, and within a reasonable period of time, and that the system has the mechanisms needed to render that decision effective.

Here it is worth bearing in mind that the right to access justice is not restricted solely to freedom to have recourse -- and the possibility of having recourse -- to judges and courts, legal representation, and completion of the corresponding proceedings; it also implies access to all "the means through which rights become effective"<sup>1</sup> and effective judicial protection is guaranteed. Achieving that may require overcoming barriers or obstacles to the recognition and enforcement of judgments outside the States in which they are handed down.

Advances in international business, the abundance of rules governing international trade, the considerable progress made with purchases over the Internet, the migratory movements of the past decade, and a host of other developments have posed enormous challenges for the administration of justice and, especially, for the recognition and enforcement of rulings handed down in other States: an area in which adjustments have not kept up with changing requirements, needs, and circumstances.

While the application of communication technology has shaped progress in business, banking, the satisfaction of all kinds of needs, and day-to-day activities, the same is not true of the mechanisms for recognition and enforcement of judgments handed down by courts in another State, where, despite international instruments, such as the New York Convention of 1948 and the Montevideo Convention of 1979, the rules and regulations have not been updated.

For that reason, there is a pressing need to use technological advances to move toward more homogeneous procedural mechanisms to overcome the hurdles to the recognition and enforcement of judgments handed down in another State. To that end, from the perspective of the effectiveness of the fundamental right of access to justice, this study seeks to analyze current international regulations affecting the efficacy of foreign judicial decisions. In so doing, it also seeks to propose formulas for eliminating the barriers to recognition and enforcements erected by domestic red tape.

## **III. Current regulations in the Americas**

The domestic laws of States typically facilitate recognition and enforcement of arbitral awards, that is, the rulings made by private persons temporarily vested with the power to administer justice, a fact that, according to the literature on the subject, is due to the success of the New York Convention of 1958. They also typically abide by and comply with decisions handed down by international courts, whereas domestic procedures established for the recognition and enforcement of judicial rulings handed down by courts in another State are so strict and surrounded by formalities that they pose an obstacle to the fundamental right of access to justice: a situation that calls for a fresh look at the subject and a new approach.

Domestic laws on the subject in the Americas usually follow parameters set in the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards ("Montevideo

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<sup>1</sup> CAPELLETI & GARTH. *Accès à la Justice et Etat-Providence*, Institut Universitaire Européen, *Económica*. Paris, 1984.

Convention" of 1979), which is based not just on the principle of reciprocity but also, in some respects, on shared procedural rules (*comunidad en normas procesales*).

The Montevideo Convention covers:

- (i) Jurisdictional resolutions adopted in civil, commercial, and labor-law proceedings;
- (ii) Judicial judgments (although the Convention allows for a statement, upon ratification, that it also applies to resolutions ending proceedings, such as those issued by authorities performing some kind of jurisdictional authority, i.e. not necessarily judicial authorities, for instance resolutions issued by administrative authorities acting in a judicial capacity);
- (iii) Arbitration awards, in all aspects not covered by the Inter-American Convention on International Commercial Arbitration, adopted in Panama on January 30, 1975.

- Aspects regulated by the Convention

The conditions for recognition and the verification documents needed to request enforcement. It leaves it up to domestic regulations to determine the procedure for ensuring enforcement and effectiveness.

The Montevideo Convention distinguishes between the recognition procedure and the enforcement procedure, when it requires certain conditions for the former and ascertainment of proof for the latter.

Thus, for recognition, the Convention provides for conciliation of authenticity and legalization requirements between the State in which the judgment was handed down and the State to which it is presented for recognition, with particular emphasis on formal aspects: for instance, judgments must exhibit the external formalities needed to be considered authentic in the State they come from; they must be translated into the official language of the State where they seek to be effective; the corresponding document must be duly legalized in accordance with the law of the State in which it is supposed to be enforced; the respondent must have been duly notified or summonsed: a legal procedure that is required to be substantially equivalent to that accepted in the State in which enforcement is requested; the parties must have had the opportunity and facilities to defend their case; the judgments must have been final in the State in which they were handed down and must not manifestly oppose the principles and *ordre public* laws of the State in which recognition or enforcement is requested.

For enforcement of the judgment, once the recognition requirements have been met, formal aspects are vital, inasmuch as the Convention requires presentation of a certified copy of the judgment, a certified copy of the notification to the respondent, a certified copy of the proceedings showing that the right to defense was assured, and a certified copy of the document or attestation that the judgment is final. These are requirements that should be reviewed given the value that legal proceedings nowadays attach to any copy, as well as the documents that can be found posted on the official websites of judicial organs.

A special feature of this Convention worth noting is that it leaves it up to domestic regulations to decide on the procedures and competence needed to ensure the efficacy of recognition and enforcement. This is a provision that propitiates the erection of a barrier to the fundamental right of access to justice because, as shown by the set of legislations reviewed in the preliminary report, the procedures concerned are typically so complex that they hamper and delay recognition and enforcement of judgments handed down in another State.

The lack of more specific regulation of the mechanism to be used for recognition and enforcement has led to the inclusion in procedural codes of a series of proceedings known variously as exequatur, final judgment or recognition statements, and so on, pertaining to procedural mechanisms designed to determine the enforceability of a foreign judgment, provided that it meets certain requirements for its recognition.

Competence to conduct the recognition proceeding is usually assigned to higher-ranking officials or, in some cases, Supreme Courts, whereas competence for enforcement is left to other judges, according to the usual assignment of competence regulations.

In enforcement proceedings, some legislations even allow the defense to present arguments against the judgment whose enforcement is being sought.

Also worth noting is the different legal treatment of cases in which the enforcement of only the imperative and probative aspects of the judgment is sought; in such cases the exequatur is omitted.

#### *Enforcement of judgments handed down by international courts of justice*

The situation with regard to enforcement of judgments handed down by international judicial bodies is very different. In the Americas, it is above all the Inter-American Court of Human Rights that is competent to rule on the international responsibility of States by applying and interpreting the American Convention on Human Rights and other inter-American instruments. Compliance with this Court's findings is guaranteed under Articles 67 and 68 of the Convention, according to which "the judgment of the Court shall be final..." and "the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. That part of a judgment that stipulated compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State."

The judgments handed down by this Court are not subject to any recognition proceeding in the State convicted and are sufficient and ready for enforcement, for which no proceedings are required other than those established in each State for the enforcement of decisions against the State.

At the same time, pursuant to Article 64 of the Inter-American Convention on Human Rights and Article 25 of the Rules of Procedure of the Court, at any stage of the proceedings and provided that it is a matter of extreme gravity and urgency and it is necessary to avoid irreparable harm to persons, the Court may, on its own motion or at the request of a party, order such provisional measures as it deems pertinent. The Convention does not establish any procedure for their enforcement within States and, given their nature, they are directly enforceable in those States that have accepted the jurisdiction of the Inter-American Court of Human Rights.

Also worth mentioning in this context is the Court of Justice of the Andean Community, which is responsible for pre-judication interpretations of the provisions contained in the Community's legal framework -- the Cartagena Agreement. Under Articles 28 and 32 of its founding treaty, those interpretations are mandatory for domestic judges, in order to ensure uniform application of those provisions in the territories of the member states.

The Organic Treaty of the Andean Court of Justice prescribes that domestic judges hearing a sole instance case involving the application of any of the provisions in the legal framework of the Cartagena Agreement<sup>2</sup> may request the Court's interpretation of said provisions (Article XXIX). It also established that said interpretation must be adopted by the judge hearing the case, i.e. it is mandatory.

#### **IV. The preliminary draft Convention prepared by the "SPECIAL COMMISSION ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS" of the Hague Conference on Private International Law**

The work of this Commission, whose latest published text is the "PRELIMINARY DRAFT CONVENTION OF 2018" incorporating changes made during the meeting held from May 24 to 29, 2018, introduces some new features that do not, however, alter the strictness of the formalities surrounding internal proceedings for recognition and enforcement of judgments handed down in another State. In fact, the draft does not address that issue.

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<sup>2</sup> Agreement on Andean subregional integration signed on May 26, 1969 by Bolivia, Colombia, Ecuador, and Peru.

What it does seek to do is regulate recognition and enforcement in one contracting State of judgments handed down in another contracting State, based on reciprocity. It does not apply to arbitration or to related procedures. It maintains the distinction between recognition and enforcement and it leaves untouched the privileges and immunities of States or international organizations in respect of themselves and their nature/qualities.

One novelty, compared to the contents of the Montevideo Convention, is that it does not touch on labor issues; that is to say, it seeks to regulate the issue only in relation to judgments in civil or commercial law cases and it includes a long list of even civil or commercial topics that are excluded.

It includes definitions of "respondent", "judgment" and "habitual residence", whereby the last of these is presented as a novelty for determining the admissibility of recognition, which shall apply, *inter alia*, when the respondent had his or her habitual place of residence in the originating State at the time when she or he became a party to the proceedings before the originating court.

The definition provided of "judgment" is broad, in that it encompasses any decision on the merits handed down by a court, regardless of the term used to describe it, such as judgment, resolution, or decree (*auto*), as well as the court's (or a court official's) ruling on costs, provided that said determination refers to a decision on the merits that is capable of being recognized or enforced under this Convention. Provisional and precautionary measures are not considered to be judgments.

The preliminary draft establishes a restrictive list of grounds for denying recognition and includes an also restrictive list of eventualities in which recognition and enforcement of judgment is admissible, whereby preference is accorded to territorial factors, as when, *inter alia*, the person against whom recognition is sought had his or her habitual residence in the originating State when he or she became a party to the proceedings that gave rise to the judgment; or else that person had his principal business in the originating State, provided that the claim that gave rise to the judgment originated in activities related to that business or a branch, agency or other establishment without separate legal status; or when the judgment deals with a contractual obligation and was handed down in the State in which the obligation was enforced or should have been enforced; or else the judgment refers to the lease of a property and was handed down in the State where the property is located; or when an extracontractual liability judgment refers to an injurious act committed in the State in which it was handed down.

Article 4 of the latest version of the preliminary draft included the possibility of reviewing the merits of the judgment, as follows:

"There shall be no review in the requested State of the merits (substance) of the judgment [This shall not preclude such a review if it is needed to apply the present Convention]"<sup>3</sup>

This is another matter that could trigger more obstacles to recognition and enforcement.

As regards the procedure for recognition and enforcement, Article 14 upholds the *status quo*, in the sense that it leaves regulation of this aspect up to the domestic legal system.

Thus, the preliminary draft Convention states:

"1. The procedure for recognition, statement of enforceability, or registering for enforcement, as well as enforcement of the judgment shall be governed by the law of the Requested State, unless otherwise provided in the present Convention. The requested court shall act promptly."

## V. Conclusions

1. International regulations governing recognition and enforcement of arbitral awards handed down in another State are more expeditious and effective than those relating to judgments handed down by the courts of another State. It is therefore proposed that the study exclude arbitral awards.

2. International regulations in force for the recognition and enforcement of judgments handed down

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<sup>3</sup> The sentence in parenthesis is an addition made in the latest version.

by the courts of another State do not guarantee the fundamental right of access to justice and effective judicial protection in that they delegate to the domestic laws of the requested State regulation of the procedures to be applied to that end, without establishing any parameters.

3. The preliminary draft Convention prepared by the Hague Conference on private international law regarding recognition and enforcement of foreign judgments does not address the matter of the procedures to be applied within States, matters that it once again delegates to domestic regulation, only this time without requiring prompt action.

4. It is necessary to amend the international regulations currently in effect with respect to domestic recognition and enforcement processes, which is where the difficulties have been detected that seriously impair the fundamental right of access to justice and, hence, effective judicial protection.

5. The required amendment should address, at a minimum, the following aspects:

5.1. The need to maintain the duality of the recognition and enforcement procedures, or else to abolish it and keep just the enforcement process.

5.2. If the recognition procedure is eliminated, exceptionally allow arguments in the enforcement procedure alleging circumstances established as grounds for denying recognition.

5.3. Urge that domestic procedures involve as few stages as possible and be carried out as swiftly as possible.

5.4. In the authentication and legalization of documents process, adopt the procedural improvements made possible by the use of new technology.

5.5. Embrace the use of information technology and its impact on knowledge of judicial decisions.

5.6. Combat the red tape surrounding recognition and enforcement procedures.

5.7. Disallow revision of the merits of the decision.

5.8. Provide different parameters for recognizing the probative effects of judgments.

6. The work that this Committee could do does not involve any replication of work already done by the Special Commission on Recognition and Enforcement of Foreign Judgments of The Hague Conference.