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DOMESTIC PROCEDURES FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: RECOMMENDATIONS

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Commentary: Part I provides context for the recommendations that follow in order to explain why this work was considered necessary, its purpose and how that is to be achieved. It also identifies the existing international instruments that have been taken into consideration to demonstrate that this work does not duplicate other efforts but rather, that it is consistent with and supplementary to the international standards for the recognition and enforcement of foreign judgments. Part II outlines the current situation, namely, the limitations of international instruments, challenges in domestic law, and the advances that have been made possible by technology. Part III contains the Recommendations with accompanying explanatory commentaries. Part IV provides the brief summarized conclusion. Annexes A, B and C contain text that is referenced in the Recommendations.

PART I. Context

1. Overarching Rights

Access to justice is a fundamental right recognized in the *Universal Declaration of Human Rights* (Article 8) and the *American Declaration of the Rights and Duties of Man* (Article 25). The right is not restricted solely to 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."[1] Thus, the actualization of the right may require overcoming barriers or obstacles to the recognition and enforcement of judgments outside the states in which they are handed down (*Recognition and Enforcement of Foreign Judgments and Arbitral Awards: Report*. CJI/doc. 564/18, August 3, 2018).

2. Problem

International instruments on recognition and enforcement of judgments do not *effectively* guarantee the fundamental right of access to justice and judicial protection. Although these instruments address the *substantive* legal issues for the recognition and enforcement of judgments, the *procedure* for the actualization of recognition and enforcement is delegated to the domestic law of each state. However, these domestic procedures vary greatly from one state to another and are typically so strict and surrounded by formalities that they pose an obstacle to the fundamental right of access to justice (CJI/doc. 564/18).

3. Purpose and Goal

The purpose of these Recommendations is to improve access to justice in the region by suggesting guidelines for the domestic procedures used in the recognition and enforcement of foreign judgments. This in turn will support and foster the right of access to justice, strengthen rule of law, and promote development based on the actualization of human rights and equality before the law.

[1] CAPELLETI & GARTH. Accès à la Justice et Etat-Providence, Institut Universitaire Européen, Económica. Paris, 1984. Cited in CJI/doc. 564/18, *infra*, at p. 2.

The goal of these Recommendations is to simplify domestic procedures used in the recognition and enforcement of foreign judgments by providing guidance for the interpretation, application and, where necessary, legislative reform of such procedures, in conformity with international standards and best practices, and to encourage, wherever possible, application and use of technological advances for greater efficiency by courts in the recognition and enforcement of foreign judgments.

PART II. Current Situation

1. Limitations of Applicable International Instruments

There are international instruments that address the recognition and enforcement of foreign judgments. With some variations, they essentially outline the bases on which a judgment (or arbitral award) in one state is to be recognized and enforced in another state. Their main similarities and differences have been described elsewhere (*Recognition and Enforcement of Foreign Judgments and Awards: Preliminary Report.* CJI/doc. 558/18, February 20, 2018, Part III).

Although these instruments address the substantive legal bases for the recognition and enforcement of judgments, almost all of them delegate the civil procedure for the recognition and enforcement to the domestic law of each state, as illustrated below.

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (hereinafter "NY Convention") outlines the conditions under which the Contracting Parties shall recognize arbitral awards as binding and the requirements for obtaining their recognition and enforcement, as well as the grounds for refusal of recognition. Regarding procedure, it provides that:

- "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,…" (Article III).

In the regional context, the *Inter-American Convention on International Commercial Arbitration* (Panama, 1975) (hereinafter "Panama Convention") provides that an arbitral award shall have the force of final judicial judgment and outlines the conditions under which recognition and enforcement may be refused. Regarding procedure, it provides that:

- "…execution or recognition [of an arbitral decision or award] may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed…" (Article 4).

The *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (Montevideo, 1979) (hereinafter "Montevideo Convention") was designed as an instrument of judicial cooperation to ensure the extraterritorial efficacy of both judgments and arbitral awards issued in the States Parties' respective territorial jurisdictions. Regarding procedure, it provides that:

- "The procedures for ensuring the validity of foreign judgments, awards and decisions, including the jurisdiction of the respective judges and tribunals, shall be governed by the law of the State in which execution is sought" (Article 6).

Most recently, the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* was concluded by the Hague Conference on Private International Law (2019) (hereinafter "HCCH Convention"). It establishes a set of core rules to facilitate such recognition and enforcement. Regarding procedure, it, too, provides that:

- "The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State …" (Article 13).[2]

[2] For the Spanish version, as the official text of this Convention is not yet available, the reference was taken from Article 14, numeral 1 of the Annex on Recognition and enforcement of foreign judgments and awards. CJI / doc. 581/19, February 14, 2019, page 19.

In addition to these conventions, consideration has also been given to Regulation No. 1215/2012 of the European Parliament and Council on *Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (hereinafter "EU Regulation") which has among its objective to facilitate access to justice through mutual recognition of judicial decisions. Consideration has also been given to the work completed in 2016 by the American Association of Private International Law (Association Americana de Derecho Internacional Privado), namely, the *ASADIP Principles on Transnational Access to Justice (TRANSJUS)* (hereinafter "ASADIP Principles") and work produced in 2008 by the Iberoamerican Institute of Procedural Law (Instituto Iberoamericano de Derecho Procesal), namely, the draft *Model Code of Interjurisdictional Cooperation for Iberoamerica* (Proyecto de Código de Cooperación Interjurisdiccional para Iberoamericana) (hereinafter "Draft IIDP Code"). Consideration has also been given to the joint work by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) that resulted in 2004 in the adoption of the *ALI/UNIDROIT Principles of Transnational Civil Procedure* and ongoing efforts on a similar project with the European Law Institute (ELI) to develop the draft *ELI/UNIDROIT European Rules of Civil Procedure*, as well as a current project about to begin at UNIDROIT to develop "Principles on Effective Enforcement." These various initiatives will be referenced where relevant in the commentary below.

2. Domestic Procedures

Most OAS Member States, including those that have ratified the Montevideo Convention, have their own unique domestic procedures for the recognition and enforcement of foreign judgments, as described in a survey of such procedures (CJI/doc. 558/18, Part IV). The survey found that "it is common for States' internal regulations to require an exequatur or judicial proceeding for requesting recognition of a foreign judgment…; there is no automatic obligation to enforce foreign decisions."

The impediments that these procedural hurdles create for access to justice have been widely recognized. For example, during the CJI's 92nd regular session, a meeting was held 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" (CJI/doc. 564/18, at page 1). Moreover, during that same regular session, a meeting was also held with several of the Legal Advisers of the Ministries of Foreign Affairs of OAS Member States at which "there was warm acceptance of the fact that the Committee was working on this issue to the extent that it could render massive services to the law in the region, as well as the administration of justice for private parties in the region, […] that would allow domestic proceedings to be more efficient and less costly" (*Recognition and Enforcement of Foreign Judgments and Arbitral Awards*. CJI/doc. 581/19, February 14, 2019, at page 5).

3. Technological Advances

In the 40-plus years since the Montevideo Convention was concluded in 1979, significant advances have been made in Information Technology (IT) and Information and Communication Technology (ICT). Many of the concerns that preoccupied judges in previous centuries, when faced with recognition and enforcement of a paper-based foreign judgment, are dwindling and many are no longer an issue. For example, it is much easier today to verify the validity of a foreign judgment with the click of a mouse at an official government website.

Thus, these Recommendations are made in keeping with the spirit of the Montevideo Convention, while at the same time acknowledging that the law needs to stay abreast of technological developments in order to achieve the broader goals to ensure the fundamental right of access to justice. These were set out first and foremost in the Montevideo Convention, namely, "that the administration of justice in the American states requires mutual cooperation for the purpose of ensuring the extraterritorial validity of judgments…"

PART III. Recommendations

The domestic legal regime of States should be consistent with the following Recommendations:

1. Definitions

In these Recommendations,

(a) "judgment" means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court).

(b) "Requested State" means the State in which the judgment is sought to be recognized and enforced and in which it is to take effect.

(c) "State of Origin" means the State in which the judgment was issued or rendered.

Commentary: These Recommendations should be applicable to the widest possible range of decisions issued by court authorities. Accordingly, the term "judgment" has been broadly defined as adapted from the HCCH Convention, Article 3. However, while the HCCH Convention definition goes on to exclude interim measures, States should decide for themselves, given their own particular circumstances, whether or not these Recommendations should extend to also include decisions involving such measures or other rulings as would be consistent with the desire for improved effectiveness in the right of access to justice. For example, the Montevideo Convention provides in Article 1 that States could, upon ratification, extend its application "to rulings that end proceedings, to the decisions of authorities that exercise some jurisdictional function and to judgments in penal proceedings ordering compensation for damages resulting from an offense." Also noteworthy in this regard are the ASADIP Principles, in which Article 7.7 states that "to ensure the extraterritorial effect of decisions, appropriate provisional measures of protection shall be facilitated…" as well as articles 13 and 14 of the Draft IIDP Code, which propose the execution of an urgent precautionary measure and even the provisional execution of an unsigned foreign sentence.

2. Scope

2.1. These Recommendations apply to judgments rendered in civil, commercial or labor proceedings.

2.2. These Recommendations do not apply to the following matters:

(a) arbitral awards;

(b) revenue, customs or administrative matters;

(c) any other types of judgments or subject areas that a State considers should be excluded.

Commentary: The Recommendations are intended to encompass judgments rendered in the widest possible range of matters. At the aforementioned meeting on private international law that was held during the CJI's 92nd regular session, among other things, these experts referred to the need to eliminate distinctions such as those between judgments handed down on commercial or non-commercial matters; between international contracts or domestic business (CJI/doc. 564/18, at page 1). Language of Paragraph 2.1 has been adapted from the Montevideo Convention, Article 1.

Paragraph 2.2(a) excludes arbitral awards from the scope of these Recommendations, because the recognition and enforcement of such awards is the subject of a different set of international instruments (CJI/doc. 564/18).

Paragraph 2.2(b) excludes revenue, customs or administrative matters, consistent with the language of the HCCH Convention, Article 1. This is because of the general principle under the act of state doctrine that courts will not enforce the tax laws of another sovereign state.

Paragraph 2.2(c) offers an exclusion category for any other types of judgments or subject areas that a State considers should be excluded from the scope of these Recommendations. Examples of the types of such exclusions may be found in the HCCH Convention, Article 2.

3. Access to Justice

3.1. Judges and other state authorities should always endeavor to give force and effect to foreign judgments.

3.2. The principle of reciprocity should not be considered as a requirement in the determination of the extraterritorial validity of foreign judgments.

Commentary: Access to justice is a fundamental right recognized in the *Universal Declaration of Human Rights* (Article 8) and in the *American Declaration of the Rights and Duties of Man* (Article 25) as was discussed above. This is an important grounding principle for an approach to the extraterritorial validity of foreign judgments. Paragraph 3.1 has been adapted from the ASADIP Principles, Article 7.1, which states that "The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to."

At the aforementioned meeting on private international law that had been held during the CJI's 92nd regular session, among other things, these experts stressed the importance of the topic and referred to the need to eliminate the principle of reciprocity as the basis for recognition of judgments handed down by a tribunal of another State (CJI/doc. 564/18, at page 1).This is also consistent with the ASADIP Principles, Article 7.6 which states that "the requirement of reciprocity for giving effect to decisions and acts of foreign authorities is presumed to violate the right to access to justice." The Commentary to the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Arbitration* points out that "reciprocity is not included as a condition for recognition and enforcement" (para. 52). This is also included in the General Principles of the Draft IIDP Code in Article 1.IV, that is, "no dependency on reciprocity of treatment, except as expressly provided in this Code."

4. Extraterritorial Validity

4.1. Determination: When the extraterritorial validity of a judgment by a court in one State (State of Origin) is sought in another State (Requested State),

(a) where both States are parties to a convention on extraterritorial validity that applies to that judgment, extraterritorial validity shall be determined in accordance with that convention;

(b) where no such convention is applicable, extraterritorial validity shall be determined in accordance with international standards as outlined below, namely, that;

- The judge or tribunal that rendered the judgment exercised proper jurisdiction to try the case and to pass judgment on it in accordance with the law of the Requested State;
- The parties against whom the judgment was rendered were summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the Requested State;
- The parties had an opportunity to present their defense in the State of Origin;
- The judgment is final or, where appropriate, has the force of *res judicata* in the State of Origin;
- The judgment is not manifestly contrary to the principles and laws of the public policy (*ordre public*) of the Requested State.

Commentary: For greater clarity, in Recommendation 4 the term "extraterritorial validity" is used to encompass the broader concept of recognition and enforcement of foreign judgments in its entirety

and from the perspective of substantive requirements; Recommendation 5, which follows below, uses the terms "recognition" and "enforcement" specifically in relation to the domestic procedure used to achieve actualization of extraterritorial validity.

Paragraph 4.1(a) defers to the requirements of any convention that may be in force between the State of Origin and the Requested State because those requirements would prevail. This might be the Montevideo or HCCH Conventions or some other convention or treaty. Paragraph 4.1(b) addresses those situations where there is no convention between the two States. It is adapted from Montevideo Convention, Article 2, but rather than including all the listed items from (a)-(h), several of which are procedural formalities, it summarizes the substantive requirements, which are also consistent with the HCCH Convention (see Articles 4, 5 and 7) and the ASADIP Principles (see Articles 7.2, 7.3, 7.4 and 7.8).

If the requirements for extraterritorial validity have been met, whether pursuant to an applicable convention or international standards, the judgment has extraterritorial validity. This is consistent with the ASADIP Principles, Article 7.9 which states that "A foreign decision produces effects in the Requested State from the moment that the decision becomes effective in the State of Origin."

4.2. <u>No review of merits</u>: Where the bases for extraterritorial validity have been satisfied in accordance with 4.1(a) or (b) above, there shall be no review of the merits of the foreign judgment by any court or other entity in the Requested State.

<u>Commentary</u>: Foreign judgments are not to be reviewed on the merits (CJI/doc.564/18, Recommendation 5.7). As stated in the ASADIP Principles, Article 7.5, "The revision of the merits of a foreign judicial decision violates the right to access to justice,…" This is also reflected in the HCCH Convention, Article 4.2, which states that "There shall be no review of the merits in the requested State."

4.3. <u>Grounds for refusal</u>: Recognition of a foreign judgment may only be refused by a court or appropriate judicial authority in the Requested State under the following circumstances:

(a) where both States are parties to a convention on extraterritorial validity that applies to that judgment, if the grounds for refusal under that convention have been met;

(b) where no such convention is applicable, if any of the internationally accepted grounds for refusal as outlined below have been met, namely, that;

- The judge or tribunal that rendered the judgment did not exercise proper jurisdiction to try the case and to pass judgment on it in accordance with the law of the Requested State;
- The parties against whom the judgment was rendered were not summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the Requested State;
- The parties did not have an opportunity to present their defense in the State of Origin;
- The judgment is not final;
- The judgment is manifestly contrary to the principles and laws of the public policy (*ordre public*) of the Requested State;
- or if any other grounds for refusal as provided in the law of the Requested State have been met.

<u>Commentary</u>: These are the fundamental grounds for refusal and are consistent with Recommendation 4.1(b) above, which outlines the requirements for extraterritorial validity. Clearly,

failure to meet these requirements constitutes grounds for refusal (see ASADIP Principles, Articles 7.2 and 7.4). A State may wish to add other grounds for refusal. For example, the ASADIP Principles provide that extraterritorial effect also may be denied if a court of the Requested State has already rendered a prior decision on the same cause of action or if another foreign court has rendered a decision on the same cause of action that could be recognized in the Requested State (Article 7.3), where the jurisdiction of the rendering authority is based on a choice of court agreement not freely consented to by the affected party or that is in conflict with a prior agreement that was validly concluded, or where the jurisdiction of the rendering authority disregarded other pending proceedings in a court of a State reasonably connected to the claim or the parties (Article 7.4, (b) and (c)). Additional grounds for refusal are outlined in the HCCH Convention, Article 7. However, if a State should consider that there may be additional grounds for refusal, it is recommended that such grounds be outlined clearly in the law; this will provide guidance and transparency in the process and minimize arbitrariness in judicial decision-making.

5. Procedural Requirements

5.1. Analogous treatment: Foreign judgments that are final and definitive should be treated analogously to their equivalents in the Requested State, even if issued by public authorities different from those that would have been competent in the Requested State.

Commentary: Foreign judgments should be treated no differently than those rendered by domestic courts. Paragraph 5.1 has been adapted from the ASADIP Principles, Article 7.8. It is also consistent with the Panama Convention, which provides that "…execution or recognition [of an arbitral decision or award that is not appealable] may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts…" (Article 4).

5.2. Expediency: Domestic procedures should involve as few steps as possible and should enable and encourage the court of the Requested State to act expeditiously, including consideration of the possible automatic effect of a foreign decision.

Commentary. Justice delayed is justice denied. Domestic procedures must be carried out as swiftly as possible (CJI/doc. 564/18, Recommendation 5.3). States should review their procedural laws and remove any barriers that would prevent their courts from acting expeditiously in the recognition and enforcement of a foreign judgment. This Recommendation is also consistent with HCCH Convention, Article 13.1 and as noted in the HCCH Convention Draft Explanatory Report,[3] para 356, "the court must use the most expeditious procedure available to it. States should consider provisions to avoid unnecessary delays."

This Recommendation is overarching. It flows from the reality that in many states, there exists a duplicity of domestic procedural steps and requirements that may be referred to by various names (recognition, declaration of recognition or exequatur proceedings, declaration of enforcement, or registration of enforceability). In some states, grounds of defense may be raised at more than one of these stages in the process. This only delays justice and is addressed in the following paragraphs.

Inasmuch as it promotes the automatic effects of a foreign decision, this Recommendation takes into account Article 10 of the Draft IIDP Code.

[3] HCCH, Judgments Convention: Revised Draft Explanatory Report. Prel. Doc. of December 2018. Twenty-Second Session, Recognition and Enforcement of Foreign Judgments, 18 June – 2 July 2019. https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf

5.3. Documentation: Requirements for documentation during the internal process of recognition and enforcement should be simplified and modernized to take advantage of technological advances as follows:

(a) The **only** documents of proof required to request recognition and execution of judgments should be the following, which may be either paper-based or made available using any electronic form or by means of any technological media that offers functional equivalency:

- certified copy of the judgment[4];
- certified copy of the documents proving that the bases for the recognition and enforcement of the judgment have been complied with;
- certified copy of the document stating that the judgment is final or has the force of *res judicata*; and,
- translation of the above documents into an official language of the Requested State, where necessary, if the originals are in another language.

(b) Other documents used during the process of recognition and enforcement of judgments may be either paper-based or made available using any electronic form or by means of any technological media that offers functional equivalency, in particular as follows:

- in the authentication and legalization of documents;
- in the verification of judicial decisions;
- any other documents or process that a state may identify in order to improve the efficiency of domestic procedures for the recognition and enforcement of foreign judgments.

Commentary: As was noted above, in Recommendation 4 the term "extraterritorial validity" is used. To distinguish the domestic procedures that are used to actualize extraterritorial validity, in Recommendation 5 the terms "recognition" and "enforcement" are used. (The terms "declaration of recognition" and "registration for enforcement" are explained in the Commentary to Paragraph 5.4, below.)

The overarching Recommendation is that documentation requirements should be modernized to enable new formats enabled by advances in technology (CJI/doc. 564/18, Recommendation 5.5). It has been noted that the documentation requirements for recognition and enforcement "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." (CJI/doc. 564/18 at page 3). Although electronic records are not accepted yet by all States, legislators should be encouraged to adopt legislation that will provide for "functional equivalence."

Paragraph 5.3(a) specifies that the enumerated items should be the **only** documents required. The provisions are consistent with those outlined in the Montevideo Convention, Article 3 and the HCCH Convention, Article 12, although both conventions include additional details (for example, HCCH Convention requires that the judgment be complete and certified). It should be possible to provide these documents either in paper form or electronically.

Paragraph 5.3(a) also advocates, in effect, for elimination of the translation certification requirement, opting instead for translation of the above documents "where necessary", which is consistent with the General Principles of the Draft IIDP Code.

Paragraph 5.3(b) specifically addresses authentication and legalization. It is recommended that this process be adapted to incorporate procedural improvements that are now possible with the use of new technology (CJI/doc. 564/18, Recommendation 5.4). At the aforementioned meeting on private international law that had been held during the CJI's 92nd regular session, these experts "underscored

[4] The Montevideo Convention uses "authenticated" in the Spanish and "certified" in the English.

the merits of using [information] technology instead of authentication/legalization [in the recognition process]" (CJI/doc. 564/18, at page 1).

5.4. Process: In the procedure to obtain recognition and enforcement in the Requested State,

(a) if any of the grounds for refusal as outlined above in Recommendation 4 are to be raised, they may be raised **only** during the request for recognition as follows:

- where the rules of civil procedure provide for a single recognition and enforcement process, at any time during that process;
- where the rules of civil procedure maintain duality of recognition and enforcement, at any time during the recognition process.

(b) where no grounds for refusal have been found during the aforementioned process and the judgment has met the requirements of extraterritorial validity as outlined in Recommendation 4, that judgment shall be recognized in the Requested State.

(c) once a judgment has been recognized as outlined above, no further procedures as to its recognition are required; its enforceability may be presumed.

Commentary: In most instances, some type of process to obtain formal recognition of the foreign judgment will be required. While some states may have a single procedure, others maintain a dual process of recognition and enforcement. Moreover, in some states, grounds for refusal may be raised at multiple stages - during recognition and again at enforcement. It is suggested that States review their domestic procedural requirements and either maintain the duality or reduce these to a single proceeding. In any case, if recognition of the foreign judgment is disputed, grounds for refusal of recognition should only be raised once, and only during the recognition stage. This is the essence of Paragraph 5.4(a) (CJI/doc. 564/18, Recommendation 5.1 and 5.2).

If no grounds for refusal have been evidenced and the requirements for extraterritoriality have been met, then the judgment is recognized; once so recognized, nothing further should be necessary. That is the essence of Paragraphs 5.4(b) and (c).

In many states, however, the domestic law of procedure may contain additional requirements, such as a declaration of recognition or exequatur. As explained in the HCCH Convention Draft Explanatory Report, para 354, terms such as "declaration of recognition" are terms that "refer to the so-called 'exequatur' proceedings, *i.e*., special proceedings by which the competent authority of the requested State confirms or declares that the foreign judgment is enforceable in that State."

The problems inherent in such additional procedures are widely acknowledged and have been explained as follows: "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" (CJI/doc. 564/18, at page 4). Moreover, at the aforementioned meeting held with several of the Legal Advisers of the Ministries of Foreign Affairs of OAS Member States, "[…] the speakers qualified domestic procedures on exequatur as a type of trap for parties engaged in litigation, doomed to face all types of difficulties when attempting to enforce legal decisions abroad" (CJI/doc. 581/19, at page 5).

Therefore, Paragraph 5.4(c) emphasizes that once a judgment has been recognized, nothing further is required and its execution should not entail any more demands than those required to enforce a domestic judgment; in essence, this eliminates the "red tape" surrounding recognition and enforcement procedures (CJI/doc. 564/18, Recommendation 5.6; see also ASADIP Principles, Article 7.11). Also

noteworthy is the EU Regulation, which provides that "A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required" (Article 36). That EU provision has essentially "abolished the exequatur" and brings domestic rules of civil procedure into alignment with modern developments; the Recommendation here seeks to do the same.

Paragraph 5.4(c) also provides that enforceability may be presumed, without the need for any declaration of enforcement. As explained in the HCCH Convention Draft Explanatory Report, para. 354, enforcement "refers to the legal procedure by which the courts (or competent authorities) of the requested State ensure that the defendant obeys the foreign judgment. It includes measures such as seizure, confiscation, attachment, etc. The enforcement of the foreign judgment presupposes a declaration of enforceability or a registration for enforcement." It has been pointed out that "In enforcement proceedings, some legislations even allow the defense to present arguments against the judgment whose enforcement is being sought" (CJI/doc. 564/18, at page 4). Pursuant to this Recommendation, paragraph 5.4(a), grounds for refusal could only be raised during the process seeking recognition, unless that procedure has been abolished or merged with that of execution. This will also improve efficiencies of both recognition and enforcement.

5.5. Probative Effects: Procedural rules may provide different parameters for recognizing the probative effects of judgments.

Commentary: This Recommendation recognizes that in some instances, a party does not seek recognition of a foreign judgment in order for it to be enforced by the Requested State, but rather, so that the foreign judgment may serve as evidence. In such cases, a different set of standards may be applicable. This follows from the observation that there is "[a] 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" (CJI/doc. 564/18, at page 4, and Recommendation 5.8). It is also consistent with the ASADIP Principles, Article 7.10.

PART IV. Summary

These Recommendations offer suggestions to simplify domestic procedures used in the recognition and enforcement of foreign judgments. They provide guidance for the interpretation, application and possible legislative reform of such procedures, if necessary, to bring domestic practice into conformity with international standards and best practices. They also encourage, wherever possible, application and use of technological advances for greater efficiencies.

As a result of simplifying domestic procedures for the recognition and enforcement of foreign judgments, significant advances can be made towards improving access to justice in the region. This in turn will strengthen rule of law and promote development based on the actualization of human rights and equality before the law.

* * *

ANNEX A

Recognition and Enforcement of Foreign Judgments and Arbitral Awards: Report
CJI/doc. 564/18, August 3, 2018

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. [See 5.4(b)]

5.2. If the recognition procedure is eliminated, exceptionally allow arguments in the enforcement procedure alleging circumstances established as grounds for denying recognition. [See 5.4(b)]

5.3. Urge that domestic procedures involve as few stages as possible and be carried out as swiftly as possible. [See 5.2]

5.4. In the authentication and legalization of documents process, adopt the procedural improvements made possible by the use of new technology. [5.3(b)]

5.5. Embrace the use of information technology and its impact on knowledge of judicial decisions. [See 5.3]

5.6. Combat the red tape surrounding recognition and enforcement procedures. [See 5.4(c)]

5.7. Disallow revision of the merits of the decision. [See 4.2]

5.8. Provide different parameters for recognizing the probative effects of judgments. [See 5.5]

ANNEX B

ASADIP Principles on Transnational Access to Justice (TRANSJUS)
Chapter 7
The effect of foreign decisions

Article 7.1. The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to.

- See III.3.1 Access to Justice

Article 7.2. The right to obtain extraterritorial effect of a foreign judicial decision shall not be infringed where such a decision has been issued in violation of fundamental rights related to the proceedings or where the full effects of its recognition or enforcement would be manifestly contrary to fundamental rights related to the substance of the dispute.

- See III. 4.1(b)

Article 7.3. The requested State may also deny extraterritorial effect to a foreign judicial decision where a court of the requested State has rendered a prior definitive judgment on the same cause of action, or if a foreign court has rendered a prior definitive judgment on the same cause of action which may be able to be recognized in the requested State.

- See III.4.1(b)

Article 7.4. The recognition or enforcement of a foreign decision may be refused on grounds of indirect jurisdiction only in the following cases:

a.- Where the jurisdiction of the rendering authority is based on an exorbitant ground of jurisdiction.

b.- Where the jurisdiction of the rendering authority is based on a choice of court agreement not freely consented to by the affected party or that is in conflict with a prior agreement that was validly concluded.

c.- Where the jurisdiction of the rendering authority disregarded other pending proceedings in violation of Article 3.7 of these Principles.

- See III.4.1 (b)

Article 7.5. The revision of the merits of a foreign judicial decision violates the right to access to justice, without prejudice of the prerogative of the requested State to impose the necessary safeguards to avoid the violation of fundamental rights.

- See III.4.2.

Article 7.6. The requirement of reciprocity for giving effect to decisions and acts of foreign authorities is presumed to violate the right to access to justice.

- See III.3.2

Article 7.7. To ensure the extraterritorial effect of decisions, appropriate provisional measures of protection shall be facilitated, including prior to the commencement of homologation or exequatur proceedings in the State in which recognition is sought.

- See III.1(a)

Article 7.8. In order to ensure the extraterritorial effect of foreign decisions, they shall be treated analogously to their equivalents in the requested State, as long as they produce final and definitive legal effects in the State of origin, irrespective of their denomination. This rule shall also apply in cases where

the relevant decisions were issued by public authorities different from those that would have been competent in the requested State.

- See III.5.1

Article 7.9. A foreign decision produces effects in the requested State from the moment that the decision becomes effective in the State of origin.

- See III.4.1

Article 7.10. When the effect of a foreign decision is invoked in the course of proceedings, the requested State shall afford it incidental recognition, without prejudice to the homologation or exequatur proceedings that the requested State may be able to initiate for its recognition or enforcement.

- See III.5.5

Article 7.11. The homologation or exequatur of foreign decisions shall be decided pursuant to a motion for summary judgment, limited to a verification of the basic requirements for its recognition or enforcement in the requested State. The effective enforcement of such decisions shall be decided in an expeditious manner, with any provisional measures granted being maintained until enforcement has been finalized.

- See III.5.4

ANNEX C

Ibero-American Institute of Procedural Law
Draft Model Code for Inter-Jurisdictional Cooperation for Ibero-American States[5]

Section V. Efficacy of foreign judgments

Article 10. Automatic effect of foreign judgments

The effects of the foreign judgments will automatically occur and do not depend on prior judicial recognition.

Article 11. Requirements for the efficacy of a foreign judgment.

The efficacy of the foreign decision in the required State will depend on the compliance of the following requirements:

I - to be compatible with the fundamental principles of the required State;

II - to have been given in a process in which the guarantees of the due legal process are in place;

III - to have been given by a competent international court according to the rules of the required State or to the norms established in Section IV above;

IV - not be dependent on a decision about an appeal accepted with suspensive effect;

V - to be compatible with another decision ruled in the required State, in an identical case, or in other State, in an identical process having the necessary conditions to gain efficacy in the required State.

Sole paragraph. The efficacy of the foreign decision may be controlled ex officio, by the judge, in an ongoing process, with due respect for the controversial procedure, or by challenging it in the terms of articles 42 to 47.

Section VI. Enforcement of a foreign judgment

Article 12. Enforcement

“The enforcement of a foreign judgment is subject to the compliance of the requirements established in the previous article …”

“Challenge procedure of the efficacy of the foreign judgment”

Section III. Action and ancillary challenging procedure of the efficacy of the foreign judgment

Article 42. Active legal standing for filing a challenging ancillary action

The action for challenging the efficacy of a foreign judgment shall be filed by the person having a legal interest in the rejection of its effects in the required States.

Sole paragraph. The competent court to deal with the challenging procedure will be that which, according to the procedural norms of the required State, is the one competent to address the main issue of the case.

Article 43. Guarantees for the due process

Procedures for the current action, of a controversial jurisdiction, will ensure the parties the guarantees of the due legal procedure.

Article 44. Reasons for filing a challenging action.

The challenge shall be restricted to the compliance of the requirements established in Article 11, and the foreign judgment will revise the merits of same under any circumstances.

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[5] English text from CJI/doc. 581/19.

Article 45. Retroactive effects on the judgment of the action

The effects of the judgment accepting the challenging procedure shall be retroactive to the date on which the efficacy in the required State started.

Article 46. Ancillary procedure on foreign res judicata

Pursuant to the provisions contained in Articles 42 to 44, the challenging procedure against the efficacy of the foreign judgment will be accepted if and when one of the parties claims the efficacy of the foreign res judicata decision, and the other party, or a legally interested third party, intends to discuss the enforcement of the requirements established in Article 11.

Sole paragraph. The court competent to address the main action will be the one to judge the challenging ancillary procedure.

Article 47. Challenging ancillary process on plea of lis pendence (litispendence)

The challenging ancillary procedure may be filed against the party that has been successful in the international litispendence.