

# ***“The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process”***

## **European Community Framework Programme for Judicial Co-operation in Civil Matters**

### **Ideas Paper**

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### **Introduction**

#### ***Legal framework (theoretical)***

##### *The nature and categorisation of judgments*

It will first be necessary to explore the concept of "judgment". At a high level, it may be suggested that a "judgment" has four essential characteristics. First, it involves a decision, the formation of an opinion by the exercise of judgement in the wider (and differently spelled) sense of the word. Secondly, the decision is that of a judicial body exercising the judicial<sup>2</sup> authority of the State. Thirdly, the decision involves the determination by the judicial body of particular matters which have been submitted to its judicial authority. Fourthly, the decision has some binding character.

It may also be necessary to consider different descriptions of judgments (award, order, decree etc.) and to explore the distinction between the use of the word "judgment" to describe the decision of the court insofar as it has legal effect and to use of that word to describe the reasons for a decision.<sup>3</sup>

Judgments can be categorised in different ways. For example:

- (a) According to whether the decision is final or provisional only (e.g. the distinction between a decree *nisi* and a decree absolute in divorce proceedings).

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<sup>2</sup> Not, for example, administrative.

<sup>3</sup> Thus it has been suggested: "In a proper use of terms the only judgment given by a court is the order it makes. The reasons for judgment are not themselves judgments though they may furnish the court's reason for the decision and thus from [*form?*] a precedent" (*R v. Ireland* (1970) 44 ALJR 263 quoted in Stroud's Judicial Dictionary (7<sup>th</sup> ed., 2006).).

- (b) According to whether the decision determines the matters submitted by the parties (substantive, or merely some aspect of the decision making process (procedural)).<sup>4</sup>
- (c) According to the nature of the matters to which the decision relates (e.g. judgments *in rem* and *in personam*, discussed further below).
- (d) According to the circumstances in which judgment was given (e.g. merits, default and consent judgments).
- (e) According to the identity of the court or tribunal (e.g. judgments of superior or inferior courts).
- (f) According to origin (domestic and foreign judgments).
- (g) According to the type of proceedings (e.g. civil and criminal judgments; ordinary and class action judgments).
- (h) According to the relief granted by the decision (e.g. money judgments, declaratory judgments).

Although not all of these categorisations may be relevant to the present analysis, they should be borne in mind when analysing the effects of judgments.

Arguably the most significant distinction which will need to be analysed is that between judgments *in personam* and judgments *in rem*. The term "judgment *in rem*" has been described as "a specialised and somewhat misleading term of art limited to judgments concerned with status".<sup>5</sup> In contrast, judgments *in personam* determine questions concerning the rights and obligations of natural and legal persons towards each other. The distinction between the two categories is usually drawn in terms of the parties who will be bound by the judgment: judgments *in personam* are said to bind only on the parties to the proceedings (and certain related persons) in contrast to judgments *in rem* which are said to bind the whole world. This view, however, is liable to mislead. Judgments *in personam*, as much as judgments *in rem*, may have a legal effect beyond the parties to proceedings (e.g. insofar as they create new obligations or discharge existing ones by merger). By virtue of their subject matter, however, the immediate impact of judgments *in personam* is focused on the parties to the proceedings, and those claiming under them. In contrast, the determination of questions of status of persons or property by a judgment *in rem* has, potentially, a much wider resonance. It may also be noted that a judgment *in rem* may itself

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<sup>4</sup> It is noted that the distinction commonly invoked between "final" and "interlocutory" judgments may embrace either of the preceding two categorisations.

<sup>5</sup> *Skyparks Group plc v. Marks* [2001] EWCA Civ. 319, at [46] (Robert Walker LJ).

only determine the question of status within territorial or other limits, dictated by rules (of private international law<sup>6</sup>, procedure or otherwise).

### *The possible effects of judgments*

As a starting point for analysis, it is submitted that the possible effects of judgments, at least at a domestic level, can be sub-divided into three categories as follows:

1. *Dispositive effects*: The act of giving judgment creates, constitutes, modifies or destroys a legal obligation or status (i.e. a legal attribute attaching to a person or to the relationship between two or more persons or between a person and a thing). Thus, for example, a judgment *in personam* upon an ordinary civil debt claim might both create an obligation between the claimant and the defendant (i.e. the judgment debt) and destroy or modify a previously existing obligation (i.e. the debt sued upon which may merge with the judgment debt or become unenforceable). Judgments *in rem* also, by their nature, affect legal status. For example, a decree absolute in divorce proceedings dissolves the relationship of marriage between two persons.
2. *Procedural effects*: The fact of judgment alone or in combination with the reasons given for it excludes or restricts the ability of participants in the legal proceedings in which it was given, or other legal proceedings, and of related persons to conduct their case as they would wish. Most obviously, so-called rules of *res judicata* (cause of action estoppel and issue estoppel precluding, respectively, the re-opening of determined claims and issues) fall within this category. More doubtfully, rules concerning "abuse of process" fall within this category. Arguably, in the case of rules of *res judicata*, it is the judgment itself which creates the procedural bar, whereas, in the case of "abuse of process" rules, it is the subsequent conduct of the litigating party (albeit against the background of the judgment) which creates that bar. This possible distinction will, however, need further to be investigated. The rationale for rules of both kinds can be expressed in terms of two maxims, *interest reipublicae ut sit finis litium* (that it is in the public interest that there should be an end of litigation), and *nemo debet bis vexari pro una et eadem causa* (that no one should be troubled twice by the same claim).

The procedural effects of judgments also include their ability to be given effect by state supported sanctions in the form of measures of execution

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<sup>6</sup> See, e.g., *Simpson v. Fogo* (1860) 1 John & H 18; *Castrique v. Imrie* (1870) LR 4 HL 414. For more recent (detailed) discussion concerning the distinction between judgments *in rem* and judgments *in personam*, see *Pattni v. Ali* [2006] UKPC 51.

and similar measures. Such procedural effects, however, fall outside the scope of this study.<sup>7</sup>

3. *Evidential effects*: The record of judgment serves as evidence of a particular fact in subsequent legal proceedings. Thus, under English law:

"Judgments being public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date, and legal effect, as distinguished from the accuracy of the decision rendered. ... [A] judgment by a creditor against a surety is evidence in an action by the surety against the principal debtor of the amount the surety has been compelled to pay<sup>8</sup>, but not the liability to pay it."<sup>9</sup>

Thus, as a general proposition, a judgment is not under English law admissible as secondary documentary evidence of any fact determined to exist by the judge, such evidence being excluded on the ground that it is inadmissible opinion or hearsay evidence or on grounds of public policy.<sup>10</sup> This category thus concerns the effects of a judgment as a document, although it is acknowledged that these evidential effects may in practice be difficult to distinguish from the procedural effects described above.<sup>11</sup>

### *Parties and non-parties*

One of the most interesting areas for discussion concerns the effects of judgments on persons other than the direct participants in litigation. The focus of this discussion is likely to be on the procedural effects of judgments. As noted above, dispositive and evidential effects of judgments, by their nature, are capable of having implications beyond the parties to litigation. Procedural effects (including rules of *res judicata*) are likely to be limited (as they are under English law) to the litigating parties between whom particular claims or matters were determined by the judgment as well as to certain related persons (including those claiming under or through a participant in legal proceedings). Unsurprisingly, the categories of person bound by a judgment varies between legal systems (see, for example, the extract from the Schlosser Report quoted below).

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<sup>7</sup> The Court of Justice has emphasised that the Brussels Convention does not regulate in any way measures of execution of judgments, which remain a matter for the law of the enforcing State (see *Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur* (Case 148/84) [1985] ECR 1981, para. 18).

<sup>8</sup> i.e. the legal obligation created by the judgment (a dispositive effect).

<sup>9</sup> H. Malek and others (ed.), *Phillips on Evidence* (16<sup>th</sup> ed., 2005), para. 44-02.

<sup>10</sup> *Hollington v. Hewthorn & Co. Ltd* [1943] KB 587, discussed in *Phillips on Evidence*, above, paras. 44-77 and following.

<sup>11</sup> For example, the doctrine of *res judicata* in English law is often described as "estoppel by record" and viewed as part of the law of evidence.

### *The nature of foreign judgments and their recognition*

Thus far, the analysis has focused on the domestic effects of judgments. It will, however, be necessary to consider separately the treatment of foreign judgments, the requirements and processes for their recognition and the consequences of that recognition. Rules concerning the recognition of judgments are, to a greater or lesser degree, in the nature of rules of applicable law. Thus, the courts of the recognising country must apply certain criteria to determine whether, and (if so) to what extent, they are prepared to recognise within their own legal system the legal effects (dispositive or procedural<sup>12</sup>) of a foreign judgment. That recognition may, in turn, be inhibited by theoretical or practical difficulties, by the procedural or remedial rules of the recognising state, or by its public policy or mandatory rules.

### *The possible consequences of recognition of a foreign judgment*

If a foreign judgment is "recognised", the recognising country may give effect to it in a variety of ways. At one end of the spectrum ("absolute equalisation of effects") the foreign judgment may be given the same effects within a legal system as a corresponding domestic judgment. At the other end of the spectrum ("absolute extension of effects") the foreign judgment is given the same effects within a legal system as it would have in its legal system of origin, at least insofar as such effects are compatible with the procedural and remedial rules of the recognising state and with its public policy and mandatory rules. The solution adopted in practice is likely to be somewhere between the two extremes, with the recognising country applying a combination of the rules of the legal system of origin and its own rules. Extension of effects is more likely so far as the dispositive effects of judgments are concerned; indeed, the debate among commentators appears hitherto to have concentrated on the procedural effects of judgments.<sup>13</sup> Under English common law rules, for example, the dispositive effects of foreign judgments *in rem* relating to property given by the courts of the *lex situs* will generally be followed, but not those of other courts.<sup>14</sup> Certain dispositive effects of foreign judgments *in personam* (conclusive, judicially created debt obligations<sup>15</sup>), but not others (judicially created obligations of other kinds<sup>16</sup> nor *semble* the extinction of obligations by merger<sup>17</sup>) will also be adopted.

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<sup>12</sup> For present purposes, it is assumed that the evidential effects of a judgment would fall to be treated as part of the law of evidence, governed by the *lex fori*.

<sup>13</sup> See, for example, P. Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, 2001), paras. 7.08-7.11

<sup>14</sup> See, for example, Sir L. Collins and others (ed.), *Dicey, Morris & Collins on the Conflict of Laws* (14<sup>th</sup> ed., 2006), rule 40 and commentary (judgments *in rem* relating to property). Compare, for example, rule 87 and commentary (effect of foreign decrees of divorce and nullity) where English law (a combination of common law and statute) prescribes a mix of equalisation and extension of effects.

<sup>15</sup> *Dicey, Morris & Collins*, above, para. 14-006 (and see 7<sup>th</sup> ed. of *Dicey's Conflict of Laws*, pp. 983-987; *Godard v. Gray* (1870) LR 6 QB 1329, at 149-150.

<sup>16</sup> For example, injunctions and orders for specific performance (see *Dicey, Morris and Collins*, above, rule 35(1)(a)).

In contrast, the preclusive effects of foreign judgments (whether *in rem* or *in personam*) recognised under English common law rules fall to be determined largely (but not exclusively<sup>18</sup>) by the rules applicable to English judgments, although there are important differences between the two categories of judgment in the practical application of these rules.<sup>19</sup>

### **Legal framework (Brussels Convention/ Reg. 44/2001)**

#### *Introduction*

Reg. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and its predecessor, the 1968 Brussels Convention, must be acknowledged as having created an entirely novel regime for the cross-border recognition and enforcement of Member State judgments within the European Community, that regime having the objective of the "free movement of judgments"<sup>20</sup> and being premised (in particular) on the principle of mutual trust<sup>21</sup> and that of full respect for another Member State's judgments.<sup>22</sup> It will, therefore, be important to consider *de novo* the current effect of the EC rules for the recognition of judgments, and to analyse possible future developments within and improvements to those rules.

#### *The nature of a judgment: Brussels Convention, Art. 25*

As to the concept of "judgment", Art. 25 of the Brussels Convention defines this to mean "any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court". In *Solo Kleinmotoren v. Boch*<sup>23</sup>, the Court of Justice emphasised that in order to be a "judgment" for the purposes of the Convention, the decision must emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties. Thus, a court approved settlement fell outside the scope of the provisions on recognition and enforcement.<sup>24</sup>

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<sup>17</sup> See the (critical) commentary in the 7<sup>th</sup> ed. of *Dicey's Conflict of Laws*, pp. 996-997. The rule, which has now been effectively reversed by the statutory, procedural bar in Civil Jurisdiction and Judgments Act 1982, s. 34, is particularly difficult to justify in circumstances where the original obligation is subject to the law of the court which gave judgment.

<sup>18</sup> The "finality" of a foreign judgment is established by reference to the law of the legal system of origin (see P. Barnett, above, paras. 2.40 to 2.41).

<sup>19</sup> See generally P. Barnett, above, ch. 1 to 6, esp. paras. 2.10 to 2.13.

<sup>20</sup> See, for example, *Solo Kleinmotoren GmbH v. Boch* [1994] ECR I-2237, para. 20; *Unibank v. Christensen* (Case C-260/97) [1999] ECR I-3715, para. 14; Reg. 44/2001, recital (6).

<sup>21</sup> See, for example, *Turner v. Grovit* (Case C-159/02) [2004] ECR I-3565, para. 24; Reg. 44/2001, recital (16).

<sup>22</sup> See J. Pontier and E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters* (TMC Asser Press, 2004), pp. 30-38.

<sup>23</sup> Above, para. 17.

<sup>24</sup> *Solo Kleinmotoren*, above, para. 18. See also *Italian Leather SpA v. WECO Polstermöbel GmbH* (Case C-80/00) [2002] ECR I-4995, para. 41 (interim measures within definition of

It may also be noted that the examples in Art. 25 of labels attaching to a judgment suggest that the authors of the Convention drew a distinction between the substantive judgment and the reasons given for it. Arguably, this supports the view that it is the former alone which falls to be recognised under Art. 26. Nevertheless, it is submitted, that does not preclude reference to the reasons for a decision in order to determine the legal effects of that decision: recognition of a judgment may thus be tantamount to recognition of the underlying reasons.

*Recognition of a judgment: Brussels Convention, Art. 26, para. 1 and Art. 27, paras. 3 and 5*

Art. 26, para. 1 of the Convention provides:

"A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required."

This deceptively simple formulation, of course, hides many complexities as the meaning and effect of the obligation of the receiving court to "recognize" the judgment. In particular, the question arises as to the relative roles of the law of the country or origin and the law of the recognising state concerning the legal effects of a judgment. Which of the possible dispositive, procedural and evidential effects of a Member State judgment (if any) are carried with it by the concept of "recognition" and to what extent may the recognising Member State override those effects by reference to its own procedural or remedial rules or its public policy and mandatory rules? In other words, does the Brussels Convention regime favour the principle of "equalisation of effects" or that of "extension of effects"? This is the central aspect of this study, and (as appears from the following discussion) is one on which the source materials and authorities provide relatively little and, in any event, contradictory guidance.

It will also, in this context, be important to consider Art. 27, paras. 3 and 5 which require that recognition be refused if the judgment is "irreconcilable" with a judgment given in a dispute between the same parties in the recognising Member State, or with an earlier judgment given in a non-Member State involving the same cause of action and between the same parties and fulfilling the conditions necessary for its recognition in the recognising State. These provisions constitute important restrictions on the effectiveness of judgments within the Convention scheme, and may be thought to cast further light on the meaning of "recognition".

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judgment, but compare *Denilauler v. Couchet Frères* (Case 125/79) [1980] ECR 2553, para. concerning measures granted without notice); *Owens Bank v. Bracco* (Case C-129/92) [1994] ECR I-117 (decisions of non-Contracting State courts and decisions enforcing a non-Member State judgment fall outside scope of Convention regime)

## *Jenard Report*

The opening sentence of the Jenard Report's commentary on Art. 26 suggests a stark preference for a principle of "extension of effects":<sup>25</sup>

"Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given."

Pausing there, it might be suggested that the concept of "authority" more naturally refers to the dispositive effects of a judgment and that the concept of "effectiveness" more naturally refers to the procedural effects of a judgment<sup>26</sup>, although neither term has a clear meaning, and these concepts will require further investigation.

The commentary continues:

"The words '*res judicata*' which appear in a number of conventions have expressly been omitted, since judgments given in interlocutory proceedings and *ex parte* may be recognized, and these do not always have the force of *res judicata*."

This confirms that decisions may be recognised and enforced even if they are not conclusive in their legal system of origin. It is, however, neutral as to whether the rules of *res judicata* of the legal system asked to recognise the judgment or those of the legal system of origin will apply. More pertinently, the commentary points out that, as recognition is automatic, it "does not require a judicial decision in the State in which recognition is sought to enable the party in whose favour the judgment has been given to invoke that judgment against any party concerned, for example an administrative authority, *in the same way as a judgment given in that State*". Although at first sight, the closing words might be taken to support an "equalisation of effects" approach, at least insofar as the procedural effects of judgments are concerned, it is submitted that the intended reference is to the processes for invoking the foreign judgment, rather than its effects. Thus, for example, if judgment against an insolvent regulated organisation is a pre-requisite to obtaining compensation from the regulator, the judgment of another Member State should be given equal status with a local judgment in the compensation process, but that is not the same thing as giving it the same legal effect.

As to Art. 27, para. 3<sup>27</sup>, the Jenard Report notes the absence of a requirement that the judgment given in the recognising State be *res judicata* or should merely

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<sup>25</sup> [OJ C59, 5.3.1979, 43]. See also the Evrigenis and Kerameus Report on the accession of Greece to the Brussels Convention, para. 75 [OJ C298, 24.11.1986, 19-20].

<sup>26</sup> Cf. Layton & Mercer, *European Civil Practice* (2<sup>nd</sup> ed., 2004), paras. 24.007-24.010.

<sup>27</sup> The Jenard Report appears to contain no specific commentary on Art. 27, para. 5.

be final and conclusive, leaving this to the "discretion" of the recognising State.<sup>28</sup> Further, the Report emphasises that, for a refusal of recognition, it would be sufficient if the judgment whose recognition was sought were irreconcilable with a judgment given in the recognising state.<sup>29</sup> "It is therefore not necessary for the same cause of action to be involved".<sup>30</sup> Art. 27, para. 3 thus creates a Convention regime concerning the priority of judgments, capable of restricting the original authority or effectiveness of a Member State judgment.

Strong support for the view that recognition of a judgment under the Convention regime encompasses at least some procedural effects is provided by Art. V of the Protocol to the Convention and the Jenard commentary on that provision. Art V (dealing with warranty and guarantee actions in Germany and Austria) provides that "[a]ny effects which judgments given in [Austria and Germany] may have on third parties by application of the [provisions of the German and Austrian codes of civil procedure set out] in the preceding paragraph shall also be recognised in the other Contracting States". The Jenard Report expands on this, as follows:

"Thus, for example, a guarantor or warrantor domiciled in France can be sued in the German court having jurisdiction over the original action. The German law judgment in Germany affects only the parties to the action, but it can be invoked against the guarantor or warrantor. Where the beneficiary of the guarantee or warranty proceeds against the guarantor or warrantor in the competent French courts, he will be able to apply for recognition of the German judgment, *and it will no longer be possible to re-examine that judgment as to the merits.*"

Overall, the Jenard Report strongly supports an "extension of effects" approach<sup>31</sup>, although the precise limits of that approach are not defined.

### *Schlosser Report*

In contrast, the report of Prof. Schlosser describes the problem, as follows, in more neutral terms:<sup>32</sup>

"The effects of a court decision are not altogether uniform under the legal systems obtaining in the Member States of the Community. A judgment delivered in one State as a decision on a procedural issue may, in another state, be treated as a decision on a matter of substance. The same type of judgment may be of varying scope and effect in different countries. In France, a judgment against the principal debtor is also effective against

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<sup>28</sup> [OJ C59, 5.3.1979, 45].

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* Contrast the language of Art. 27, para. 5 requiring that the other judgment involve the same cause of action.

<sup>31</sup> See also text to fn. [42] below.

<sup>32</sup> Para. 191 [OJ C59, 5.3.79, 127-128].

the surety, whereas in the Netherlands and Germany it is not. The Working Party did not consider it to be its task to find a general solution to the problems arising from these differences in the national legal systems. ..."

If anything, this supports the solution that questions relating to the law applicable to judgments within the European Community should be resolved by the Member States using their own rules of private international law and procedure.

#### *De Wolf v. Cox*

This is the first of two key judgments of the Court of Justice concerning the effect of a foreign judgment under the Convention regime.<sup>33</sup> Its significance lies in the recognition that the terms of the Convention itself, as opposed to the law of either the Member State of origin or the recognising Member State, may confer procedural, preclusive effects upon a judgment. The terms of the judgment were that the provisions of the Convention prevent a party who has obtained a judgment in his favour in a Member State, being a judgment for which an order for enforcement under Art. 31 of the Convention may issue in another Member State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first State. In other words, once triggered<sup>34</sup>, the procedures laid down in the Convention for the enforcement of judgments are exclusive and the judgment creditor may not issue a fresh action upon the judgment debt or upon the underlying cause of action, relying on the judgment to support its claim. The decision was thus concerned with abuse of process, as the Advocate General recognised<sup>35</sup>, and the solution was found within the framework of the Convention.

#### *Hoffmann v. Krieg*

This is the second key Court of Justice judgment, and the most important in terms of its analysis as to the legal effects of Member State judgments under the Convention.<sup>36</sup> It is important, however, that the relevant statements of the Court of Justice and the Advocate General should be understood in context. The issues raised for decision, so far as relevant to the present study, concerned (1) whether the Dutch court, asked to enforce a German maintenance judgment, should be bound by the German law view as to whether the judgment was "enforceable"<sup>37</sup>, and (2) how the Dutch court should approach the question

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<sup>33</sup> (Case 42/76) [1976] ECR 1759.

<sup>34</sup> Art. 31 of the Brussels Convention requires that the judgment be "enforceable" in the Member State of origin, as to which requirement see *Coursier v. Fortis Bank* (Case C-267/97) [1999] ECR I-2543.

<sup>35</sup> "Therefore, under the guise of a fresh main action Mr de Wolf obtained by means of nothing other than an abuse of procedure a judgment in which the principal issue was the recognition of a judgment given in his favour by a Belgian court."

<sup>36</sup> (Case 145/86) [1988] ECR 645

<sup>37</sup> See the formulation of the first question presented by the Hoge Raad.

whether the German judgment and a Dutch divorce decree were "irreconcilable" under Art. 27, para. 3 of the Convention. In this connection, the responses to the second of these questions (question 3 in the case itself) are arguably more significant for the present debate.

As to issue (1), the Court cited with approval the passage from the Jenard Report, quoted above, concerning the authority and effectiveness of judgments.<sup>38</sup> It then stated its conclusion in the following terms:<sup>39</sup>

"It follows that the answer to be given to the national court's first question<sup>40</sup> is that a foreign judgment which has been recognised by virtue of Article 27 of the Convention must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given."

The terms of the decision are, at first sight, very broad, and certainly broader than required to answer the first question. Indeed, one might have thought that the requirement that the question of "enforceability" be governed by the law of the Member State of origin was explicit in Art. 31 of the Convention. Nevertheless, the imposition of the qualifying words "in principle" appear significant and certainly do not give free rein to the extension of effects doctrine. It may, however, be noted that the Court of Justice differed in its view from that of the Advocate General who, again in the context of the issue raised as to enforceability<sup>41</sup>, had concluded:<sup>42</sup>

"I agree with G.A.L. Droz that a dual limit should be imposed: the judgment cannot have greater effects in the State in which enforcement is sought than it would have in the State in which it was delivered nor can it produce greater effects than similar local judgments would. That second limitation is founded on the need to harmonise interpretations and the desirability of preventing excessive recourse to the public policy exception."

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<sup>38</sup> Judgment, para. 10.

<sup>39</sup> Judgment, para. 11.

<sup>40</sup> See text to fn. 37 above.

<sup>41</sup> Note that, in the context of *enforcement* proceedings, the proposition that the Convention allows the judgment, once registered, to have the same legal consequences as a local judgment would appear to be supported by a statement in the Jenard Report to the effect that: "Article 31 does not purport to determine whether it is the judgment given in the State of original, or the decision authorising the issue of the enforcement order, which is enforceable in the State in which enforcement is sought" [OJ C59, 5.3.1979, 49]. The following words, however, appear to reinforce the view that, prior to registration, the principle of extension of effects applies ("The expression 'on the application of any interested party' implies that any person who is entitled to the benefit of the judgment in the State in which it was given has the right to apply for an order for its enforcement." (*ibid*)). See also the questions presented to the Court of Justice in *Italian Leather v. WEKO* (Case C-80/00) [2002] ECR I-4995)

<sup>42</sup> Opinion of Advocate General Darmon, para. 20.

As to issue (2), the Court concluded that:<sup>43</sup>

"In order to ascertain whether the two judgments are irreconcilable within the meaning of Article 27(3), it should be examined whether they entail legal consequences that are mutually exclusive."

In this connection, one might note that the words used by the court to describe the impact of the judgment ("legal consequences"; French: "*conséquences juridiques*") are different from the word used in responding to the first question ("effects; French: "*effets*"). Nevertheless, it is suggested that the terms are interchangeable. As the Advocate General recognised, the focus is not on the terms of the judgment itself (which he considered separate from the reasoning involved<sup>44</sup>) but on the "legal effects" ("*conséquences juridiques*") which recognition of the judgment would produce in the State of enforcement and on the question whether the "combined effects" ("*effets cumulés*") of the two judgments would lead to "a contradiction incompatible with the logical consistency of the legal order of the State in which enforcement is sought".<sup>45</sup> The Advocate General, however, differed from the Court in his analysis as to whether the German judgment was "incompatible" with the Dutch decree – the difference in viewpoint being, apparently, as to whether one should have regard to the consequences during a period not relevant to the actual proceedings.<sup>46</sup>

There is no analysis in the judgment or the opinion upon this issue as to the law(s) by reference to which the "legal consequences" of the foreign (German) judgment fell to be identified for these purposes. Indeed, on the basis that (unquestionably) the effects of the Dutch divorce decree fell to be evaluated under Dutch law<sup>47</sup>, it was not necessary to determine whether any particular effects of the German judgment fell to be determined under German or Dutch law. Moreover, the focus was on what have been described above as the dispositive effects of the two judgments (i.e. the order to pay money "which necessarily presupposes the existence of the matrimonial relationship" and the dissolution of the marriage by a decree of divorce). Other than through its broad statement of principle, *Hoffmann v. Krieg* therefore tells us very little about the treatment under the Convention what have been described above as the procedural effects of judgments.

*Kongress Agentur Hagen v. Zeehaghe and Turner v. Grovit*

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<sup>43</sup> Judgment, para. 22.

<sup>44</sup> Opinion, para. 10.

<sup>45</sup> Opinion, para. 11.

<sup>46</sup> Opinion, para. 11. Compare Judgment, paras. 23 and 24.

<sup>47</sup> See Judgment, para. 23; Opinion, para. 14.

In this connection, it will also be necessary to consider the relationship between the Convention and Member State rules of procedure. Thus, in *Hagen v. Zeehaghe*, the Court of Justice observed that:<sup>48</sup>

"It should be stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments. It is therefore necessary to draw a clear distinction between jurisdiction and the conditions governing the admissibility of an action."

The court continued, however:<sup>49</sup>

"It should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention."

The key question is, thus, whether the application of national procedural rules of the recognising State concerning (for example) cause of action preclusion, issue preclusion and abuse of process would impair the effectiveness of the Convention provisions concerning the recognition of judgments. That depends, of course, on the meaning that one gives to the concept of "recognition".

In *Turner v. Grovit*<sup>50</sup>, the Court of Justice declared to be incompatible with the Convention the practice of the English courts in granting an injunction to restrain a litigating party from pursuing proceedings in another Member State which were considered to involve an abuse of process. In reaching that conclusion, the court followed the reasoning in *Hagen* relating to impairment of the effectiveness of the Convention.<sup>51</sup> Nevertheless, the Court of Justice's decision is premised on the basis that it was for the Spanish court to consider the "appropriateness" of bringing proceedings before it.<sup>52</sup> Although it must here be noted that no question of recognition of any judgment of the English courts appears to have been raised in *Turner*, this reasoning seems entirely consistent with the proposition that the *lex fori* should determine whether local proceedings have been properly brought or are "abusive", whether or not those proceedings take place against the background of a related Member State judgment which falls to be recognised but which *per se* does not determine the matters in issue. The foreign judgment, and the relevant Convention rules of jurisdiction, provide part of the background to that assessment, but (it is submitted) the Convention is not impaired by the possibility that the recognising State may, in situations not involving *res judicata*, have a different concept of "abuse" from that of the Member State of origin.

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<sup>48</sup> (Case C-365/88) [1990] ECR I-1845, para. 17.

<sup>49</sup> Para. 20.

<sup>50</sup> (Case C-159/02) [2004] ECR I-3565.

<sup>51</sup> Para. 29.

<sup>52</sup> Para. 28.

### *Drouot Assurances v. CMI*

The decision in *Drouot*<sup>53</sup> concerned the meaning of the concept of "same parties" within Art. 21 of the Brussels Convention, and is not therefore directly relevant to the present date. The judgment, however, touched on the question of the effect of judgments against related persons (here, insurer and insured). One paragraph of the Court of Justice's reasoning might be taken that an autonomous meaning should be given to the concept of "*res judicata*" in relation to Convention judgments.<sup>54</sup> The following paragraphs suggest, however, that the concept of *res judicata* constitutes part of a wider test (identity and indissociability of interests) to be applied by the national court.<sup>55</sup>

### *Kapferer v. Schlank*

Finally, although again outside the context of the recognition and enforcement of judgments, attention should be drawn to the following passage from the decision of the Court of Justice in this recent case:<sup>56</sup>

"In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38)."

### *Reg. 44/2001*

In the context of the preceding discussion, the relevant provisions of Reg. 44/2001 would appear to raise no additional issues. Art. 32 and 33, para. 1 of the Regulation reflect, respectively, Art. 25 and 26, para. 1 of the Convention. Similarly, Art. 34, para. 3 of the Regulation reflects Art. 27, para. 3 of the Convention. Of greater interest for present purposes, is the re-wording of Art. 27, para. 5 of the Convention in its transition to Art. 34, para. 4 of the Regulation to include a reference to Member State judgments, as well as non-Member State judgments. Thus, Art. 34 now prescribes Community rules dealing not only with conflicts between the Member State judgment to be recognised and a judgment

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<sup>53</sup> (Case C-351/96) [1998] ECR I-3075.

<sup>54</sup> Para. 19 ("It is certainly true that, as regards the subject-matter of two disputes, there may be such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of *res judicata* as against the other. That would be the case, *inter alia*, where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings.").

<sup>55</sup> Paras. 20-23.

<sup>56</sup> (Case C-234/04) [2006] ECR I-2585, para. 20.

of the recognising court, but also conflicts between the judgment to be recognised and a judgment of another Member State court. Unlike para. 3, however, Art. 34, para. 4 applies only if the "cause of action" is the same, and this raises the difficulty that judgments of two Member States may both be entitled to recognition although they entail mutually exclusive legal consequences.<sup>57</sup>

### **Thoughts and Issues**

This is a relatively unexplored<sup>58</sup>, and very interesting, area of law and practice. Although it is tempting to take statements, such as those in *Hoffmann v. Krieg* and the Jenard Report, as favouring a universally broad principle of extension of effects of Member State judgments, that temptation (it is submitted) should be resisted. Instead, it must be recognised that the law applicable to the intra-Community effects of judgments in cross-border situations may differ according to the type of effect in issue. In each case, the "choice of law solution" may involve application, individually or in combination, of the law of the Member State of origin [(*lex loci iudicii*)], the law of the recognising State [(*lex loci legitimationis*)]<sup>59</sup> and/or European Community law (derived from Regulation 44/2001). As appears from the following discussion, some solutions may already be obvious, but there are several important aspects of the EC law of judgments which remain to be addressed. In assessing the breadth of the concept of "recognition", it will necessary to investigate and examine the law and practice of the Member States concerning the effects of judgments locally, for such investigation may enable it to be posited that particular effects which are not widely attributed to local judgments within the EC should fall outside the framework of the Regulation and be left to the law of the recognising State.<sup>60</sup>

First, it is submitted that the nature and extent of any obligation (to pay money or otherwise) created by a Member State judgment must, inevitably, fall to be determined by the original law of judgment. It is, however, more doubtful whether other "dispositive" effects of judgments under that law must, without more, be recognised. For example:

- If a Member State judgment, under its original law, would be treated as merging with or otherwise discharging the obligation, contractual or otherwise, on which it was founded, irrespective of the law applicable to the contract or other claim, should that discharge be recognised?<sup>61</sup>

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<sup>57</sup> See Layton & Mercer, above, paras. 26.081 to 26.082, preferring the solution that the judgment first in time should be given priority. See, by analogy, *Showlag v. Mansour* [1995] 1 AC 431 (PC).

<sup>58</sup> At least in the English language texts that I have reviewed for the purposes of this note.

<sup>59</sup> These Latin tags are merely suggestions. A better scholar than I will, no doubt, be able to suggest improved versions. It is submitted, however, that such tags may improve understanding between legal systems using different languages.

<sup>60</sup> See, for example, the discussion of "issue preclusion" below.

<sup>61</sup> See Layton & Mercer, above, para. 26.070.

- How, if at all, should the obligation to recognise Member State judgments be applied in relation to the dispositive effects of judgments *in rem*? If, for example, a Member State judgment were to purport to alter proprietary entitlements to property situated outside the territory of the Member State of origin, should any new title thereby created be recognised?

Secondly, as the procedures for recognition are governed principally by the Regulation, Community law is the natural place to look for any argument that a particular procedure laid down by the Regulation is exclusive or has been abused.<sup>62</sup> As noted above, the ruling in *De Wolf v. Cox* was concerned with abuse of process. It is unclear, however, whether this "Community" abuse of process doctrine may be extended further than the facts in *De Wolf* required, for example to the situation in which a claimant seeks to recover by fresh proceedings in another Member State additional items of damage arising from the same legal relationship but not claimed in the first action. In these circumstances, having regard to the *lis alibi pendens* rules concerning claims between the same parties and the same cause of action<sup>63</sup>, might the claimant be taken to have "exhausted" his rights under the Convention/Regulation by securing judgment in the first action, irrespective of the effects of that judgment under the law of the Member State of origin or the recognising Member State? Similarly, might a claimant (or defendant) who has suffered an adverse judgment be precluded by the Convention itself from later bringing proceedings against the same claimant in another Member State premised on the same cause of action (or denying that cause of action)?<sup>64</sup>

Thirdly, as has been seen, the Community rules on recognition (and, in particular, Art. 34, paras. 3 and 4 of the Regulation) govern some (but not all) situations involving conflict between Member State judgments.

Fourthly, outside the scope of any Community "abuse of process" doctrine, there would appear to be a strong case for applying the law of the recognising State to determine whether local dispute resolution procedures are being improperly used by new claims litigating matters which ought to have been, but were not, determined in earlier proceedings in another Member State (see the discussion of *Turner v. Grovit*, above).<sup>65</sup>

Fifthly, so far as the evidential value of a judgment is concerned, the traditional approach of private international law and issues of practicality would appear, in combination, to present a very strong case for application of the law of the recognising State, as the *lex fori*.

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<sup>62</sup> In this connection, it might be worthwhile considering the principles of European Community law concerning abuse of rights (*abus de droit*).

<sup>63</sup> Brussels Convention, Art. 21; Reg. 44/2001, Art. 27. See *De Wolf v. Cox*, above, paras. 10-12.

<sup>64</sup> See the discussion of *De Wolf v. Cox* in Barnett, above, paras. 7.69 to 7.74.

<sup>65</sup> See Barnett, above, paras. 7.94 to 7.102.

Finally, but arguably most significantly, there remain important questions as to the procedural, *res judicata* effects of judgments. For purposes of analysis, it may be helpful to divide these into three categories, as follows:

1. Cause of action preclusion against a successful party, preventing the re-litigation by a claimant of a claim which has already succeeded, in circumstances where the underlying obligation has not been discharged by merger or otherwise. Such situations are covered, at least in part, by the decision in *De Wolf v. Cox* and it is possible that the effect of that judgment may be capable of being extended (see above).
2. Cause of action preclusion against unsuccessful parties, preventing the re-litigation (whether by claimant or defendant or related persons) of particular claims which have already been determined. In this connection, it might be thought to be implicit in the Convention/Regulation regime (and, in particular, the rules governing *lis alibi pendens*) that there should only be one determination of a cause of action between the same parties. To this extent, Community law might be argued to support an independent, *res judicata* doctrine based on the concepts of "same cause of action" and "same parties".<sup>66</sup> Alternatively, and perhaps more convincingly, the nature of the Convention/Regulation regime would appear to support extending the effects of a Member State judgment insofar as cause of action preclusion is concerned. Thus, if this argument were to be sustained, the original law of judgment would determine the identity of the cause of action sued upon, the persons between whom that cause of action should be determined<sup>67</sup> and whether the judgment has the status of *res judicata*.<sup>68</sup>
3. Issue preclusion, preventing the re-litigation (by claimant or defendant or related persons) of issues which have already been determined as an element of a previous claim. So called "issue estoppel" raises particular difficulty when it comes to foreign judgments.<sup>69</sup> Indeed, it would appear that not even the US courts treat issue preclusion in the same way as cause of action preclusion in applying the "full faith and credit" principle to judgments of other US States.<sup>70</sup> Further, fuller analysis of the legal systems of Member States may support the view that rules concerning issue preclusion vary so widely between the Member States that they should be seen as falling outside any principle of "extension of effects"

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<sup>66</sup> See Cheshire & North, *Private International Law* (Butterworths, 13<sup>th</sup> ed., 1999), p. 514, building on the decision in *De Wolf v. Cox*.

<sup>67</sup> Particular attention may need to be paid to the judgments in "class" or "representative" actions which may be capable of binding persons falling within a particular description, whether or not they choose to participate or even know of the proceedings.

<sup>68</sup> See Barnett, above, paras. 7.58 to 7.68.

<sup>69</sup> See *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 (HL).

<sup>70</sup> See Barnett, above, paras. 7.80 to 7.83.

arising by virtue of Art. 33, para. 1 of Regulation 44/2001 and its predecessor, Art. 26, para. 1 of the Brussels Convention.<sup>71</sup> In the circumstances, and as a matter of first impression, there would appear to be strong arguments for restricting the concept of "recognition" under the Regulation to the judgment as a whole, leaving the law of the recognising State (including its rules of private international law) to determine the effect of a Member State judgment so far as issue preclusion is concerned. That said, such rules must, very arguably, continue to operate within the framework of the Regulation and Community law generally, so that (for example) there could be no review of the jurisdiction of the court of origin or the substance of its judgment<sup>72</sup> and no discrimination on grounds of nationality (including, very arguably<sup>73</sup>, by reference the origin of a judgment so that another Member State judgment could not be treated less favorably for these purposes than an equivalent local judgment).

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<sup>71</sup> See Barnett, above, paras. 7.84 to 7.85.

<sup>72</sup> Reg. 44/2001, Arts. 35.3 and 6.

<sup>73</sup> The precise basis in Community law of this proposition will, however, need to be further considered. Possibilities include indirect discrimination on the ground of nationality contrary to EC Treaty, Art. 12 or an unlawful restriction on free movement of capital contrary to EC Treaty, Arts. 56 and following.