Main features of Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

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Regulation No 1215/2012 was adopted recently and recasts Regulation N°44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It introduces important innovations as well as technical improvements. The main amendments are the abolition of exequatur, *the extension of some of the jurisdiction rules to parties domiciled in third States and the improvement of the rules relating to* lis pendens *and related actions.*

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Le règlement n° 1215/2012 a été adopté récemment et opère une refonte du règlement n° 44/201 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale. Il introduit de nombreuses nouveautés ainsi que des améliorations d'ordre technique. Les principaux amendements sont l'abolition de l'exequatur, l'extension de certaines règles de compétence aux parties domiciliées dans des États-tiers et l'amélioration des règles de litispendance et de connexité.

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Mit der vor kurzem verabschiedeten Verordnung Nr. 1215/2012 wird die Verordnung Nr. 44/2001 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen neu gefasst. Wichtige Neuerungen und technische Verbesserungen werden eingeführt. Zentrale Änderungen sind die Abschaffung des Exequaturverfahrens, die Ausdehnung von Zuständigkeitsregelungen mit Blick auf Parteien mit Wohnsitz in Drittstaaten sowie verbesserte Regelungen zur Rechtshängigkeit und zu im Zusammenhang stehenden Verfahren.

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[1] The views expressed are solely those of the author and shall not be regarded as stating an official position of the Council.

Contents

1. Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the so-called "Brussels I Regulation" (hereinafter "the 2001 Regulation"), is the cornerstone of European private international law, as it covers a wide scope (contracts, torts etc.) and sets up a complete set of rules on jurisdiction, recognition and enforcement of judgments. The recently adopted Regulation No 1215/2012 of 12 December 2012 (hereinafter "the Regulation") recasting the Brussels I Regulation is therefore of great important for practitioners and legal actors.

2. Following a report on the application of the 2001 Regulation[2] and a Green paper[3], the Commission presented on 14 December 2009 a proposal aiming at recasting the 2001 Regulation[4]. After two years of negotiations, the Council of the European Union and the European Parliament adopted the Regulation. Even if the final result is in general less ambitious than the proposal of the Commission, the Regulation is nevertheless a step further towards a harmonised area of freedom, security and justice. The aim of this paper is to draw attention on the main amendments introduced in the Regulation compared to the 2001 Regulation. They relate to Jurisdiction (I) and Recognition and enforcement (II).

I - Main amendments concerning jurisdiction

3. The changes in the Regulation relate to the extension of some jurisdiction rules to parties domiciled in third States (A), and to the improvement of the rules on *lis pendens* and related actions (B). Some additional amendments relating to other issues should also be noted (C).

A – Extension of the jurisdiction rules to parties domiciled in third States

4. In the area of jurisdiction, the proposal of the Commission was very ambitious. The main innovation proposed was to extend most of the jurisdiction rules to defendants or parties domiciled in third States. In the 2001 Regulation, currently in force, Sections 2 to 7 of Chapter II relating to jurisdiction provide for, in certain matters, grounds of jurisdiction additional or alternative to the general ground of Article 2 giving jurisdiction to the Courts of the Member State where the defendant is domiciled. Most of those sections authorise the application of those additional or alternative grounds only if they are located in a Member State. This is the case for the Sections relating to special jurisdiction (Section 2), insurance (Section 3), contracts of employment (Section 5), exclusive jurisdiction (Section 6) and prorogation of jurisdiction (Section 7).

5. In its proposal, the Commission envisaged the suppression of the requirement of a location in a Member State. It was argued that the fact a defendant is domiciled in a third State should not prevent him from benefiting from those grounds of jurisdiction, in particular the one protecting the "weaker party" in a contractual relationship. The aim was to abolish what the Commission considered to be an unjustified discrimination.

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[2] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [COM(2009) 174 final].

[3] Green Paper on the review of Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [COM(2009) 175 final].

[4] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [COM(2010) 748 final].

6. The proposed amendments were perceived during the negotiations as being too generous to defendants domiciled in third States. The main argument supporting this assessment was that jurisdiction rules are defined in a context of mutual trust between Member States and, as the Regulation is directly applicable in the EU, reciprocity between Member States is ensured. But such trust and reciprocity do not exist with third States of which most apply discriminatory rules towards defendants located in the EU. Therefore, the idea was to avoid unilaterally granting special protection to defendants coming from third States which do not necessarily give such protection to EU parties.

7. Therefore, the Regulation reverted to the wording of the 2001 Regulation and got rid of most of the Commission amendments relating to the extension of the 2001 Regulation. Consequently, jurisdiction has not been modified in depth.

8. However, the Regulation has in some instances slightly extended some of the provisions on jurisdiction. This is the case of the new Article 21(2) of the Regulation completing Article 19 of the 2001 Regulation. It was introduced in order to facilitate an action brought by an employee against an employer domiciled in a third State. It is one of the few provisions on jurisdiction where extension to third state defendants was considered relevant by the Council and the European Parliament. Currently, the 2001 Regulation is not applicable to an action brought against an employer domiciled in a third State. In practice, this legal situation penalises the employee when the place where or from where he habitually carries out his work (or the last place where he did so) is situated in a Member State. It is also the case where the employee does not or did not habitually carry out his work in one State, but was engaged in a Member State. In those two situations, the employee is prevented from bringing an action before the court of a Member State which present a strong connection with the case and must sue the employer in a third State. The Regulation fills this loophole by giving the possibility to the employee to start proceedings before the court of a Member State where he habitually carries out his work or, in the absence of such a place, before the courts of the Member State where he was engaged.

9. Another provision which has benefited in the Regulation from an extension to parties domiciled in third States is Article 25 (Article 23 of the 2001 Regulation) on prorogation of jurisdiction. Under the 2001 Regulation, a choice of court agreement is only valid if the chosen court is one of a Member State and if at least one party is domiciled in a Member State. Article 25 has eliminated this second requirement. The Regulation will therefore be applicable where two parties domiciled in third States agree on a Court of a Member State unless – and this is a new limitation introduced –the agreement is null and void as to its substantive validity under the law of the Member State of the chosen court. Nevertheless, it is indubitably an important extension of the scope of the Regulation

B – Improvement of the rules on lis pendens *and related actions*

10. The practical application of the Regulation has revealed some issues of coordination of proceedings in case of *lis pendens* or related actions. The Regulation is intended to clarify the different steps to be followed by the courts involved in *lis pendens* and related actions.

11. Article 27(1) of the 2001 Regulation provides: "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established". In practice, the

interpretation of this provision given by the Court of Justice in the Gasser case[5] leads to a possible avoidance of the application of a choice of court agreement. The Court of Justice ruled that this Article "must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction" and that "it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long". Therefore, a claimant acting in bad faith can easily block the operation of a choice of court agreement by starting first a proceeding before a court situated in a member State which is not the one of the court designated in the choice of court agreement creating a so called "torpedo action" by which the chosen court will have to stay proceedings, sometimes for years.

12. The Regulation is intended to fight against such "torpedo actions" by introducing an exception to the general rule of Article 27 of the 2001 Regulation (now Article 29). The exception provided for in a new paragraph 2 added to Article 29 of the Brussels I Regulation (now Article 31). Article 31(2) states that "*where a court of a Member State on which a [choice of Court] agreement confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement*". Thus, the priority is now clearly given to the court designated in the choice of court agreement to decide on its jurisdiction. Article 31(3) clarifies that "*[w]here the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court*"[6].

13. The *lis pendens* rules can only be applied in a correct way if a seised court knows the date when another court has been seised. Some problems had been reported to the Commission as to the availability of such information. The Regulation has added a new Article 29(2) clarifying that "*upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised*". In parallel, some clarifications relating to the time where a court is deemed to be seised have been added to Article 30 of the 2001 Regulation (Article 32 of the Regulation).

14. Finally, in Article 33 and 34, the Regulation introduces new rules regarding *lis pendens* and related actions pending before a court of a third State. Such rules only apply where jurisdiction is based on Article 4 (General principle of jurisdiction of the court of the Member States of the defendant) or on Section 2 (special jurisdiction). Articles 33(1) and 34(1) state that, when proceedings or an action are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings. Two requirements are laid down in the provision. Firstly, it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in the Member State concerned; and, secondly, the court of the Member State is to be satisfied that a stay is necessary for the proper administration of justice. It should be stressed that this stay of the proceedings is only a possibility given to the court of the Member State. The goal of this provision is to give

[5] Judgment of the Court of 9 December 2003, Gasser, C-116/02 (ECR. 2003, p. I-14693).

[6] Nevertheless, in order to protect the "weaker parties", Article 31(4) provides that paragraphs 2 and 3 do not apply to matters referred to in Sections 3 (insurance), 4 (consumer contracts) or 5 (contract of employment) where the "weaker party" is the claimant and the agreement is not valid under a provision contained within those Sections.

some flexibility to the court of a Member State to stay proceedings when it appears that the court of a third State is better placed to rule on the case. Articles 33(3) and 34(3) provide that the court of the Member State dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

15. In order to avoid infinite staying of the court of the Member State concerned due to the absence of action of the court of the third State, Articles 33(2) and 34(2) give the possibility to the court of the Member State concerned to resume the proceeding at any time if one of the following conditions is met: the proceedings in the court of the third State are themselves stayed or discontinued or it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or the continuation of the proceedings is required for the proper administration of justice.

C – Other amendments relating to jurisdiction

16. As regards new provisions concerning jurisdiction, it is worth mentioning Article 7, point (4) which sets out a new special ground of jurisdiction dedicated to civil claims for the recovery of a cultural object. This new ground was not originally proposed by the Commission but was added at the end of the negotiations. As regards such civil claims, it gives the person claiming the right to recover a cultural object the possibility to ask for the recovery of such an object, based on ownership, in the courts for the place where the cultural object is situated at the time when the court is seised.

17. Article 20 of the Regulation amending Article 18 of the 2001 Regulation is aimed at facilitating proceedings introduced by the employee. By adding a reference to Article 8, point (1) of the Regulation in matters of individual contracts of employment, Article 20 introduces the possibility to an employee to bring proceedings against various employers domiciled in different Member States before the Court for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Currently, the employee must bring individual proceedings against each employer in different Member States. This amendment will facilitate the action of the employee by saving him time and money.

18. The Regulation inserts a new paragraph 2 in Article 26 (Article 24 of the 2001 Regulation) which aims to protect the "weaker party" in Sections 3, 4 and 5[7] when he enters an appearance as a defendant. At present, the "weaker party" is subject to the general rule of Article 24 which provides that a court of a Member State before which a defendant enters an appearance has jurisdiction, except where such appearance is entered in order to contest the jurisdiction, or where another court has exclusive jurisdiction. New Article 26(2) provides that, when the "weaker party" is the defendant, the court before which he enters an appearance must ensure, before assuming jurisdiction, that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

[7] The policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee.

II - Main amendments concerning recognition and enforcement

19. The main amendment relates to the abolition of *exequatur* (A), but some other technical innovations are worth mentioning (B).

A – Abolition of exequatur

20. The Commission recalled in the explanatory report of the proposal that it considered that time had come to abolish the *exequatur* as it is set out in the 2001 Regulation. In order to explain the changes introduced in the Regulation (2) it seems useful to recall the system put in place in the 2001 Regulation (1).

1 / The system applicable in the 2001 Regulation

21. The *exequatur* is a procedure which is aimed at granting enforceability in a Member State to a decision given in another Member State. It does not concern the recognition of a judgment which is "*recognised in the other Member States without any special procedure being required*" (Article 33 of the 2001 Regulation). *Exequatur* is therefore only needed where a person seeks to enforce in one Member State ("the Member State addressed") a decision given in another Member State ("the Member State of origin"). At present, the *exequatur* procedure is laid down in Article 38 *et seq.* of the 2001 Regulation, which provide for the following steps: any interested party can apply for a declaration of enforceability before the court or competent authority designated by the Member State addressed. The application is accompanied by a copy of the judgment (Article 53) and, if the court or competent authority so requires, a translation of it (Article 55(2)). As soon as the formalities are completed, the judgment is declared enforceable without any possibility for the person against whom enforcement is sought to contest, at this stage, the decision granting enforceability (Article 41).

22. The decision on the application for a declaration of enforceability is brought to the notice of the applicant and is served on the person against whom enforcement is sought together with the judgment if not already served on that person (Article 42). Both parties can appeal against the decision on the application for a declaration of enforceability within one month (Article 43). The competent court or authority dealing with the appeal can refuse or revoke the declaration of enforceability only on the basis of one of the grounds specified in Articles 34 and 35. Those grounds are the following:
- the judgment is manifestly contrary to public policy in the Member State addressed;
- where the judgment was given in default of appearance, the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the requested Member State;
- if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;

- if it conflicts with matters relating to insurance, consumer contracts or exclusive jurisdiction.

23. Finally, Articles 36 and 35(3) provide that a foreign judgement cannot be reviewed as to its substance nor as to the jurisdiction of the court of the Member State of origin.

2 / The system applicable in the proposal and in the Regulation

24. In the explanatory memorandum of the proposal, the Commission stated that "[t]oday, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States. The proposal therefore abolishes the *exequatur* procedure for all judgments covered by the Regulation's scope with the exception of judgments in defamation and compensatory collective redress cases".

25. The aim of the proposal of the Commission was to get rid of the *exequatur* in its two dimensions: the procedural aspect consisting in the need to formally introduce a request to a court or competent authority in the Member State addressed in order to get a declaration of enforceability; and the substantive aspect *i.e.* the check of the grounds of Articles 34 and 35 of the 2001 Regulation, in particular the public policy test. The Commission proposed to accompany the abolition of *exequatur* by three main remedies at the disposal of the person against whom enforcement is sought, by which, in exceptional circumstances, he could have prevented that a judgment given in one Member State is recognised or enforced in another Member State. First, he would have been able to contest the judgment in the Member State of origin if he was not properly informed about the proceedings in that State. Second, the proposal would have created an extraordinary remedy in the Member State addressed which would have enabled the person against whom enforcement is sought to contest any other procedural defects which might have arisen during the proceedings before the court of origin and which may have infringed his right to a fair trial. The third remedy proposed was to enable the person against whom enforcement is sought to stop the enforcement of a judgment in case it is irreconcilable with another judgment which had been issued in the Member State addressed or - provided that certain conditions were fulfilled – in another country. Such safeguards addressed situations which are currently foreseen by some of the existing grounds of refusal, in particular those linked to the protection of the rights of the defence. However, the main innovation proposed by the Commission was to supress the control of substantive public policy.

26. It has to be admitted that the co-legislators departed from the proposals of the Commission to a large extent. First, it was considered that the system envisaged in the proposal was too complicated, especially in the light of the two "corridors" foreseen which provided for the maintenance of the *exequatur* as it stands in the 2001 Regulation for defamation and compensatory collective redress cases and its abolition for other cases. Second, the views of the Commission that the mutual trust between Member States had come to a point where it could be proposed to abolish some of the *exequatur* substantive grounds, in particular public policy, were not shared by the Council and the European Parliament – although they considered that the prohibition of review on the substance of the judgment should remain unchanged compared to the 2001 Regulation (Article 52 of the Regulation).

27. By way of contrast, they agreed that the procedural part of the *exequatur* (declaration of enforceability) should be removed. Thus, the Regulation ensures that it is no longer necessary to seise a court or competent authority in the Member State addressed in order to obtain a declaration of enforceability prior to enforcement of a decision given in another Member State.

28. Since the co-legislators had decided to abolish the declaration of enforceability but not the checks provided for in Articles 34 and 35 of the 2001 Regulation, the co-legislators faced a huge difficulty. If the person seeking enforcement no longer has to apply, prior to enforcement, for a declaration of enforceability, how and when the person against whom enforcement is sought would be able to invoke a ground of refusal? Currently, under the 2001 Regulation, it is only at the stage of an application for a declaration of enforceability that a the person against whom enforcement is sought can invoke public policy or the fact that he was not served with the judgement or any other grounds of Articles 34 and 35 which the court of the requested Member State has to check before issuing the declaration of enforceability.

29. In order to give an answer to this issue, a new Section 3 on refusal of recognition and enforcement was introduced in the Regulation. Article 45 deals with refusal of recognition and grants to "*any interested party*" the right to invoke the grounds currently provided in Articles 34 and 35 of the 2001 Regulation. Therefore, the person against whom enforcement is sought can seise at any time a court of the Member State addressed to establish that a judgment cannot be recognised. In practice, it can be useful for him to start proceedings before enforcement is launched. It allows the person against whom enforcement is sought to avoid his assets to be frozen before he can contest the judgment on the basis of one the grounds provided in Article 45 of the Regulation. In parallel, Article 36(2) of the Regulation authorises the person seeking recognition of a judgement to apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45. The aim is to deal with the case where a party seeks the recognition of a judgement (but not necessarily the enforcement). Since the enforcement is not needed (or not wished), in the case where the person against whom enforcement is sought does not take the initiative, under Article 36(2), to challenge the judgement in the Member State addressed, the person seeking enforcement can confirm before a court of that Member State that there are no grounds of non-recognition. This provision gives the certainty to the person seeking recognition that the judgement is entitled to be recognised.

30. The procedure for refusal of enforcement is provided in Articles 46 to 51 of the Regulation. It is inspired by the current procedure for enforceability of the 2001 Regulation with the necessary adaptations to address the fact that the procedure can only take place under the Regulation at the enforcement stage and not before as it is the case for the procedure for obtaining a declaration of enforceability. It is open to the person against whom enforcement is sought on the basis of one of the grounds referred to in Article 45 of the Regulation (Article 46) before a court designated by the Member State addressed (Article 47). The court decides on the application without delay (Article 48) and its decision may be appealed by both parties (Article 49). The decision given by the court of appeal can only be submitted to further appeal if the Member State addressed has indicated to the Commission a court to do so (Article 50). The court of first and second instance may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired (Article 51).

B – Other amendments relating to recognition and enforcement

31. Two innovations should be highlighted under this section. The first one is Article 54 of the Regulation which lays down a procedure of adaptation of rights. It is an answer to a practical problem which had been reported to the Commission by practitioners in charge of applying the rules on recognition of the 2001 Regulation and describes how to enforce a measure which is unknown in the Member State addressed (for instance, usufruct is a concept unknown in some Member States). Some courts simply refused to enforce a requested measure on the grounds that it is unknown in the internal law of the Member State addressed. In order to avoid such situation, Article 54(1) provides that "*[i]f a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests*" and clarifies that such adaptation must not have effects going beyond those provided for in the law of the Member State of origin. Article 54(2) sets out the obligation for Member States to provide for a way of challenging the adaptation of the measure or order before a court.

32. The second innovation worth mentioning is Article 55. This Article is also an answer to practical difficulties in the enforcement in the Member State addressed of a judgment ordering a payment of which the amount is not definitively determined. It could be the case of a *per diem* amount to be paid until a harmful behaviour in matters, for example, of intellectual property, is stopped. In such situation, it is very difficult for the court of the Member State addressed to determine the exact amount to be recovered in the absence of information on the legal situation in the Member State of origin after the judgment was given by the court of origin. Therefore, Article 55 states that a judgment given in a Member State which orders a payment by way of a penalty is enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin. In practice, it means that the person seeking enforcement will have to come back before the court of origin to determine the definitive amount to be enforced.

33. In summary, the Regulation, which will enter into force on 10 January 2015, does not revolutionise the rules applicable to civil and commercial matters. In many aspects, it shows a much more similar shape to the 2001 Regulation than the proposal of the Commission did. It is not necessarily to be criticised as all practitioners, specialists and even the Commission acknowledge that the operation of the 2001 Regulation is, globally, very satisfactory. The Regulation appears to be a good balance between innovations aimed at enhancing the implementation of a European judicial area in civil matters (for instance, by abolishing *exequatur*) and the preservation of provisions which have proven to be successful.
