

Enforcement and the 'enforcement order Regulation'

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I. GENERALLY

- What
 - *‘To recognise foreign judgments is to admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down’.* [Virgos-Schmit Report]
 - See similarly Report Jenard: *conferring judgments the authority and effectiveness accorded to them in the State in which they were given*
- Was the raison d’être for EU PIL
- 'Near-automatic character'
 - As a result of the safeguards granted to the defendant in the original proceedings, Title III of the JR is very liberal on the question of recognition and enforcement:
 - Reduction in the number of grounds which can operate to prevent the recognition and enforcement of judgments; and
 - Simplification of the enforcement procedure which is common to all Member States.

I. GENERALLY ctd

- Three sections
 - 'recognition'; 'enforcement'; common provisions.
 - 'enforcement' is a misleading title: it only paves the way to such enforcement in the relevant Member State. Enforcement itself is left to national law — what is meant therefore is 'exequatur'.
- Sections on 'Recognition' and 'enforcement' intertwined
- The section on recognition firstly ensures the automatic recognition of judgments without any special procedure being needed; a cross-reference to the swift procedure foreseen for exequatur, should one for a particular reason require express recognition of a foreign judgment; and finally a limited number of grounds which may lead to a court refusing recognition. The latter are in turn cross-referred to in the section on exequatur: recognition and exequatur may be refused only on the basis of the same grounds.
- Common provisions
 - Formalities, in particular the documentation required to be submitted upon application for either recognition or enforcement.

II RECOGNITION

- Article 33
 - 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*
 - 2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.*
 - 3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.*
- Article 33 includes 3 rules on recognition:
 - judgments have to be recognised automatically. There is a presumption in favour of recognition, and it takes a special procedure to rebut that presumption.
 - in the event of a dispute, if recognition is itself the principal issue, the simplified procedure for enforcement provided for in the Regulation may be applied (as opposed to the situation prior to the Brussels Convention, where complicated national procedures had to be followed);
 - if the outcome of proceedings depends on the determination of an incidental question of recognition, the court entertaining those proceedings has jurisdiction on the question of recognition.

II RECOGNITION ctd

- Contrast with classic PIL Treaties

Two conditions which are frequently inserted in enforcement treaties are not included in the JR:

- not necessary that the foreign judgment should have become *res judicata*;
 - the jurisdiction of the court which gave the original judgment does not have to be verified by the court of the State in which the recognition is sought— lest the (rare) exceptions apply: see below
- Six conditions for recognition to apply

II RECOGNITION ctd

- [a] Must be an Adjudication from a Court in a Member State
- *Article 32*
For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member 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.
- Clearly excludes judgments from non-Member States, even if they have been held enforceable by a judge in another MS (recognition of whose judgment is subsequently sought).
- Article 57 extends recognition to authentic acts (e.g. notary publics).
- !! Chapter III applies regardless of whether the judgment was issued on the basis of a jurisdictional rule of the Regulation or not.
- "Judgment" requires that it emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties.
- NOT in the case of a settlement, even if it was reached in a court of a Member State and brings legal proceedings to an end. *[Solo Kleinmotoren]*

II RECOGNITION ctd

- Rights of the defence impact on the requirements for 'judgment':

judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversarial proceedings [Denilauler; Gambazzi]

- Quid arbitral awards? In my view they may qualify, on an ad hoc basis, as an 'inquiry in adversarial proceedings' per the Denilauler and Gambazzi formula.

II RECOGNITION ctd

- See also Bot AG in *Gothaer* (C-456/11): ‘judgment’ entails into three criteria: organic, procedural (closely related to organic), and substantive.
 - *The first criterion is organic. The judgment must emanate from a court or tribunal, that is to say, a body which acted independently of the other institutions of the State and impartially.*
 - *(...) The second criterion, which cannot be separated from the first, is procedural. It requires that the rights of the defence were observed in the procedure which led up to the adoption of the judgment. (...)*
 - *The third criterion is substantive. The judgment is characterised by the exercise of a power of assessment by the judicial body from which it emanates. That criterion means that a distinction must be drawn depending on whether the authority has a decision-making role or restricts itself to a more passive function, consisting for example in receiving the intentions of the parties to the proceedings. (...)* (ad 36 ff)
- Consequently, in the AG’s view, a judgment by a court in a Member State, finding that it does not have jurisdiction because of a choice of forum clause pointing away from the EU (in the case at issue: Iceland), is a ‘judgment’ within the meaning of Article 32 JR.

II RECOGNITION ctd

- [b] Must be Given in a Civil or Commercial Matter.
 - Title III cannot be invoked for the recognition and enforcement of judgments given on matters excluded from the scope of the Regulation
 - May the recognising court second-guess the decision by the adjudicating court on whether the issue falls within the scope of application of the JR (e.g. arbitration)? The jury is out.
- [c] Must not have been in Proceedings Instituted after the Entry into Force of the Regulation.

with a proviso to have some earlier judgments included in Article 66 JR - is now historic.

II RECOGNITION ctd

- [d] Must not be Impeachable for Jurisdictional Error
- Article 35
 - *1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.*
 - *2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.*
 - *3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.*
- No second-guessing of the jurisdictional rules once it is clear that the matter is within the scope of the Regulation.
- ! the exercise by the national courts of their national rules of jurisdiction as per Article 4 JR, is covered by Chapter III.
- The only exceptions are the jurisdictional rules for insurance contracts, consumer contracts (not employment) and exclusive jurisdiction per Article 22. Not infringement of exclusive jurisdiction clauses validly made under Article 23.

II RECOGNITION ctd

- [e] Must not be Impeachable for Procedural or Substantive Reasons



- *Article 34*

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if 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;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. 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.

II RECOGNITION ctd

- 1. Public Policy
- = ordre public international.
- The recognition itself must be 'manifestly' contrary to (national) public policy: not the judgment itself, but rather its enforcement'
- *Hoffmann, Krombach*: Member States give their own interpretation of the term, however the exception applies only in exceptional cases.
Recourse to the clause on public policy can be envisaged only where recognition or enforcement of the judgment delivered in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. (...) the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.
- The possibility that the court of the State of origin erred in applying certain rules of EU law, including free movement of goods and competition law, does not qualify as such (*Renault*)
- Disregard for rights under the ECHR have famously been upheld as within reach of a national court's option to apply Article 34 JR in *Krombach v. Bamberski*

II RECOGNITION ctd

- 2 Judgments in Default of Appearance

Whether the document which instituted the proceedings was duly served or not, has to be judged in accordance with the internal law of the Member State where the judgment was issued, however the second leg of that exception ('in a way as to enable him to arrange his defence') indicates that the courts in the State of recognition have room to judge the timeliness in particular viz the ECHR.

- 3 Irreconcilability with Other Judgment of the MS of Forum

Whether issued sooner or later, however *lis alibi pendens* ought greatly to reduce the number of irreconcilable judgments. Article 34(3) requires the same parties only, not the same cause of action.

- 4 Irreconcilability with other Judgment of Other MS (than the Adjudicating MS) or of a Third State

This exception does require the same parties and the same cause of action.

- **[f] Must not be Excluded from Recognition by a Relevant Other Treaty.**

See Article 72, which has limited application.

Enforcement

- Unlike recognition, enforcement (= 'exequatur') does always require a procedure, albeit a simplified one.
- The procedure has two stages
 - the first one effectively introduces the judgment, enforcement of which will be subsequently sought, into the legal order of the Member State in which enforcement is sought. The authorities at this stage of the procedure must not carry out any other assessment (in particular, they may not review the conditions for refusal of exequatur, listed in Articles 34 and 35 precited).
 - The result of this formal exercise is a declaration of enforceability, which in accordance with Article 42 is served upon the party against whom enforcement is sought.
- Once served, the decision may then be appealed, following which the relevant court (again identified in Annex) reviews the grounds for refusal, which are the same as those listed for the refusal of recognition.

Enforcement ctd

- *Trade Agency*: the court in which exequatur is sought, may only refuse after review of the individual merits of the case
- Exequatur has been overhauled in the new JR. However it is exactly on issues of the rights of the defence, such as those raised in *Trade Agency*, that a number of Member States insisted that exequatur can never be entirely automatic, even among EU Member States.

European enforcement order [for uncontested claims]

- Regulation 805/2004
- Completely drops the need for exequatur
- No PIL stricto sensu - rather, proper European civil procedure
- No interference with the jurisdictional rules of Regulation 44/2001. Does not replace Title III of the JR.
- Exclusive jurisdictional grounds, insurance contracts and consumer contracts (if consumer did not contest, and the claim was entered in the domicile of the consumer) receive additional protection
- Conditions for the document instituting the proceedings

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