



FREE CIRCULATION OF JUDGEMENTS

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INTRODUCTION

Under Article 81 of the Treaty on the Functioning of the European Union¹, the European Union is allowed to adopt the measures relating to the judicial cooperation in civil and commercial matters. More than anything else, this provision forms the basis for an activity of the European Parliament and the Council in adoption measures aimed at ensuring: “the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases”.² The main aim of the European Union (previously the European Community) in the area of freedom, security and justice is to ensure mutual trust in the administration of justice within the Member States of the EU.

A concept of “mutual trust”, that has been explicitly invoked in EU private international law for many years, was the leading idea throughout the whole process of changing the law in order to create conditions for free circulation of judgements. It has played an animating role in private international law since at least the early 1990s. In *Sonntag v. Waidmann*, a 1993 case before the European Court of Justice, Advocate General Darmon stated in his opinion that “[t]he principle of the recognition of judgments is based on the Member States’ mutual trust in their respective legal systems and judicial institutions. This trust allows the Member States to waive their internal rules on the recognition and enforcement of foreign judgments.”³ In his opinion in *Owusu v. N.B. Jackson and others*, Advocate General Léger explained that the EU established the simplified Brussels Convention mechanism for recognition and enforcement “in a specific

¹ Consolidated version 2012, OJ C 326 (2012)

² Article 81 par.2 a of the Treaty on the Functioning of the European Union

³ Opinion of Advocate General Darmon in case C-172/91, *Sonntag v. Waidmann* [1993] ECR I-1963, at para. 71-72

context characterized by mutual trust between the Member States of the Community regarding their legal systems and their judicial institutions”.⁴

Reinforcing this understanding, the Brussels I bis Regulation explicitly links the abolition of exequatur to mutual trust: “Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognized in all Member States without the need for any special procedure.... As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.”.⁵

The concept of automatic enforceability of foreign judgments has been consequently implemented into EU law in last 10 years. Already in Art. 41 and 42 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility⁶ it was decided that judgments concerning contact with the child and the child’s return issued pursuant to Art. 11 (8) of the Regulation will be carried out in other Member States without the need of a declaration of enforceability. It was the first regulation in European law which referred to the construct of automatic enforceability of foreign judgments.

The concept has been then developed in the Regulation (EC) No 805/2004 of EP and Council of 21 April 2005 on creating a European Enforcement Order for uncontested claims⁷, Regulation (EC) No 1896/2006 of PE and Council of 12 December 2006 creating a European order for payment procedure⁸ and Regulation (EC) No 861/2007 of PE and Council of 11 July 2007 establishing a European Small Claims Procedure⁹. The most important assumption of the abovementioned Regulations is that the enforcement of a judgement abroad does not have to be preceded by a new *acto de dominio*, and thus enforceability is no longer granted *ex novo* in each country in which the creditor intends to initiate the enforcement proceedings individually, but it is obtained at the same time across the European Union. Thus, these acts gave rise to a complete freedom of circulation of judgments within their respective material scope as

⁴ Opinion of Advocate General Léger in case C-281/02, *Owusu v. N.B. Jackson and others* [2005] ECR I-1383, at para 144

⁵ Recital 26 of Brussels I bis Regulation

⁶ EU JO L 338/1 of 2003

⁷ EU OJ L 143/15 of 2004

⁸ EU OJ L 399/1 of 2006

⁹ EU OJ L 199/1 of 2007

they put on the same footing the decisions rendered in a foreign Member State and the national ones by means of the complete abolition of any exequatur procedure.

The real improvement that would significantly impact the area of a circulation of judgements in civil and commercial matters within the EU Member States has come with the revised Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter “Brussels I bis Regulation”)¹⁰. This Regulation importantly modified the main instrument controlling the recognition and enforcement of judgments in civil and commercial matters, which is Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters [hereinafter “Brussels I Regulation”]¹¹.

In the following text I will discuss the problem of the recognition and enforcement of judgements presenting the relevant issues in the light of the rules adopted in both abovementioned Regulations. This way of presentation will be very useful for better understanding the scale and the essence of the historic changes in this area of European law that we all are witnessing.

RECOGNITION OF FOREIGN JUDGEMENT

The both Brussels I Regulations distinguish between recognition and enforcement of a foreign judgment.

The mechanism of recognizing a judgment have remained unchanged under the Brussels I bis Regulation – the main rule remains the same: “A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required” (Art. 33 par.1 of Brussels I and Art. 36 par.1 of Brussels I bis). These provisions establish the principle of the automatic recognition of foreign judgments. If a question arises as to whether a foreign judgment should be recognized, the issue can be resolved either by proceedings specifically directed to that issue (under Art. 33 par.2 of Brussels I and Art. 36 par.2 of Brussels I bis) or, if the issue arises incidentally in the

¹⁰EU OJ L 351/1 of 2012

¹¹ EU OJ L 12/1 of 2001

framework of other proceedings, pursuant to Art. 33 par.3 of Brussels I and Art. 36 par.3 of Brussels I bis.

The Regulations do not provide a definition of what is meant by “recognition” of a foreign judgment. Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given. The State addressed accepts to consider that what the court of origin has decided constitutes a valid determination of the rights and obligations of parties. For example, if the court of origin has ordered a party to pay damages because the party has been found in breach of a contract, courts in other Member States should accept that the parties were bound by a contract and that this contract has been breached.

This principle of automatic recognition, which is one of the cornerstones of the European judicial area, means that judgments issued in one Member State are automatically recognized in other Member States without any prior proceedings or formal steps. In other words, a party who wishes to rely on a foreign judgment must not undergo any formal procedure or have the judgment be registered in the other Member State prior to relying on the foreign judgment. A direct consequence of the automatic nature of the recognition is that the foreign judgment is deemed to be effective at the same time in the state of origin as in the other Member States.

Art. 33 par.2 of Brussels I allowed an interested party to apply to the court for a declaration that a judgment given in another Member State be recognized. It referred to the possibility to obtain only a positive declaration of the recognition. In these circumstances arises a question about the possibility of obtaining a declaration of non-recognition. This problem does not exist under the Brussels I bis Regulation. According to Art. 45 par.1 and 4 any interested party is entitled to apply for the court decision that a judgment not be recognized. The grounds for non-recognition are enumerated in Art. 45 par.1 and they are in vast majority the same as provided for in the Brussels I Regulation (Art. 34 and 35). Because those grounds are also relevant for refusing enforcement of judgements, I will discuss them in a detailed way later.

ABOLITION OF EXEQUATUR

For judgments that the creditor seeks to enforce, the Brussels I Regulation requires a declaration of enforceability (exequatur) before enforcement measures can proceed (Art. 38 par.1). The court or authority grants exequatur *ex parte*, i.e. without prior notice to the debtor, and without reviewing the grounds for refusing enforcement. Under the Brussels I bis Regulation, the judgment-creditor can directly apply for enforcement as if the judgment had been given in the enforcement state (Art. 39).

What is exequatur? It has three purposes: it authorizes the enforcement authorities to act, it instructs the enforcement authorities how to act, and it allows to review the foreign judgment. Whereas the first function of exequatur is not so important in the present European framework, the second could play some role in the enforcement proceedings, especially when a foreign judgment contains insufficient information that needs to be supplemented. For instance, some judgments might order the defendant to pay money plus interest at the statutory rate that is unknown to the foreign enforcement authorities. This kind of problems could be solved by requiring the court of origin to provide more information in the Certificate under the Brussels I Regulation¹². Consequently, the Brussels I bis Regulation includes an extended Certificate with detailed information¹³. Another possible problem would be a situation when a foreign judgment contains an order or a measure unknown to the enforcement state; this order or measure needs to be transformed into a title that can be enforced with the available enforcement measures. With regard to this situation, the Brussels I bis Regulation introduced an explicit obligation for the competent authority of the enforcement state to adapt “to the extent possible, [...] the measure or order to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests.”¹⁴. The third purpose of exequatur (revision of the foreign judgement) also cannot play an important role in the whole proceedings, because the court declaring exequatur does not examine the grounds for review.

¹² Annex V of the Brussels I Regulation

¹³ Annex I of the Brussels I bis Regulation

¹⁴ Article 54 par.1 and Recital 28 of the Brussels I bis Regulation

Having taken into account those aspects of exequatur the European Parliament and Council, in order to strengthen a mutual trust and free movement of judgments within the EU, decided to abolish this instrument. There were also vital practical reasons for that decision, based on a cost-benefit analysis and length of exequatur proceedings.

ENFORCEMENT OF FOREIGN JUDGEMENT

The main idea of the construct of automatic enforceability under the Brussels I bis Regulation can be found in its Recital No 26. It says: “mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed”.

As stated before, pursuant to Art. 39 of the Brussels I bis to perform a foreign judgment the declaration of its enforceability is no longer needed. The applicant shall submit the application for initiation of enforcement proceedings directly to the competent enforcement authority.

Under the both Brussels Regulations, the judgment-creditor must submit two documents (to the court in support of his exequatur – Brussels I or to the enforcement authority to support his enforcement application – Brussels I bis): (1) a copy of the judgment satisfying the conditions necessary to establish its authenticity; and (2) a certificate issued by the court of origin using the standard form annexed to the both Regulation (the “Certificate”)¹⁵.

The Certificate contains considerably more information under the Brussels I bis Regulation than under the Brussels I Regulation. While the older Regulation allows the exequatur court to dispense with the production of the Certificate, this possibility no longer exists under the Brussels I bis. To the contrary, the

¹⁵ Articles 53-54 and Annex V of the Brussels I Regulation and Article 42(1) and Annex I of the Brussels I bis Regulation.

Certificate provided for in the Brussels I bis must be served on the judgment-debtor prior to the first enforcement measure¹⁶.

The Brussels I bis Regulation increases the protection for the judgment-debtor regarding translations. Under the Brussels I Regulation, the judgment-creditor must submit a translation of both the judgment and the Certificate only if required by the court or authority of the enforcement state¹⁷. This Regulation contains no right of the judgment-debtor to request a translation of the judgment. Under the Brussels I bis, the enforcement authority may request a transliteration or translation of the Certificate, but it may require a translation of the judgment only if it is unable to proceed without such a translation¹⁸. However, the Brussels I bis Regulation entitles a judgment-debtor domiciled in a Member State other than the state of origin to request a translation of the judgment if it is written in a language that he does not understand and that is not an official language at the place of his domicile¹⁹. Until the judgment-debtor receives the requested translation, only protective measures may be taken, not enforcement measures²⁰. This amendment constitutes an important protection of the judgment-debtor at the expense of the judgment-creditor.

The Brussels I bis Regulation contains no substantive changes to the scope of what the competent court or enforcement authority examines *ex officio*. Upon the judgment-creditor's exequatur application (Brussels I Regulation) or enforcement application (Brussels I bis Regulation), the court or authority seized with the application examines the following requirements *ex officio*:

- (a) Local and subject-matter competence of the court or authority;
- (b) Submission of an authentic copy of the judgment and of the Certificate;
- (c) Judgment falling under the Brussels I (I bis) Regulation, in particular whether it is a judgment²¹ rendered in a Member State in civil or commercial matter;
- (d) Enforceability of the judgment in the state of origin (stated in the Certificate);
- (e) Other requirements under national law that apply to all judgments regardless of their origin, to the extent that they are not incompatible with the grounds of refusing enforcement under the Brussels I bis Regulation²².

¹⁶ Article 43 par.1 of the Brussels I bis Regulation

¹⁷ Article 55 par.2 of the Brussels I Regulation

¹⁸ Article 42 par. 3-4 of the Brussels I bis Regulation

¹⁹ Article 43 par.2 of the Brussels I bis Regulation

²⁰ Article 43 par.2 of the Brussels I bis Regulation

²¹ Article 32 of the Brussels I Regulation and Article 2(a) of the Brussels I bis Regulation

²² Article 41 par. 1-2 Brussels I bis Regulation

If the requirements listed above are fulfilled a competent enforcement authority will, as the case may be, proceed to protective measures (if requested) and/or serve the Certificate and the judgment (if not previously served) on the judgment-debtor prior to the first enforcement measure²³.

The grounds for refusing enforcement are examined only if and when the judgment-debtor files an application for refusing enforcement²⁴.

The content of the foreign judgment determines what protective and/or enforcement measures the seized court or authority will take. The Brussels I bis Certificate provides detailed information about the content of the judgment. The Brussels I bis Regulation thereby makes it easier for the enforcement court or authority to take the appropriate protective and/or enforcement measures, while putting an additional burden on the court of origin.

In case of monetary claims, the Certificate sets out the following information:²⁵

- a short description of the subject-matter of the case,
- the debtor and creditor of the payment and, in case of several debtors, whether the whole amount may be collected from any one of them,
- the currency of the payment,
- the principal amount to be paid, and whether it must be paid in one sum, in installments (together with information about the amount and due date of each installment) or regularly (together with information about the frequency of payments),
- the contractual and/or statutory interest to be paid, including the amount, interest rate or statutory basis, the start and end date/event, and whether and how interest is to be capitalized.

For judgments other than monetary judgments, the Certificate sets out a short description of the subject-matter of the case and of the court's ruling²⁶.

In case of provisional measures, the Certificate also sets out whether the measure was ordered by a court having jurisdiction for the substance of the matter²⁷.

²³ Articles 40 and 43 par.1 and Recital 32 of the Brussels I bis Regulation

²⁴ Article 46 of the Brussels I bis Regulation

²⁵ Annex I of the Brussels I bis Regulation, Section 4.6.1

²⁶ Annex I of the Brussels I bis Regulation, Section 4.6.3

²⁷ Annex I of the Brussels I bis Regulation, Section 4.6.2

For judgments or orders other than monetary judgments, it may become necessary to adapt the foreign decision if the order or measure is not known to the law of the enforcement state²⁸. The competence and procedure for adapting the foreign decision is subject to national law²⁹.

Under the Brussels I Regulation, the judgment-creditor could enforce the judgement only after the period for appealing the exequatur decision had lapsed or, in case of an appeal, after the appeal had been dismissed³⁰. The judgment-creditor could thus obtain enforcement at the earliest one month after service of the exequatur decision if the debtor was domiciled in the enforcement state, and two months after service of the exequatur decision if the debtor was domiciled elsewhere³¹. This procedure does not exist anymore, since exequatur has been abolished.

On the other hand, under the Brussels I bis Regulation the judgment-debtor still can take some steps to delay enforcement. As it was stated before, prior to the first enforcement measure, the Certificate and the judgment (if not previously served) must be served on the judgment-debtor. A judgment-debtor domiciled in a Member State other than the state of origin may then request a translation of the judgment if it is not written in or accompanied by a translation into a language that he understands or that is an official language of the place where he is domiciled³². If the judgment-debtor requests such a translation, no enforcement measures may be taken other than protective measures until he has received the translation.

Enforcement measures are not automatically excluded if the judgment-debtor applies for refusal of enforcement. However, upon request of the judgment-debtor, the competent court has discretion to limit enforcement to protective measures, make enforcement conditional on the provision of a security, or suspend enforcement either wholly or in part³³. When exercising its discretion, the competent court will consider the seriousness of the judgment-debtor's objections to the enforcement.

²⁸ Article 54 of the Brussels I bis Regulation

²⁹ Recital 28 of the Brussels I bis Regulation

³⁰ Article 47 par.3 of the Brussels I Regulation

³¹ Article 43(5) of the Brussels I Regulation

³² Article 43 par.2 of the Brussels I bis Regulation. Section 4.5 of the Certificate indicates whether and in what language the judgment has already been served on the judgment-debtor

³³ Article 44 par.1 and Recital 31 of the Brussels I bis Regulation

The enforcement court or authority has no such discretion if the enforceability of the judgment is suspended in the Member State of origin – in that case, the enforcement court or authority must suspend the enforcement proceedings upon request of the judgment-debtor³⁴.

Waiver of proceedings for the declaration of enforceability does not mean the removal of the control of grounds for the declaration of enforceability.

In particular, the judgement-debtor may apply to the court for refusal of enforcement arguing on the basis of Art. 45 par.1 in conjunction with Art. 46 of the Brussels I bis Regulation that:

1) enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed;

2) the judgment 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 defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3) the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

4) the judgment 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;

5) the judgment is contrary to detailed arrangements concerning insurance matters, consumer contracts and individual contracts of employment, but only when the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant;
or

6) the judgement conflicts with the provisions of exclusive jurisdiction.

With some minor amendments, those grounds correspond to the provisions of Art. 34 and 35 of the Brussels I Regulation.

From the list indicated above, a particular attention should be given to two of the grounds.

³⁴ Article 44 par.2 of the Brussels I bis Regulation

First of them is a violation of public policy. The Brussels I Regulation provides that a foreign judgment shall not be recognized if such recognition is manifestly contrary to the public policy of the enforcement state. This ground for review has remained unchanged under the Brussels I bis Regulation³⁵.

The courts of the enforcement state will still be entitled to apply their own national concept of public policy. However, they can do so only within specified European limits³⁶, which are inspired by Article 6 par.1 of the European Convention on Human Rights (“ECHR”)³⁷. This means that the courts are entitled to refuse enforcement only if the violated principle of national public policy has sufficient weight under European standards, in particular under the standards of the ECHR. The European Court of Justice (“ECJ”) has accepted the refusal of enforcement in cases where the court of origin refused to hear the defendant’s representative when the defendant did not appear personally³⁸ and where the court of origin excluded the defendant from further participating in the proceedings and thereby manifestly and disproportionately infringed his right to be heard³⁹.

Despite the objection against the enforcement (recognition) discussed above, which has a procedural character, there is also a possibility to invoke that enforcement (recognition) of the judgement is manifestly contrary to the substantive public policy of the enforcement state. Judgment-debtors have only very rarely invoked substantive public policy successfully⁴⁰. One of the most famous examples is the German case *Sonntag* where the German Federal Supreme Court (“BGH”) applied substantive public policy in its decision⁴¹. It is also interesting to know that according to the ECJ decision in *Renault v. Maxicar*, the court of enforcement may not refuse recognition and enforcement of a foreign judgment even if it considers that Community law was misapplied⁴².

³⁵ Article 34(1) of the Brussels I Regulation and Article 45 par.1 a of the Brussels I bis Regulation.

³⁶ ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, paras 22-23

³⁷ ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, paras 24-27

³⁸ ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98

³⁹ ECJ, 2 April 2009, *Marco Gambazzi v. Danieli*, C-394/07

⁴⁰ 2009 Brussels I Commission Report (note 6)

⁴¹ BGH, 16 September 1993, BGHZ 123, 268: Sonntag was a school teacher at a German school. During a school trip to Italy, a schoolboy died in an accident. An Italian criminal court ordered the teacher to pay damages to the boy’s parents. The BGH refused enforcement of the decision. This was because, under German law, the social security system replaces the personal liability of a teacher at a public school for injuries suffered by the students, and therefore only the state employing the teacher can be sued for compensation

⁴² ECJ, 11 May 2000, *Renault v. Maxicar and Formento*, C-38/98, para. 33

The next objection against the recognition and enforcement of the foreign judgement that deserves a little more comment is a situation when the judgement was rendered in default. In that case parties most often resist enforcement based on defects in the service of the document instituting the proceedings⁴³. It is worth noting that this ground for review was subject to change during the transition from the Brussels Convention of 1968 to the Brussels I Regulation.

Under the Brussels Convention, the debtor of a default judgment could refuse enforcement if the document instituting the proceedings “was not duly served [...] in sufficient time to enable [the defendant] to arrange for his defense.”⁴⁴. The Brussels I Regulation abandoned the notion of “duly served” and provided the judgment-debtor with a ground for refusing enforcement if service was not made “in sufficient time and in such a way as to enable him to arrange for his defense.”⁴⁵. This language has remained unchanged in the Brussels I bis Regulation⁴⁶.

The wording of the Regulation makes clear that compliance with the applicable provisions on proper service is not examined. The only issue examined is whether the service effectively enabled the defendant to take note of the action and prepare his defense. The date of service is indicated on the Certificate⁴⁷.

The Brussels I bis Regulation also maintains the limitation introduced by its predecessor (Brussels I) that the judgment-debtor cannot invoke the ground for refusal if “he failed to commence proceedings to challenge the judgment when it was possible for him to do so.”⁴⁸. This exception requires that the judgment-debtor be acquainted with the contents of the judgment because it was served on him in sufficient time to enable him to prepare his defense⁴⁹.

The court examine the grounds for review upon the judgment-debtor’s application for refusal of enforcement⁵⁰. As under the Brussels I Regulation, the

⁴³ 2009 Brussels I Commission Report (note 6)

⁴⁴ Article 27 par.2 of the 1968 Brussels Convention

⁴⁵ Article 34 (2) of the Brussels I Regulation

⁴⁶ Article 45 par.1 (b) of the Brussels I bis Regulation

⁴⁷ Annex I, Section 4.3.2 of the Brussels I bis Regulation

⁴⁸ Article 34 (2) of the Brussels I Regulation and Article 45 par.1 (b) of the Brussels I bis Regulation

⁴⁹ ECJ, 14 December 2006, *ASML v. SEMIS*, C-283/05

⁵⁰ Article 46 of the Brussels I bis Regulation

court shall decide “without delay.”⁵¹ Up to two levels of appeal are available against the first-instance decision on the application, which may lead in some Member States to three instances that examine the grounds for review⁵².

Within the framework outlined above, the review procedure is subject to the law of the enforcement state⁵³. National law will therefore determine what court is competent, what time limit the judgment-debtor must respect for filing the application and what procedure applies

CONCLUSION

The above considerations lead to the conclusion that the Brussels I bis Regulation strikes a fair balance between the judgment-creditor and judgment-debtor. It brings certain improvements for both sides. It is clear that the abolition of proceedings for the declaration of enforceability (exequatur) is probably the most important change. It means the weakening of the position of the judgement-debtor. Therefore, an integral part of the new system is the creation of some protection measures for him in the Member State where the judgement is enforced.

⁵¹ Article 48 of the Brussels I bis Regulation

⁵² Articles 49 and 50 of the Brussels I bis Regulation

⁵³ Article 47 par.2 of the Brussels I bis Regulation