Regulation 1215/2012: Recognition and Enforcement

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I. Main features of the 2001 system of recognition and enforcement

- Difference between recognition and enforcement
- Already under BR I, a judgment was "recognised in the other Member States without any special procedure being required" (Art. 33(1) BR I).
- However, recognition could be refused under the grounds specified in Article 34 and 35 BR I.
- Yet an exequatur was needed where a person sought to enforce in one Member State ("the Member State addressed") a decision given in another Member State ("the Member State of origin") (Art. 38(1) BR I).
- Exequatur = a procedure which is aimed at granting enforceability in a Member State to a decision given in another Member State.
- According to the Commission: time-consuming and costly!
- One of main aims: „making cross-border litigation less time-consuming and costly" - abolition of exequatur (Recital 26 BR Ia)

2010 Commission's proposal (CP) for a recast

- **Abolition of exequatur**, with the exception of judgments in defamation cases and judgments given in collective compensatory proceedings („class actions").
- The defendant would have had certain **remedies** at his disposal, but:

- Substantive public policy would no longer have been available as a ground for refusing the enforcement of a foreign judgment!

- In the state of enforcement, violations of the defendant's right to be heard could no longer have been invoked as a ground for refusal!

- Weaker parties (insured, consumers) would no longer have received a privileged treatment at the stage of enforcement: A foreign judgment could not have been reviewed as to the jurisdiction of the court of the Member State of origin!

- **Criticism:**

- Contrary to other instruments which have abolished exequatur (e.g. European payment order, small claims, uncontested claims), the revised BIR would neither provide minimum procedural standards nor unified procedural rules; Necessity for control is stronger in cases involving contested and possibly large claims; Substantive public policy is still necessary as a safeguard, even in the EU; Protection of weaker parties is necessary at the stage of enforcement.

The new system

- Recital 26 BR Ia: Mutual trust- a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.
- **Abolition of exequatur**: Art. 39 BR Ia: „A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States **without any declaration of enforceability being required**."
- The certificate issued in the state of origin (Art. 53 BR Ia) is a functional substitute for the former declaration of enforceability issued in the state of enforcement.
- However, pursuant to Art. 46 BR Ia, the enforcement of a judgment shall be **refused**, on **the application of the person against whom enforcement is sought**, where one of the grounds referred to in Art. 45 BR Ia is found to exist (so-called **"reverse exequatur").**
- Art. 45 BR Ia mostly replicates and even slightly **extends** the grounds for refusing the recognition of a foreign judgment formerly found in Art. 34, 35 BR I.
- In certain cases, using the European Order for Uncontested Claims - Payment Order - Small Claims Procedure may still be more advantageous to the judgment creditor (in particular, no public policy clause).

Transitory provision

- A judgment is given by a court in Bucharest against debtor D on 15 January 2015. The proceedings were instituted in May 2013. Claimant C wants to enforce this judgment in France. Which version of the BR will apply to the enforcement, that of 2001 or that of 2012?
- **Art. 66(2) BR Ia: · Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted before 10 January 2015 (even if the judgment is given after that date!).**
- less liberal than the rule governing the transition from the BC to BR I (cf. Art. 66(2) BR I).

II.Recognition

- As before, recognition without any special procedure (Art. 36(1) BR Ia).
- A party who wishes to invoke a foreign judgment must produce (Art. 37)

- **a copy of the judgment** as defined in Art. 37(I)(a) BR Ia and

- **the certificate** issued pursuant to Art. 53 BR Ia - form set out in annex 1

- If necessary, a translation of the judgment (Art. 37(2) BR Ia).

- Pure" recognition of a foreign judgment may be relevant e.g. for declaratory actions.
- Recognition will in most cases take place incidentally (Art. 36(3) BR Ia).
- A special procedure is provided in Art. 36(2) BR Ia (positive declaration of recognition) and Art. 45(4) BR Ia (refusal of recognition)

R. 1215/2012 RECOGNITION & ENFORCEMENT

(a) Authentic copy of judgment; (b) Certificate that it is enforceable

Recognition [36]

1. Automatic recognition [37]
2. Application that there are no grounds for refusal (or for refusal [45.4, 38.b])
3. Incidental refusal

Enforcement

NAT. LAW [41.1]

Service of certificate [43]

Grounds – proceedings NAT. LAW

[41.2]

Refusal

[46]

Grounds: (a) against public order; (b) in default and not sufficient time and no challenge; (c-d) irreconciliable with another judgment; (e) conflicts with certain rules of jurisdiction [45.1]

Appeal [49]

Further appeal [50]

PROVISIONAL MEASURES

[40, 43, 44.a]

ENFORCEMENT MEASURES

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(a) Authentic copy of judgment; (b) Certificate that it is enforceable

Proceed. 21/6/12 - 10/1/15 **R 44/2001**
Case C-541/10, 21 June

Declaration of enforceability

Refused

Granted, served

Appeal [49]

urther appeal [50]

Enforcement

NAT. LAW [41.1]

Service of certificate [43]

Grounds – proceedings NAT. LAW

[41.2]
Refusal
[46]

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PROVISIONAL

MEASURES

[40, 43, 44.a]

Enforcement

ENFORCEMENT MEASURES

II.1.What can be recognised and enforced?

- The notion of „judgment" is now defined in Art. 2(a) BR Ia:
- „'[J]udgment' 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 a decision on the determination of costs or expenses by an officer of the court.
- For the purposes of Chapter III, 'judgment' includes **provisional, including protective, measures** ordered by a court or tribunal which by virtue of this Regulation **has jurisdiction as to the substance of the matter**.
- **It does not include** a provisional, including protective, measure which is ordered by such a court or tribunal **without the defendant being summoned to appear**, unless the judgment containing the measure is **served on the defendant prior to enforcement**;"
- lack of surprise effect · Useful alternative: seizure of bank accounts, Reg. 655/2014.

II.1.What can be recognised and enforced?

- Irrelevant factors:

- Parties‘ nationalities or domiciles, see Recital 27: „For the purposes of the free circulation of judgments, a judgment given in a Member State should be recognised and enforced in another Member State **even if it is given against a person not domiciled in a Member State**. “

- The basis for jurisdiction of the court of origin (except for Art. 45(1)(e) BR Ia) – contradiction with Section 3,4,5,6 (insurances, consumers, employment, exclusive jurisdiction)

- Finality of the judgment (cf. Art. 39 BR Ia: “Enforceability” is sufficient)

II.1.What can be recognised and enforced?

- **Are only decisions on the merits covered? What about decisions on jurisdiction?**
- **C-456/11, Gothaer**: - Chapter III also covers a judgment by which the court of a Member State declines jurisdiction on the basis of a jurisdiction clause, irrespective of how that judgment is categorised under the law of another Member State.
- The court before which recognition is sought of a judgment by which a court of another Member State **has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding** – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – **regarding the validity of that clause**.

NOW: ART.31 alin.2: where a court of a Member State on which an agreement as referred to in Article 25 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.

II.1.What can be recognised and enforced?

- Not recognisable are:
- Ex parte decisions on preliminary or provisional measures, unless the judgment containing the measure is served on the defendant prior to enforcement.

- Decision on recognition or granting exequatur of a judgment rendered in a third state: "Exequatur sur exequatur ne vaut."

- Decisions of a state court into which an arbitral award has been "merged".

- Authentic instruments and court settlements are not "judgments" as defined in Art. 2(a) BR Ia; still, the may be enforced in a similar maner (Articles 58-60 BR Ia).

II.2. Effects of recognition

- recognition must 'have the result of conferring on judgments **the authority and effectiveness accorded to them in the State in which they were given**' (C-145/86, Hoffmann, par.10).
- Accordingly, a foreign judgment which has been recognised under Article 33 of Regulation No 44/2001 must in principle have **the same effects** in the State in which recognition is sought **as it does in the State of origin** (Hoffmann, par. 11, C-456/11, Gothaer par. 34)

III. Grounds for refusing recognition and/or enforcement
III.1. Public Policy

- Art. 45(1)(a) BR Ia: Public Policy „On the application of any interested party, the recognition of a judgment shall be refused […] if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed."
- **ECHR and EU public policy** are parts of the domestic public policy of each member state (C-7/98, Krombach; C-38/98, Renault).

- BUT: The fact that a judgment given in a Member State **is contrary to EU law** as such does not justify that judgment's not being recognised in another Member State on the grounds that it infringes public policy in that State **where the error of law relied on does not constitute a manifest breach of a rule of law regarded as essential in the EU legal order** and therefore in the legal order of the Member State in which recognition is sought or of a right recognised as being fundamental in those legal orders. That is not the case, e.g., of an error affecting the application of a provision such as Article 5(3) of the Trade Mark Directive (C-681/13, Diageo Brands)

No grounds

- **Case C-302/13, FlyLAL: Does not constitute grounds establishing the infringement of public policy of the Member State in which recognition is sought which would permit the refusal of recognition and enforcement in that Member State of such a judgment given in another MS:**
- **the detailed rules for determining the amount of the sums which are the subject of the provisional and protective measures granted by a judgment in respect of which recognition and enforcement are requested, in the case where it is possible to follow the line of reasoning which led to the determination of the amount of those sums, and even where legal remedies were available which were used to challenge such methods of calculation**
- **the mere invocation of serious economic consequences.**

III. Grounds for refusing recognition and/or enforcement

- „When determining whether there is a manifest breach of public policy in the State in which recognition is sought, the court of that State must take account of the fact that, save **where specific circumstances make it too difficult, or impossible, to make use of the legal remedies** in the Member State of origin, **the individuals concerned must avail themselves of all the legal remedies available in that Member State** with a view to preventing such a breach before it occurs." (C- 681/13, Diageo Brands).
- „The courts of the Member State in which enforcement is sought may refuse to enforce a judgment given in **default of appearance** which **disposes of the substance of the dispute** but which does **not contain an assessment of the subject-matter or the basis of the action and which lacks any argument of its merits**, only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of the impossibility of bringing an appropriate and effective appeal against it." (C-619/10, Trade Agency/Seramico).

III.2. Judgment given in default of appearance

- Art. 45(1)(b) BR Ia: „On the application of any interested party, the recognition of a judgment shall be refused where 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 defence, **unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so**." – **see C-70/15, Lebek- including applications for relief when the period for bringing an ordinary challenge has expired**
- it does not necessarily require the document which instituted the proceedings to be duly served, but rather requires that **the rights of the defence are effectively respected** (*ASML*, C-283/05)
- unchanged from earlier version - But CJEU's case law on R.1393/2007 Regulation, especially C-325/11 – Alder- precluding legislation of a Member State- judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are **placed in the case file**, and deemed to have been effectively served, if that party has **failed to appoint a representative** who is authorised to accept service and is resident in the first Member State, in which the judicial proceedings are taking place.

III.2. Judgment given in default of appearance

- **C-619/10, Trade Agency**: „where the defendant brings an action against the declaration of enforceability of a judgment given in default of appearance in the Member State of origin which is accompanied by the **certificate** provided for by Article 54 of that regulation, claiming that he has not been served with the document instituting the proceedings**, the court of the Member State in which enforcement is sought hearing the action has jurisdiction to verify that the information in that certificate is consistent with the evidence**." ().
- The same should apply to Art. 45(1)(b) and Art. 53
- **C-559/14, Meroni**- Recognition and enforcement of provisional and protective measures - **the recognition and enforcement of an order issued by a court of a Member State, without a prior hearing of a third person whose rights may be affected by that order, cannot be regarded as manifestly contrary to public policy in the Member State in which enforcement is sought or manifestly contrary to the right to a fair trial within the meaning of those provisions, in so far as that third person is entitled to assert his rights before that court.**

III.2. Judgment given in default of appearance

C-394/07, Marco Gambazzi - the court of the State in which enforcement is sought may take into account, with regard to the public policy clause referred to in that article, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.

III.3. „Irreconcilable“ judgments

- Art. 45(1)(c) BR Ia: Irreconcilable judgments - (c) if the judgment is irreconcilable with a judgment given between the same parties in the MS addressed
- judgments that entail legal consequences which are mutually exclusive (C-145/86, Hoffmann).
- Both judgments must have been rendered between the same parties (including cases of succession).
- Domestic judgments (Art. 45(1)(c) BR Ia) prevail, regardless of priority.

IV.4. Judgment of another Member State or a third state -Irreconcilable

(d) if the judgment is irreconcilable with an earlier judgment given in another MS or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the MS addressed."

- **Irreconcilable judgment**:

- Between the same parties (same as in letter c) BUT

- Same cause of action (merely related actions do not suffice)
- earlier judgment fulfills the conditions for its recognition in the MS addressed
- given „in another MS" - different from the state of enforcement or from the state of origin as well? –**C-157/12, Salzgitter Mannesmann Handel GmBH**
- **not covering irreconcilable judgments given by courts of the same Member State** Only three-state scenarios are covered by the provision. Internal conflicts (two irreconcilable judgments given in the same state) should be left to the domestic law of that state. Reason: Mutual trust among Member States.
- Contrary to Art. 45(1)(c) BR Ia, the conflict between the judgments in letter (d) is solved according to the **principle of priority**: The earlier judgment prevails.
- As far as **judgments from third states** are concerned, their recognition and enforcement is governed by the state of enforcement's domestic law.

IV.5. Jurisdiction protecting weaker parties and exclusive jurisdiction

- Art. 45(1)(e) BR Ia: Innovations:
- Employees are now included as protected parties as well.
- Jurisdiction protecting weaker parties can only serve as a ground for refusing recognition/enforcement in cases where the weaker party has been in the role of defendant (otherwise, there is no need for protection).

- Not yet settled: Is Art. 45(1)(e) BR Ia applicable as well when the court of origin has failed to inform the weaker party (as a defendant) of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance (Art. 26(2) BR Ia)?

Strict interpretation

- art.45 BIR interpreted in a literal way, blocking any recourse to domestic law during exequatur

- **C-139/10, Prism Investments BV**- Debtor **could not**, in the course of exequatur proceedings, **invoke the fact that he had already paid** the sum demanded from him in the judgment which the creditor sought to enforce.
- the debtor could raise the objection against the actual enforcement of the title in **separate proceedings under the domestic law** of the state of enforcement.
- Art. 41 BR Ia: ▪ „1. Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another MS shall be governed by the law of the MS addressed. A judgment given in a MS which is enforceable in the MS addressed shall be enforced there under the same conditions as a judgment given in the MS addressed.
- 2. Notwithstanding par. 1, **the grounds for refusal or of suspension of enforcement under the law of the MS addressed shall apply in so far as they are not incompatible with the grounds referred to in Art. 45**."
- **Enforcement** (not recognition!) may be challenged "in the same procedure" (cf. Recital 30 BR Ia) by the debtor in the state of enforcement if he has already paid the sum demanded from him - **the grounds for refusal available under national law and within the time-limits laid down in that law.**

V. Further Improvements

- Under Art. 47(1) and (2) BR I, only the declaration of enforceability carried with it the (automatic) power of the creditor to proceed to any protective measures; before that, the creditor was limited to provisional measures available under the domestic law of the state of enforcement.

- Pursuant to Art. 40 BR Ia, **an enforceable judgment** (Art. 39) shall already carry with it by operation of law the power to proceed to protective measures in the state of enforcement → speeding up of enforcement proceedings/surprise effect!

- Under Art. 47(3) BR I, no measures of enforcement – other than protective measures – could be taken against the debtor while exequatur proceedings were pending → automatic protection of the debtor by operation of law.

- Art. 44(1) BR Ia- the debtor has to file an extra application for any suspension or limitation of enforcement proceedings – merely applying for a refusal of enforcement under Art. 46 BR Ia is not sufficient to trigger protection!

VI.Adaptation

- What happens if a judgment contains a measure or an order which is not known in the law of the member state addressed?
- In this case, the newly introduced Art. 54 BR Ia provides for the possibility of an adaptation of the foreign title (cf. also Recital 28).
- The measure should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. - How, and by whom, such an adaptation is to be carried out should be determined by each Member State.
- Note: For the determination of a penalty, Art. 55 BR Ia (formerly Art. 49) remains a lex specialis. The court of origin has to fix the final sum.

About judgments...