Recognition and enforcement of foreign judgments under the Brussels Ia Regulation

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Recognition

Recognition of a judgment happens when a court of one Member State takes a judgment of another into account in reaching a decision on a matter before it.

Positive effect: 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

Negative effect: the foreign judgment constitutes a sufficient basis for a plea of res judicata (*ne bis in idem* principle)

Enforcement

Enforcement of a judgment entails taking steps against a person in order to give the judgment effect (for example by the recovery of money from that person in satisfaction of a judgment)

- Recognition → (especially relevant for) declaratory/constitutive judgments

- Enforcement → (especially relevant for) condemnatory judgments

Recognition and enforcement are legally distinct in the sense that, depending on the legal framework governing the judgment, not all judgments that are recognized must be enforced.

If the foreign judgment concerns the establishment of a certain status it is sufficient to, for example, invoke recognition of that status in ongoing proceedings.

If the foreign judgment concerns an order to perform a certain act (e.g., make a payment or transfer ownership), mere recognition is generally insufficient. Recognition is also sometimes a prerequisite for enforcement.

In Italy, for example, the entry of a mortgage in the LR is outside enforcement proceedings and doesn’t require an exequatur (as far as the judgment is enforceable in the MS of origin).

On the opposite, the entry of an attachment (which is the starting point of enforcement proceedings) requires an exequatur

Evolution of «Brussels regime»

- 1968 Brussels Convention between the then six Member States of the EC
- 2001 Transformation into the Brussels I Regulation (44/2001)
- 2012 Brussels I recast (1215/2012) → Entrance into force: 10/1/2013 → Applicable since 10/1/2015 (judgments handed down in legal proceedings instituted on or after 10 January 2015)

Recognition

- Brussels Convention → automatic (no special procedure required)
- Brussels I → automatic
- Brussels Ia → automatic

Enforcement

- BC → exequatur required (judicial procedure)
- BI → exequatur (almost administrative procedure)
- BIa → no exequatur

Brussels I provides (Art. 33) for the automatic recognition (i.e., without any special procedure being required) of a judgment rendered in another Member State, with limited grounds for non-recognition (Artt. 34,35).

Same rules in Reg. 650/2012 on successions (Articles 39, 40)

for judgments that the party does not seek to enforce → no application for recognition is necessary, even though such an application is possible;

for judgments that the party seeks to enforce → both Brussels I and Reg. 650/2012 require a declaration of enforceability (so called exequatur) before measures can take place;

the Court grants exequatur *inaudita altera parte* and without reviewing the grounds for recognition and enforcement ….

the other party can then appeal;

the winning party can proceed to enforcement measures only if and when the losing party does not appeal or the appeal is dismissed;

in the meantime, the winning party is limited to protective measures

The main difference between the Brussels I Regulation and the Brussels Ia Regulation is that under the former an application is required to the local court for enforcement, whereas under the latter such procedure is abolished.

Simplified EU procedures which don’t require intermediate measures in the MS of enforcement

European Enforcement Order (805/2004). It is a simple procedure that can be used for uncontested cross-border claims. This procedure allows a judgment in an uncontested claim delivered in one Member State to be easily recognised and enforced in another Member State.

Reg. 1896/2006 created the first genuine European civil procedure – the European Order for Payment procedure (EOP).

It is a simplified procedure for cross-border monetary claims which are uncontested by the defendant, based on standard forms. If there is no statement of opposition by the defendant, the EOP will become automatically enforceable.

A judgment given in the European Small Claims Procedure (= up to € 5000: Reg. 861/2007 as amended) is recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Recital 26 Brussels Ia

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.

Article 36 Brussels Ia

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

A party who wishes to invoke a foreign judgment must produce (Art. 37)

- a copy of the judgment that satisfies conditions necessary to establish its authenticity

and

- a standard form certificate issued by the court that granted the judgment

- If necessary, a translation of the judgment

Recognition will in most cases take place incidentally: art. 36 (3).

Art. 36 (2) allows «any interested party» to seek «a decision that there are no grounds for refusal of recognition» → this permits the judgment creditor, among others, to seek declaratory relief in advance of a potential proceeding under Arts 45 (refusal of recognition) and 46 (refusal of enforcement)

Refusal of recogniton

Article 45

1. On the application of any interested party, the recognition of a judgment shall be refused:

- (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed (so called public policy clause)

In July 2017 the Italian Court of Cassation established that a “punitive damages” foreign condemnation is generally not against public policy

fair trial clause

(b) 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;

irreconcilable judgments clauses

(c) if the judgment is irreconcilable (= entails legal consequences which are mutually exclusive) with a judgment given between the same parties in the Member State addressed;

(d) if 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; or

exorbitant jurisdiction clause

(e) if the judgment conflicts with:

- the jurisdictional rules concerning the protection of weak parties (consumers, employees, etc.)

- the rules conferring exclusive jurisdiction

«Reverse exequatur»

Under Brussels Ia, the judgment debtor may apply for refusal of enforcement of the judgment on the non-recognition grounds of. Art. 45, which replicate the existing Arts. 34 and 35 of Brussels I

Very important: the grounds for non-recognition/enforcement may not be invoked ex officio by Courts/Land Registrars

Scope. Excluded matters

Inside → civil and commercial matters (Art. 1).

Outside →

acta iure imperii (Art. 1)

status/legal capacity (Art. 2 a)

bankruptcy (Art. 2 b)

social security (Art. 2 c)

arbitration (Art. 2 d)

matrimonial property (Art. 2 e)

succession/wills (Art. 2 f)

What does «judgment» mean?

The definition of judgment is broad and covers any judgment given by a court or tribunal of a MS, irrespective of what it may be called.

Art. 2 (a)

- ‘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 a decision on the determination of costs or expenses by an officer of the court.

provisional, including protective, measures

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

As a result, measures ordered by a court having jurisdiction as to the substance of the matter can freely circulate if they are served on the defendant prior to enforcement.

This is a sort of «middle ground solution», because it stongly reduces the rights of the debtor without giving to the creditor the possibility to benefit of the surprise effect

Authentic instruments /Court settlements

Authentic instruments and court settlements are not judgments according to the definition of Art. 2(a), but they may be enforced in a similar way (Arts. 58-60)

Exclusive jurisdiction

Art. 24

(1) proceedings which have as their object rights in rem in immovable property or tenancies of immovable property → the courts of the Member State in which the property is situated (lex rei sitae)

(3) proceedings which have as their object the validity of entries in public registers → the courts of the Member State in which the register is kept (lex auctoris)

Lex rei sitae/Lex auctoris as a general rule for immovable/LR.

It seeks to protect trade and legal certainty; general confidence in the content of the registers and in their consequences must be protected in the same way, no matter whether we deal with a cross-border judgment or not

Carruthers J.M., The transfer of Property in the Conflict of Laws (2005):

“If the rule were otherwise, recording systems would ... be rendered too cumbersome, costly and uncertain. There is obvious value in keeping the search process as simple, expeditious, and inexpensive as is possible”

Very often it is difficult to establish whether an action falls within the scope of the rules on exclusive jurisdiction or not.

Case C-518/99 Gaillard/Chekili

Even if, in some circumstances, proceedings for rescission of a contract for the sale of immovable property may have some impact on the title to the property, they are none the less based on the personal right that the claimant obtains under the contract entered into between the parties and consequently may only be raised against the other party to the contract. By raising these proceedings, one party to the contract seeks to be released from his contractual obligations towards the other party, by reason of the latter's failure to perform the contract. …

… Furthermore, the decision of the court which is to decide the case is capable of having effect only as regards the party against whom the order of rescission is made. It follows that the proceedings do not have as their object rights which relate directly to immovable property and can be raised erga omnes → An action for rescission of a contract for the sale of land and consequential damages is not within the scope of the rules on exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property under Article 16 (1) of the Brussels Convention

C-417/15 Schmidt

The applicant in the main proceedings (Wolfgang Schmidt) was the owner of a plot of land in Vienna.

By contract of gift of 14 November 2013, he gifted the land to his daughter Christiane, the defendant in the main proceedings (who was living and lives in Germany).

By virtue of the contract of gift she was entered in the land register as the landowner

C-417/15 Schmidt

In the main proceedings before the national court, the applicant claims that the contract of gift should be avoided on the ground of its invalidity and the entry evidencing the right of ownership in the name of the defendant be removed, because, at the time the gift was made, he lacked legal capacity.

C-417/15 Schmidt

The defendant in the main proceedings contends that the Austrian court before which the action was brought lacks jurisdiction.

She submits that the applicant is not seeking to enforce a right in rem within the meaning of Article 24(1) of the Brussels Ia Regulation

C-417/15 Schmidt

After the applicant in the main proceedings had a notice of legal action entered in the land register, the national court stayed the proceedings pending before it and referred the following question to the Court for preliminary ruling:

C-417/15 Schmidt

‘Does a proceeding concerning the avoidance of a contract of gift on the ground of the donor’s incapacity to contract and the registration of the removal of an entry evidencing the donee’s right of ownership fall within the scope of Article 24(1) of the Brussels Ia Regulation, which provides for exclusive jurisdiction over rights in rem in immovable property?’

C-417/15 Schmidt - Conclusion (AG/ECJ)

An action for the avoidance of a gift of immovable property, such as that in the main proceedings, does come not within the scope of Article 24(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

By contrast, an action for removal of the right of ownership in the gifted property in the land register does come within the scope of that provision.

In a case such as that in the main proceedings, both applications may be combined with one another under Article 8(4) of the Regulation No 1215/2012 before the court having jurisdiction under Article 24(1).

Recognition/enforcement models

First theory (Gleichstellungstheorie – Theory of equalisation) → ABSOLUTE EQUALISATION OF EFFECTS

The foreign judgment may be given the same effects within a legal system as a corresponding domestic judgment

at the other end of the spectrum

Second theory (Wirkungserstreckungstheorie – Theory of extension) → ABSOLUTE EXTENSION OF EFFECTS

The foreign judgment may be given the same effects within a legal system as it would have in its legal system of origin (at least insofar as such effects are compatible with the procedural and remedial rules of the recognising state and with his public policy and mandatory rules)

middle ground solution

Third theory (Kumulationstheorie/Double limitation theory) →

The extension of effects of the legal system of origin normally applies only to the extent that they are compatible with the legal system of the requested state.

It often implies a sort of “double limitation” → judgments issued in other Member States are granted the same value as domestic judgments in the MS of destination, but not more than domestic judgments (first limit) and not more than in the MS of origin (second limit).

C - 145/86 Hoffmann v. Krieg

“Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given" (§ 10)

C - 456/11 Gothaer/Samskip

«As the Court has observed, referring to» Jenard report «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./.Krieg*, § 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 (see, to that effect, *Hoffmann*, § 11).»

C- 420/07 Apostolides/Orams (§ 66)

Although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given (see Hoffmann, §§ 10,11), there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the MS of origin (see the Jenard Report) or effects that a similar judgment given directly in the MS in which enforcement is sought would not have

A. Dickinson – Recognition, Res Judicata and Abuse of Process, 2007

Although it is tempting to take statements, such as those in *Hoffmann v. Krieg* and the Jenard Report, as favouring a universally broad principle of extension of effects of Member State judgments, that temptation (it is submitted) should be resisted. Instead, it must be recognised that the law applicable to the intra-Community effects of judgments in cross-border situations may differ according to the type of effect in issue….

…. In each case, the "choice of law solution" may involve application, individually or in combination, of the law of the Member State of origin [(*lex loci judicii*)], the law of the recognising State [(*lex loci legitimationii*)] and/or European Community law (derived from Regulation 44/2001).

ADAPTATION

Art. 54 Brussels Ia

“If 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”.
Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

Art. 54 endorses the criterion known as “functional equivalence".

However, the Regulation does not clarify how to proceed to such adaptation, nor does it specify by whom it should be done → Recital 28: “…How, and by whom, the adaptation is to be carried out should be determined by each Member State”.

Land registrar?

The adaptation principle is very tricky and puts a heavy burden on our (Land registrars/Judges) shoulders.

Possible tension with numerus clausus principle

Importance of IMOLA II in this field

[Case C-218/16 – Kubicka - Immovable property located in a MS (Germany) in which legacies ‘per vindicationem’ do not exist — Refusal to recognise the material effects of such a legacy - Opinion of advocate general Bot delivered on 17 May 2017 – Decision 12 October 2017]

C-218/16 – Kubicka

Art. 1(2)(k) and (l) and Art. 31 of Regulation (EU) No 650/2012 must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy ‘by vindication’, provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.