

**REGULATION 1215/2012 AND LAND REGISTRY.  
CONCLUSIONS.**

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**I. INTRODUCTION**

This Regulation 1215/2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) is known as Brussels I “bis” or “a”, because it succeeds the Brussels Convention of 1968 and the Brussels I Regulation (44/2001). It is the most important instrument in the sphere of private international law.

It has been discussed at the meetings held in Helsinki and Lisbon.

In Helsinki, 22 September 2016, with:

- an “overview”, by prof. Guillermo Palao
- a presentation on “exclusive jurisdiction”, by judge Michele Cuccaro
- another on “protective measures”, by myself.

In Lisbon, 16 March 2017, again judge Michele Cuccaro showed a presentation on recent case-law of the European Court of Justice on exclusive jurisdiction.

The scope of Regulation 1215/2012 excludes administrative liability of the State, capacity of persons, family, succession and insolvency proceedings.

This Regulation sets out rules on

- a) international jurisdiction of Member States, if any of the parties to the proceedings is domiciled in a Member State other than the Member State of the court seised or the subject matter is related to a different State; and
- b) recognition and enforcement of a judgment given in a Member State, in case it is meant to have effects in another Member State.

The land registry gives publicity to rights, encumbrances and limitations on immovable property, or to documents –including judgments- relating to them.

Let us summarise the Regulation rules on jurisdiction, recognition and enforcement of judgments that may be related to the land registry.

### I.1. Jurisdiction

Article 24 of the Regulation describes situations that exclude the jurisdiction of any other Member State, that is, the **exclusive jurisdiction** in proceedings:

“(1) ... 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;”

“(3) ... which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;”

“(5) .... concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.”

Where **other actions** are involved (such as the existence or validity of a contract on immovable property), the rules set out by the Regulation on international **jurisdiction may be excluded** by submission to the court or “prorogation of jurisdiction”. This happens where the parties have agreed in writing which courts should have jurisdiction

(Article 25) or the defendant enters an appearance and does not contest the jurisdiction of the court (Article 26).

There is a special rule on **provisional measures**: a party may apply for provisional or protective measures either to the court that deals with the main proceedings (Article 2(1)) or to the competent court in the State where the measure should produce its effects (Article 35).

## I.2. Recognition

Recognition of a judgment was legally defined in Article 17(1) of the Regulation No 1346/2000 on insolvency proceedings: “The judgment ... shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings” (now Article 20.1 of R 2015/848). In words of the Court of Justice, recognition must “have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given” (15 November 2012, C-456/11, *Gothaer Allgemeine Versicherung*).

The principle is recognition of a judgment “without any special procedure being required” (Article 36.1). A judgment may be invoked either in private civil and commercial relations or before a court or an authority (Articles 37.2 and 38). Any interested person may apply for recognition or non-recognition in stand-alone proceedings (Articles 36.2, 38(b) and 45). In case a judgment is invoked before a court (or an authority, including land registry), the other party may apply for refusal of recognition before that court, an incidental question to the proceedings (Article 36.3).

## I.3. Enforcement

Enforcement means making use of the authority of the State to achieve the result of a judgment against a defendant unwilling to obey the decision. That is why enforcement is considered a matter within the exclusive jurisdiction of the State where enforcement

is sought, the State where the property is situated or registered, in case of a right *in rem* or a provisional measure on immovable property.

Enforcement of a judgment given in another Member State does not need a previous procedure to declare its enforceability (Article 39) and the “judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State” where it should be enforced (Article 40). The other party may apply for refusal of enforcement (Article 46).

The party that wishes to have a judgment recognised or enforced shall provide the competent authority with (Articles 37.1 and 42.2):

- a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
- b) the certificate issued pursuant to Article 53.

Recognition and enforcement may be refused only on the application by any interested party, if a ground specified in Article 45 is met, namely manifest contradiction to public policy, irreconcilability with a judgment given between the same parties or conflict with the rules on exclusive jurisdiction.

## **II.- HOW DO THESE RULES PLAY?**

### **II.1. Rights in rem.**

Jurisdiction should not give rise to problems regarding land registry, because the rule is that only the courts of the Member State where the immovable property is situated have jurisdiction to deal with rights *in rem* and with the validity of entries in the registries. At the same time, only the courts of the Member State where the property is situated may enforce the judgment. Consequently, the judgment will be given and enforced in the same State.

We find judgments of the Court of Justice which interpret that there falls within the category of proceedings which have as their object “rights *in rem* in immovable property” an action:

- seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to a property (3 April 2014, C-438/12, *Weber*)
- for the termination of co-ownership in undivided shares (17 December 2015, C- 605/14 *Komu*)
- seeking the removal from the land register of notices evidencing the donee’s right of ownership (16 November 2016, C-417/15, *Schmidt*).

Judge Cuccaro pointed out that perhaps the answer could be different in the States where the existence of the right does not depend on its registration or a specific action is not required to remove the entry in the land registry or registration is an accessory effect of the judgment.

## **II.2. Contracts on immovable property.**

Contracts on immovable property do not fall within the scope of exclusive jurisdiction. The Court of Justice interprets as proceedings on a contract and not on a right *in rem* an action:

- whereby a creditor seeks to have a disposition of a right *in rem* in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor, *actio pauliana* (10 January 1990, C-115/88, *Reichert*)
- for the rescission of a contract for the sale of land and consequential damages (Order of 5 April 2001, C- 518/99, *Gaillard*)
- seeking the avoidance of a gift of immovable property on the ground of the donor’s incapacity to contract (16 November 2016, C-417/15 *Schmidt*).

The *Schmidt* judgment, that was commented by judge Cuccaro, quotes former judgments and states, once more, that

(30) “the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights *in rem* in

immovable property, but only those which both come within the scope of ... [the Brussels regulation] and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with protection for the powers which attach to their interest” and (31) “the difference between a right *in rem* and a right *in personam* lies in the fact that the former, existing in corporeal property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor”.

It concludes (42) that “ the court[s] of the Member State in which the property is situated ... has jurisdiction on the basis of a connection between claims, pursuant to Article 8(4) of Regulation No 1215/2012, to hear and determine the request for the avoidance of a contract of gift of immovable property, those two claims being brought against the same defendant”.

In matters relating to a contract, a person domiciled in a Member State may be sued:

- a) in the courts of that Member State, Article 4;
- b) in the place of performance of the obligation in question, Article 7(1); or
- c) “if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated”, Article 8(4).

If an action relating to a contract (*in personam*) has actually been joined to an action relating to a right *in rem*, it is quite clear that only the courts of the State where the property is situated have jurisdiction to deal with both of them.

### **II.3. Measures.**

An exception to the rule of exclusive jurisdiction exists in proceedings which object is a right *in personam* (a debt, a contract ...). The court with jurisdiction as to the substance of the matter may order a protective measure to guarantee the enforcement of its future

judgment, even if that measure implies an encumbrance or limitation on an immovable property of the defendant situated in another Member State.

In case a measure is ordered by the court of the State where the property is situated, pursuant to Article 35 or Article 40, no special problem arises: the law of that Member State applies entirely.

If a measure is ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter and the property is situated in another Member State, that order is considered a “judgment” (Article 2 (a)), unless the measure “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”.

Is registration a question of recognition or enforcement? Since no special procedure is required (Articles 36 and 39) and the judgment may be invoked before any authority (Articles 37.2 and 38), an interested person may produce the judgment (and certificate) directly to the registry. The party needs not apply for enforcement to a court.

Nevertheless, nothing prevents a party from seeking enforcement of an order issued by a court of another Member State. That has happened in Spain, for example, and enforcement has been granted.

Of course, the applicant is free to institute proceedings for recognition of the judgment, pursuant to Article 36.2, and the owner of the right may apply for non-recognition (Article 38(b)).

In case there has been no application to a court, the registrar is the competent authority to recognise the measure to be registered in the State where the property is situated. Otherwise, it is the court. The registrar’s decision produces its effects only for the purpose of registration, it is subject to a further judicial decision, as is commonly admitted for incidental recognition.

The actual problem, in any case, is the nature of the measure. Entering a record in the land registry may be denied because that specific measure is not known in the Member State where it should be registered. In Spain, two decisions of the General Directorate of Registries (in the Ministry of Justice), dated 1992 and 2004, have denied entering a record in the land registry for this reason. The difficulties are even more understandable in States with a *numerus clausus* system of rights *in rem*, in which rights not legally specified are not admitted.

That is why the Regulation states in Article 54:

“1. 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.

2. Any party may challenge the adaptation of the measure or order before a court.”

This paragraph number 2 implies that the registrar may adapt the measure and his decision may be appealed before a court. Articles 37.2 and 38, with a reference to recognition by authorities other than a court, support this possibility, clear at present in the Spanish Act on Judicial Cooperation in Civil Matters that has entered into force in 2015.

It is apparent from this Article and Article 2(a) that the registrar may not make an attempt to examine the jurisdiction of the court that in the course of main proceedings has ordered a measure on immovable property situated in another Member State, with the excuse of having the courts of this State exclusive jurisdiction on rights *in rem*.

This applies even in case of a judgment in default, provided that the judgment containing the measure has been served on the defendant prior to enforcement (or recognition). Not only the certificate must state that the judgment has been served (point 4.5 of Annex I) but proof of service must be provided too (Article 42.2(c)).