

# The (Enforceable) Title Necessary to Enter a Mortgage Inscription

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# INTRODUCTION

How to deal with a request of registration of a mortgage based on a foreign title?

Presentation primarily based on Reg. (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

# KEY POINTS OF BRUSSELS I RECAST

It updates 'Brussels I regulation'.

It aims to make the circulation of judgments (authentic instruments and court settlements) in civil and commercial cases easier and faster within the EU, in line with the principle of mutual recognition and the Stockholm programme guidelines.

# KEY POINTS OF BRUSSELS I RECAST

The regulation applies in civil and commercial matters.

It does not apply, however, to family law, bankruptcy, inheritance questions and other specific matters listed in the regulation, such as social security or arbitration.

# KEY POINTS OF BRUSSELS I RECAST

Under Brussels Ia regulation, what was known as the exequatur procedure under the Brussels I regulation has been abolished. This means that a judgment given in one EU country is recognised in the other EU countries without the need for any special procedure. If it is enforceable in the country of origin, it is enforceable in the other EU countries without requiring any declaration of enforceability.

# KEY POINTS OF BRUSSELS I RECAST

The person against whom enforcement is sought must be informed of this by means of a certificate concerning a judgment in civil and commercial matters. This is drawn up at the request of any interested party (a model is provided in the regulation). The certificate must be accompanied by the judgment (if it has not already been served). It must be served on the person in reasonable time prior to enforcing the judgment.

# KEY POINTS OF BRUSSELS I RECAST

In certain cases, the person against whom enforcement is sought may apply for refusal of the recognition or enforcement of the judgment. This can arise when he or she considers one of the grounds for refusal of recognition stipulated in the regulation to be present (e.g. where the recognition of a judgment is manifestly contrary to public policy). EU countries must notify to the Commission the competent courts to which the application has to be submitted.

## Judgment: art. 2 (a)

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

(Specific definition for provisional, including protective, measures)



## Court settlement: art. 2 (b)

a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings

## Authentic instrument: art. 2 (c)

a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

- (i) relates to the signature and the content of the instrument; and
- (ii) has been established by a public authority or other authority empowered for that purpose

# Authentic instruments /Court settlements

Authentic instruments and court settlements are not judgments according to the definition of Art. 2(a) Reg. 1215/2012, but they may be enforced in a similar way (Arts. 58-60)

# 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 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 judicial mortgage in the LR is outside enforcement proceedings and doesn't require the enforceability of the title (as far as this title is a «sentenza»).

On the opposite, the entry of a writ of attachment (which is the starting point of enforcement proceedings) requires the enforceability of the title

# Court of Cassation 26/1/1996 n. 584

Article 2818 of (Italian) Civil Code, which, by attributing the nature of a title suitable for registering a judicial mortgage to "any judgment which leads to a condemnation to the payment of a sum or to the fulfillment of another obligation or to the compensation of damages to be liquidated subsequently", without any distinction, clarifies, only for such, that IT IS NOT NECESSARY FOR IT TO BE A JUDGMENT WHICH HAS BECOME FINAL OR, AT LEAST, ENFORCEABLE



This conclusion is valid only as far as an Italian «sentenza» is concerned.

In order to entry a mortgage based on a «decreto ingiuntivo» Italian law requires enforceability (at least provisional).

The cancellation of a judicial mortgage always requires a final judgment (res judicata)

# Court of Cassation 16/11/2021 n. 34574

By virtue of the combined provisions of Articles 2818 and 2884 (Italian) Civil Code, the appeal reform or the annulment with referral of the sentence on the basis of which a judicial mortgage was registered do not require the cancellation of the mortgage itself, which must be carried out by the registrar **ONLY WHEN ORDERED BY A FINAL JUDGMENT** or by another definitive provision issued by the competent authority.

# 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)
- Bla → 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.

When a party wishes to invoke a judgment or seeks its enforcement in another MS, s/he shall produce

- (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
- (2) the certificate issued pursuant to Art. 53 Bla, either in the standard version or with mandatory information → see Annex I;
- (3) if necessary, a translation or a transliteration of the contents of the certificate or a translation of the judgment

Furthermore, when the judgment orders a provisional, including protective, measure the certificate shall contain a description of the measure and certify that the court has jurisdiction as to the substance of the matter and that the judgment is enforceable in the Member State of origin.

Arts. 2(a) and 42(2)(c): provisional measure ordered without the defendant being summoned to appear

When a provisional, including protective, measure was ordered without the defendant being summoned to appear, the creditor shall provide the competent authority of the MS addressed also with proof of service of the judgment

# Copy of an Italian judgment

Authentic copy → certified as being in conformity with the original and therefore have the same legal value as the original document.

Before 1/3/2023 the “enforceable copy” was different, because it had to be endorsed with the so-called “enforcement formula” (issued only once and only in favor of the winning party or its heirs).



# DICKINSON-LEIN

Where less formal means of authentication are provided for in that State, these are sufficient to establish the authenticity of the judgment for the purposes of Art 37 in all Member States, regardless of whether, in the MS addressed, authentication is subject to more rigorous standards.

Thus, for example, the electronic copy of an Italian judgment authenticated by the lawyer of one of the parties in the way prescribed by Art 16bis of the Italian Decree-Law No 179/2012, should be deemed to satisfy the conditions necessary to establish its authenticity in all other MS, including in those MS where only court clerks have the power to issue certified true copies of judicial decisions.

# Certificate attached in the Annex I

contains the indication of the court of origin (name, address, and other relevant information), of the parties (identification of the claimant and of the defendant) and information regarding the judgment (date and reference number, whether the judgment was rendered in absentia, information about the service of the document instituting the proceedings on the defendant, operative part of the judgment, information about the type of obligation - monetary or otherwise - contained in the judgment, judgment ordering an interim/provisional measure, information about the costs and interest applicable).

The idea is that the enforcement court should be able to enforce the judgment on the strength of the certificate (or at most a translation of the certificate) if enforcement is not opposed

*ANNEX I*

**CERTIFICATE CONCERNING A JUDGMENT IN CIVIL AND COMMERCIAL MATTERS**

**Article 53 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

1. COURT OF ORIGIN

1.1. Name:

1.2. Address:

1.2.1. Street and number/PO box:

1.2.2. Place and postal code:

1.2.3. Member State:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DK ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HR ☐ HU ☐ IE ☐ IT ☐ LT ☐  
LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐

1.3. Telephone:

1.4. Fax:

1.5. E-mail (if available):

2. CLAIMANT(S) <sup>(1)</sup>

2.1. Surname and given name(s)/name of company or organisation:

2.2. Identification number (if applicable and if available):

2.3. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

2.4. Address:

2.4.1. Street and number/PO box:

2.4.3. Country:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DK ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HR ☐ HU ☐ IE ☐ IT ☐ LT ☐  
LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐ Other (please specify (ISO-code)) ☐

2.5. E-mail (if available):

3. DEFENDANT(S) <sup>(2)</sup>

3.1. Surname and given name(s)/name of company or organisation:

3.2. Identification number (if applicable and if available):

3.3. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

3.4. Address:

3.4.1. Street and number/PO box:

3.4.2. Place and postal code:

3.4.3. Country:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DK ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HR ☐ HU ☐ IE ☐ IT ☐ LT ☐  
LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐ Other (please specify (ISO-code)) ☐

3.5. E-mail (if available):

4. THE JUDGMENT

4.1. Date (dd/mm/yyyy) of the judgment:

4.2. Reference number of the judgment:

4.3. The judgment was given in default of appearance:

# Translation of the certificate

The court or authority before which the judgment is invoked or the competent enforcement authority may, where necessary, require the applicant to provide, in accordance with Art. 57, a translation or a transliteration of the contents of the certificate.

# Translation of the judgment

The court or authority before which the judgment is invoked may require the party to provide a translation of the judgment instead of a translation of the contents of the certificate if it is unable to proceed without such a translation. In addition, the competent enforcement authority may require the applicant to provide a translation of the judgment only if it is unable to proceed without such a translation.

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 recognition

## *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)



## 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

# VERY IMPORTANT

in a series of judgments handed down on 17 May 2022, the Grand Chamber of the ECJ held, inter alia, that if a domestic order for payment issued without explicitly addressing the issue of unfair terms is subsequently declared enforceable due to the absence of opposition, the unfairness of the terms may still be raised at the enforcement stage, either at the consumer's request or by a court ruling on opposition to enforcement

## «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

# AUTHENTIC INSTRUMENTS

An authentic instrument which is enforceable in the MS of origin shall be enforceable in the other Member States without any declaration of enforceability being required (Art. 58 Bla).

# Definition under Italian law

authentic instrument is a document drawn up by a notary or other public authority authorised to give it public faith in the place where the instrument is formed.

The authentic instrument constitutes full proof, up to a claim of forgery, of the source of the document from the public official who drew it up, as well as of the declarations of the parties and the other facts that the public official certifies as having taken place in her/his presence

## These instruments (art. 474 c.p.c.)

are enforceable when their content contemplates and documents a specific obligation to perform a certain obligation.

Consequently, a loan contract concluded before a notary is, under the conditions laid down by statute, an enforceable public deed, i.e. it is an enforceable title in respect of the obligation to repay the borrowed sum contained therein.



Such a loan - endorsed up to 28/2/2023 with the so-called “enforcement formula” (issued by the same public authority which issued the authentic instrument) – constitutes an enforceable title and allows the LR registrar to enter a mortgage inscription

When a party seeks the enforcement of an authentic instrument in another Member State, s/he shall produce

(1) an enforceable authentic instrument that satisfies the conditions necessary to establish its authenticity in the Member State of origin and

(2) the certificate issued under Art. 60

## Art. 60

The competent authority or court of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.

# Court settlement

A court settlement which is enforceable in the Member State of origin shall be enforced in the other Member States under the same conditions as authentic instruments (art. 59)

When a party seeks the enforcement of a court settlement in another Member State, s/he shall produce

- (1) an enforceable court settlement that satisfies the conditions necessary to establish its authenticity in the Member State of origin and
- (2) the certificate issued under Art. 60.

In Italy the parties may reach a settlement even without the involvement of the court, within the context of the ADR mechanisms.

Such a settlement, however, is not enforceable abroad under Bla (which refers only to court settlements in civil and commercial matters)