Recognition and Enforcement in the new Brussels I Regulation (Regulation 1215/2012, Brussels I recast): The Abolition of Exequatur

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I. Introduction

The recognition and enforcement of a foreign judgment has been traditionally subject to the compliance with typical requirements -such as compatibility with a judgment given between the same parties in the Member State addressed, or non-incompatibility with the forum’s public policy-, to be checked within the framework of a specific procedure – the so called “exequatur”. To the extent that exequatur procedure adds complexity, discomfort, and ultimately deters from entering into cross-border transactions in the same way that differences of language or currency do, the EU final goal is to abolish such intermediate step as among the Member States, in the name of mutual trust. One of the priorities set by the European Council of Tampere was the removal of all measures which impede the effectiveness of an intra-European judicial area, proclaiming the so-called "Principle of mutual recognition of judgments in civil and commercial matters".

In the last 10 years exequatur has been removed to allow for the direct enforcement of access rights and of decisions ordering the return of a child, as well as of certain decisions on money claims. Several regulations have already suppressed (altogether or just partially) the exequatur: that’s the case of the Regulation (EC) no. 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and responsibility parental (Brussels II bis); Regulation (EC) no. 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation on maintenance obligations; Regulation (EC) no. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European

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3 OJ 7L, 10.1.2009.

The revision of the Brussels I regulation was accompanied by an intense debate revolving around two main issues: on the one hand, the extension of the scope of the grounds of jurisdiction to non-EU defendants; on the other hand, the abolition of exequatur.

The new regime has not endorsed the first objective. As for the second, it has been achieved only to some extent: the exequatur proceeding has disappeared, but some safeguards have been kept that may prevent (or at least, slow down) the achievement of a swift, unhindered free movement of judicial resolutions within the EU.

II. From the Commission’s Proposal to the Final Text

1. Somewhere between Renewal and Continuity

Under Arts. 33 ff of the Brussels I Regulation a judgment\(^7\) given in a Member State shall be recognised in the other Member States without any special procedure being required. Nonetheless, any interested party who raises the recognition of a judgment as the principal issue in a dispute may apply for a decision that the judgment be recognised. The procedure for such purpose would be the one provided for in order to obtain the exequatur. As for the declaration of enforceability, it is granted following an application at the requested State; a purely formal check is performed on specific documents supplied at the State of origin. Although the regulation provides for grounds for refusal of exequatur, they are only relevant upon the debtor’s appeal against the declaration of enforceability. In the Regulation Brussels I recast the situation has been reversed: a judgment given in a Member State on the subject matter of the

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\(^6\) OJ 199L, 31.7.2007.

\(^7\) See Art. 32 on the meaning of “judgment” for the purposes of the Regulation. In the Brussels I recast, see also Art. 2: ‘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.
Regulation does not need to be declared enforceable in the other Member States; however, the person against whom enforcement is sought may apply for refusal of enforcement.

The recast of the Brussels I Regulation rests on political and economic arguments; the reform is based on a proposal of the Commission\(^8\), supported by various studies containing empirical data among which the outstanding so called “Heidelberg Report”\(^9\), and amended by the Parliament.\(^10\) According to the Heidelberg Report, getting a decision on exequatur is a matter of a few weeks, or even of a few days, and only about one to five percent of all cases of exequatur granted are appealed by the judgment debtor. The Commission reading of these data led to the conclusion that the declaration of enforceability “remains an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market”. The Heidelberg Report also noted that the substantive public policy exception is seldom pleaded in order to refuse the declaration of enforceability; from this the Commission inferred that the exception no longer serves a useful purpose. Thus, in the proposal of the European Commission on the reform of Regulation (EC) No 44/2001\(^2\), the exequatur procedure of the Regulation was replaced by a system of automatic “import” of foreign decisions. That did not mean the complete suppression of the grounds for non-recognition/enforcement: some procedural safeguards were still available at the State of origin; also, an extraordinary remedy in the Member State of enforcement would enable the defendant to contest any other procedural defects which might have arisen during the proceedings before the court of origin, infringing his right to a fair trial. A third remedy granted the defendant the possibility to stop the enforcement of the judgment in case of inconsistency with another judgment issued in the Member State of enforcement or - provided that certain conditions are fulfilled – in another country. The substantive public policy exception did not exist anymore.

The final text of the Brussels I bis Regulation does not endorse the Proposal; however, neither does it simply reproduce the previous model. Rather, it enshrines a system of direct implementation of the

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decisions in all Member States, upon submission of two documents to the competent authority of the executing State: a copy of the decision in the Member State of origin satisfying the conditions necessary to establish its authenticity, and a certificate issued by the court of origin in accordance with the form set out in Annex I of the regulation (Art. 42).

The certificate must be served on the person against whom enforcement is sought, together with the original decision if it has not yet been served. The person against whom enforcement is sought is entitled to apply for refusal of the recognition or enforcement of a judgment, if he considers one or more of the following grounds for refusal of recognition to be present: manifest contrariety to public order of the requested Member State, absence of service of the document instituting the proceedings in sufficient time when the judgment was rendered by default, irreconcilability with an earlier decision of the Member State required, irreconcilability with an earlier judgment in another state, or breach of specific rules of jurisdiction by the courts of the State of origin. The decision on the refusal of recognition or enforcement may be appealed.

2. The Rationale underlying the solution de compromis

Most of the debate on the abolition of the exequatur proceedings had to do with the abolition of the conditions usually –or potentially- examined in the requested State order to accord or to refuse enforceability to the foreign decision. Especially problematic was the removal of the public policy clause. As stated by the Parliament’s Report: “A Member State before which proceedings are brought is entitled to preserve its fundamental values; therefore, equally, it must be the case for a Member State in which the enforcement of a judgment is sought”\(^\text{11}\).

Public policy is a twofold defense: contrariety of recognition/enforcement to the forum’s public policy may be due to substantive reasons (substantive ordre public), or for procedural ones (procedural ordre public). To the extent that both family and succession matters are excluded from the scope of the Regulation, a case for incompatibility with substantive ordre public is certainly unusual. Surrogate motherhood provides nevertheless an example of the international ordre public of the forum. Those contracts are allowed in some Member States, whereas they are null and void and contrary to public policy in another. A problem could therefore arise if a surrogate mother tries to enforce a judgment of a

\(^{11}\) Report, at 138.
Member State awarding her compensation for the expenses incurred during the pregnancy in another Member State that prohibits such contracts.\footnote{12}

As for the procedural \textit{ordre public} (beyond service of process) no European regulation on procedural law sweeps away the clause without further ado. All regulations abolishing exequatur require abidance by certain procedural rights or standards.\footnote{13} National case law offers examples of refusal of exequatur on procedural grounds: see, for instance, the French decision of the Cour de Cassation of 16.03.1999, \textit{Pordea} (regarding a UK security for costs order); the English Court of Appeal’s decision of 29.06.2002, \textit{Maronier v. Larmer} (the defendant was informed of the judgment by the claimant after the time for appealing had expired); or the decision of the OLG Köln of 12.04.1989, (substituted service by means of \textit{remise au parquet} was deemed insufficient). The fact that procedural \textit{ordre public} difficulties have also been acknowledged with respect to other regulations abolishing exequatur has probably worked as a warning.\footnote{14}

\textbf{III. The System (recast)}

The new provisions of Chapter III of the Regulation, \textquotedblleft Recognition and Enforcement\textquotedblright, will continue to apply to resolutions issued by the courts of a Member State and falling within its material scope.

\textit{1. Recognition}

Art. 36 reflects the well-known formula of automatic recognition. However, according to Art. 36.2 any interested party may request a resolution stating that no grounds for refusal (meaning those provided for in Art. 45) are present in the instant case. Besides, if the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question (Art. 36.3).

\footnote{12} The example corresponds to a first, unpublished version of J.J. Kuiper, \textquotedblleft The Right to a Fair Trial and the Free Movement of Civil Judgments\textquotedblright (final version to be found in the \textit{Croatian Yearbook of European Law & Policy}, Vol. 6, 2010, 23-51).

\footnote{13} See for instance Article 12 to 19 of the Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims.

\footnote{14} Particularly in the field of family law: see ECtHR decision in \textit{Sneersone and Kampanella v. Italia}, 12 July 2011, app. 14737/09; or the saga leading to the ECJ decision in Case C-491/10 PPU \textit{Aguirre Pelz}, where the Spanish and the German court displayed a different understanding of the right of a child to be heard.
Recognition may be refused at the request of any interested party for the same grounds already provided for under Regulation 44/2001, now embedded in Art. 45 with the following slight differences: breaching of the grounds of jurisdiction foreseen for individual employment contract has been included as an obstacle to recognition; and breaching of Sections 3, 4 or 5 of Chapter II only counts as an obstacle provided the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant.

2. Enforcement

In the Regulation (EU) no. 1215/2012 the abolition of exequatur means the removal of the procedure to declare a foreign judgment enforceable in another Member State, without a corresponding disappearance of the usual conditions. The declaration of enforceability, previously granted by a court of the Member State where enforcement was sought, emanates now from a court of the Member State of origin.

Art. 39 provides for the abolition of exequatur: judgments of a Member State which are enforceable in that Member States also enjoy enforceability in the other Member States without a declaration being required. According to Art. 40 an enforceable judgment carries with it by operation of law the power to proceed to any protective measures which exist under the law of the requested Member State. Art. 41 refers as a general rule to the law of the requested Member State to regulate the enforcement procedure of the judgments given in another state, which shall be executed under the same conditions as a purely domestic decision.

To facilitate the enforcement of foreign resolutions within the EU the Regulation provides for a standard form in Annex I. At the request of the interested party the court shall issue a certificate in the form of Annex I; the document has been improved compared with the pre-existing one under the Brussels I regulation, in that it includes more information regarding the parties involved in the original proceedings, as well as the sums due comprising interests and costs. The applicant shall submit the form to the competent authority of the Member State where enforcement is to take place, together with a copy of the judgment which satisfies the requirements for it to be considered authentic. Pursuant to Article 41.3, the person seeking enforcement will not be required to have an address in the Member State addressed or to have an authorized representative, unless the representative is mandatory regardless of nationality or domicile of the parties.
Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 (i.e., the form set out in Annex I) shall be served on the person against whom the enforcement is sought prior to the first enforcement measure, together with the resolution if it has not yet been notified. This way, he/she may react against the enforcement. The procedure relating to the refusal to execute appears in Art. 46 and ff (a); the grounds for refusal are the same foreseen in Art. 45 for non-recognition (b).

a.- The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.

Upon an application for refusal of enforcement, at the request of the applicant the competent court may decide: a) to limit the enforcement proceedings to protective measures; b) to subordinate the execution to the constitution of specific guarantees; c) to suspend, in whole or in part, the enforcement procedure. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

According to Art. 49 and Art. 50, the decision on the application for refusal of enforcement may be appealed against by either party. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged. The decision given on the appeal may only be contested by an appeal where the courts with which any further appeal is to be lodged have been communicated by the Member State concerned to the Commission pursuant to point (c) of Article 75.

The court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin, or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged

b.- The person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. This should include the ground that he had not had the opportunity to arrange for his
defense where the judgment was given in default of appearance in a civil action linked to criminal proceedings. It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Article 59 of the 1968 Brussels Convention.

The grounds for refusal set out in Article 45 operate cumulatively with the reasons for refusal or suspension of enforcement provided for by the legislation of the Member State addressed for decisions taken by their own courts. However, these grounds would only apply to the extent that they are not inconsistent with those provided for in art. 45.

IV. New Challenges

1. The Procedure for Refusal of Enforcement

As already indicated, the procedure for refusal of enforcement will be governed by the law of the Member State addressed in so far as it is not covered by this Regulation (art. 47.2). An immediate consequence of this provision is that deadlines for appealing will be decided by the lex fori; therefore, enforcement will require more or less time depending on the State addressed.

The design of the non-execution procedure will be a key element to the practical effectiveness of the Regulation. From a procedural point of view, the simplest solution would be to allow for the grounds of refusal provided for in art. 45 to be argued within the enforcement proceeding itself. However, this possibility may not be compatible with the provisions of the Regulation itself, as it would imply that the enforcement proceedings would be different in the same Member State according to whether the enforcing title is a national or a foreign one. Also, it has to be considered that the same proceeding will be used in the case of an application for the denial of recognition - and not of enforcement. That’s why a different, new procedure seems necessary.

2. Enforcement: the Need to Adapt National Measures

As a result of the differences among the laws of the Member States on the means for enforcement, a new provision (Art. 54) has been adopted stating that “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 who it should be done.

V. Provisional Measures

The enforcement of provisional measures deserves specific attention as one of the points where the new Regulation introduces an important innovation. Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under the Regulation. However, this does not apply to all provisional and protective measures, but only to those which were ordered by such court with the defendant having been summoned to appear; otherwise they should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. That explains the contents of Art. 42.2: for the purposes of enforcement in a Member State of a judgment given in another Member State ordering a provisional, including a protective, measure, the applicant shall provide the competent enforcement authority with the usual documents (those establish in Art. 42.1), but also, where the measure was ordered without the defendant being summoned to appear, with the proof of the service of the judgment.

Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures will be confined, under the Regulation, to the territory of that Member State.

In spite of the criticism that the Regulation has met as regards provisional measures, the new rules have been welcome by some sectors as a means to avoid *forum shopping*.

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15 However, Recognition and enforcement of such measures is still possible under national law.
VI. Third-State Decisions and Arbitral Awards

1. Third-State Decisions

Currently the EU has exclusive competence to conclude international agreements with third countries on the recognition and enforcement of decisions in civil and commercial matters. Such competence prevents the conclusion of new agreements in this area by the Member States themselves. That’s why the absence of rules on the recognition and enforcement of decisions of third countries in EU Member States is difficult to understand. In line with the situation under the Brussels I Regulation the new Regulation merely rules on the recognition and enforcement of judgments between Member States – regardless of the place of domicile of the defendant both at the moment of the filing of the claim and at the time the recognition or execution are sought. The decisions of third States remain therefore subject to the national common rules, that is, those in force in each Member State. As said, such a solution has been criticized, the more so as the new Regulation provides for rules on lis pendens and related claims in third States (Art. 33, Art. 34) which will lead to the staying or the dismissing of the proceedings in a Member State if (among other conditions) it is expected that the court of the third State will give a judgment capable of recognition (and, when applicable, of enforcement) in that Member State.

2. Arbitral Awards

In the Commission’s proposal for the revision of the Brussels I Regulation arbitration remained excluded from the scope of the instrument; however, a lis pendens was foressen aiming to avoid obstacles to the development of arbitration and the risk of irreconcilable judgments whenever the place of arbitration as a Member State. According to the proposal, which in this respect followed the provisions of the New York Convention of 1958, a State court should stay the proceedings (and, if applicable, dismiss them) in case of a challenge of her jurisdiction on the basis of an arbitration clause; also if a claim had been lodged with the arbitral tribunal, or if legal proceedings relating to arbitration had been initiated in the Member State chosen as seat for the arbitration.

In the text finally adopted no coordination mechanisms with arbitration proceedings are provided for, with the exception of Art. 73.2, where it is simply stated that the Regulation shall not affect the application of the 1958 New York Convention. As for the references to arbitration in recital no. 12, they have been and still are the subject of heated debate and extremely different understandings among scholars.
Literature (basic references, especially on the subject of the abolition of the exequatur)


López de Tejada, M., La disparition de l’exequatur dans l’espace judiciaire européen, LGDJ, 2013

