The Revision of Brussels I Regulation and the Abolition of Exequatur

1. Introduction

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] (hereinafter referred to as »Brussels I Regulation« or »Regulation«) is, according to Professor Dr. Hess,[2] one of the most successful pieces of Union legislation. Indeed, the fact that the rules contained in Regulation have, in one act[3] or another, survived almost 42 years without major conceptual revision, is impressive. However, it is interesting to note that at each stage of the Regulation's evolution, the underlying rationale for the Regulation itself has varied. Initially, the impetus of the Brussels Convention, namely the stimulation of cross-border trading within the EEC, served as a platform for the Regulation. Subsequently, the principle of mutual trust and recognition applied to judicial decisions became the »*Leitmotiv*« behind the adoption of the Regulation itself. Finally, the Treaty's[4] main tenet, that is, the proper functioning of the internal market, and the ever-increasing interest in the growing impact of the economic analysis of law took centre stage in the ongoing process of revision of the Regulation.

2. Rationale behind the upcoming revision

The proper functioning of the internal market and its economic derivatives such as »increasing the volume of cross-border transactions« or »cutting procedural expenses in terms of costs and time«[5] are practical reasons to revise the Regulation and render it more user-friendly. Systemic reasons also exist. Many of the similar Union's normative acts - the so called »parallel instruments«[6], directly refer to the Brussels I Regulation as it provides a

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[1] OJ L 12, 16.1.2001, p. 1–23.

[2] B. Hess/T. Pfeiffer/P. Schlosser, Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03 also referred to as the »Heidelberg Report«), para. 1.

[3] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as »Brussels Convention«) as the predecessor of the present Regulation.

[4] Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 47–199).

[5] According to the Heidelberg Report, the duration of exequatur procedures within the »single judicial area« varies between one hour and seven months (para. 130 et seq.)

[6] B. Hess/T. Pfeiffer/P. Schlosser, para. 65. In that same paragraph, Hess sets out examples such as Art 25 of Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings

residual set of rules (»fall back provisions«) which complement these parallel instruments. The basic principles of the Regulation also operate as »terms of reference«, given that, for instance, the differentiation between definitions of »contract« and »tort, delict or quasi-delict« also applies to parallel instruments. Accordingly, the provisions of the Regulation must be construed in a way that allows for the general application of the basic definitions in all fields of European procedural law.[7] Another reason is the adaptation to the extensive case-law of the Court of Justice of the European Union (*the former* European Court of Justice; hereinafter referred to as »Court«) that has so far rendered close to 100 decisions solely dealing with the interpretation of the Brussels I Regulation.[8]

Due to the broad scope of the Brussels I Regulation, this discussion will only focus on the question of exequatur.

3. Free movement of judgments

3.1. Recognition

The heavy presence and reference to the principle of mutual trust in both the recitals of Regulations governing European procedural law and the operative reasoning of Court judgments, coupled with Article 33 of the Regulation, suggest that the mutual recognition of judgments occurs naturally or automatically. The wording of Article 33 of the Regulation, however, is less clear. That Article merely states that recognition of foreign judgments is established »without any special procedure being required« which reveals the absence of a uniform procedure at Union level. In reality, when a national competent authority deals with a request for recognition of a foreign judgment, it will *prima facie* check if the judgment satisfies one of the uniform grounds for refusal.[9]

(OJ L 160, 30.6.2000, p. 1–18) or Article 6 of the Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006, p. 1–32) that both resort to Brussels I Regulation.

[7] Idem, para. 66.

[8] The number increases dramatically when taking into account Court decisions relating to the Brussels Convention, by virtue of Article 2 of the Luxembourg Protocol regarding the interpretation of the European Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters through the Court of Justice of 3 June 1971, BGBl. 1972 II, at 846. Current version printed in Jayme/Hausmann, Internationales Privat- und Verfahrensrecht, 15th ed., Munich, 2010.

[9] Article 34 of the Regulation.

3.2. Enforcement

Problems do not generally arise in the recognition stage, but rather during enforcement, since most foreign judgments are intended to give full remedial effect almost immediately. Currently, in order to achieve this, a declaration of enforcement is required.[10] In accordance with Article 41 of the Regulation, a foreign judgment will be declared enforceable immediately and automatically on completion of certain formalities (namely, the provision of an authentic copy of the judgment and a standard form certificate). At first instance, it is not possible to object by invoking the grounds for refusal of enforcement. It is only on appeal against the declaration itself that the application of Articles 34 and 35 is activated.[11] Those Articles establish barriers to the recognition of foreign judgments.

3.2.1. Grounds for refusal of enforcement, in particular the public policy

The Regulation aims to arrive at a proportionate balance between the two counteracting interests: 1. the interests of the successful party of judgment to have his judgment enforced without delay and superfluous costs; and 2. the protection of fundamental rights of defence. In search of this balance, the Regulation provides for four grounds for refusal of enforcement. This paper will concentrate solely on the public policy defence (Fr. ordre public), the most important of the four. It is also the most controversial, as reliance on it represents a popular sport, undermining mutual trust under the pretension that one domestic law is fundamentally different to another, perhaps even better. The Court has addressed this issue, resolving it for the most part by restricting the notion of public policy as a ground for refusal to those safeguards established in Article 6 of the European Convention on human rights (1950), at least in the area of fundamental rights. The following two landmark cases are of note. These are *Krombach*[12] and *Gambazzi*.[13] In *Krombach*, a German doctor, Dr Krombach, was convicted *in absentia* of the manslaughter of his stepdaughter by a French court. The step-daughter, Kalinka Bamberski, was visiting her mother at Krombach's place in Germany at the time. He was convicted and sentenced to 15 years imprisonment and found liable for damages[14] to be paid to the deceased's father. However, since

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[10] Article 38 of the Regulation.
[11] See P. Beaumont, E. Johnston, Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?, IPRax, 2010, tome 2, p. 105.
[12] Krombach v. Bamberski, Case C-7/98 [2000] ECR I-1395.
[13] Marco Gambazzi v. Daimler Chrysler Canada Inc., Case C-394/07 [2009] ECR I-2563.
[14] These fell under the scope of the Regulation on the basis of its Article 5(4).

Germany does not permit trials *in absentia* where the accused is charged with serious crimes, by applying the public policy rule, the verdict granted in France was not enforceable in Germany. In the second landmark case *Gambazzi*,[15] the defendant was penalized for contempt of court in the UK and was barred from further participation in the proceedings. The court in Italy, where the judgment was supposed to be enforced, has since asked the Court whether such an action contradicts public policy in the State where the recognition of the judgment was sought. The Court ruled that a foreign judgment cannot be recognised if the initial proceedings failed to comply with the Article 6 of the European Convention on human rights (1950).

The issue surrounding the application of fundamental rights was thereby solved. However the other component of the notion of »*ordre public*«, namely a breach of »fundamental principles of substantive law« still requires sound justification. For instance, mere differences between national legal systems are not enough to invoke the public policy defence. In order to successfully invoke the public policy defence, substantive aspects of the foreign judgment in question must be so incompatible with the domestic law of the State of enforcement that a fundamental principle of substantive law would be manifestly infringed.[16]

It is widely agreed that the protection of the domestic legal system against any incursion of legal influence from foreign countries has ceased to be the objective of the exequatur procedure. [17] Moreover, the concept of *ordre public* has become an increasingly uniform and universal judicial concept.

According to the Heidelberg Report*,* there is very limited existing case-law in which the substantive component of public policy defence was successfully invoked.[18] This is due to the fact that in civil and commercial matters, there are no fundamental differences between the legal systems of the Member States which could trigger a substantive public policy defence.[19] Although such a generalisation is quite bold, it points to a means of realising the goals of the Tampere resolution, especially the one regarding the abolition of »intermediate proceedings« such as exequatur.

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[15] Marco Gambazzi v. Daimler Chrysler Canada Inc., Case C-394/07 [2009] ECR I-2563.
[16] For instance: The German BGH ruled, that a foreign judgement awarding damages for personal injury against persons who are exempted from liability on the basis of Article 105/1 German Social Code, Book 7 is incompatible with the German *ordre public* (BGH 123, 268).
[17] See P. F. Schlosser,The Abolition of Exequatur Proceedings – Including Public Policy Review?, IPRax, 2010, tome 2, p. 104.
[18] Supra Nr. 1, para 559.
[19] Ibid.

4. Abolition of exequatur

When deciding whether to abolish exequatur, one cannot neglect the sometimes sad reality that in some cases, usually rare, proceedings can result in the violation of fundamental rights. In these cases, complete abolition of exequatur would result in prioritising efficiency over the right to a fair trial.[20] But the fear of abolishing exequatur is unwarranted, given the existing solutions in related Union legislation. The European Enforcement Order Regulation[21] abolished exequatur by requiring that courts of origin attach a certificate of compliance with minimum procedural rules to the judgment. The only remaining element of the exequatur is the refusal of enforcement where the judgment is inconsistent with an earlier judgment concerning the same parties and the same cause of action, but even this one is only decided at the stage of actual enforcement. Another practical example is the Regulation concerning maintenance obligations[22] that *de facto* abolishes exequatur, but allows for an *a posteriori* review in the country of origin coupled with a limited review in the country of enforcement at the actual enforcement stage.[23]

Therefore, the abolition of exequatur certainly does not mean the complete abolition of grounds for refusal if sufficient safeguards are maintained. Taking into account the existing instruments, especially the »maintenance« Regulation, exequatur could be abolished by introducing coordinated review procedures in the Member State of origin and in the Member State of Enforcement, both of them only at the actual enforcement stage. Both reviews should be subject to the existing procedural standards for refusal of enforcement. The public policy defence, however, should be replaced with a new extraordinary remedy, also only at the actual enforcement stage, in the event of a violation of the right to a fair trial.[24]

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[20] See G. Cuniberti, The Recognition of Foreign Judgements lacking Reasons in Europe: Access to Justice, foreign court avoidance and efficiency (International and Comparative law Quarterly 2008, tome 57, p. 25, para. 50).

[21] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.4.2004, p.15–39).

[22] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p. 1–79); hereinafter referred to as »maintenance Regulation«).

[23] Supra 10, p. 108.

[24] See P. Oberhammer, The Abolition of Exequatur, IPRax, 2010, tome 3, p. 203.

5. Conclusion

Metaphorically speaking, the question of abolition of exequatur is just a storm in a tea-cup. Not only because adequate safeguards will remain but also because of the fact that the existence of exequatur is hardly relevant in those Member States where grounds for refusal can be reiterated at the actual enforcement stage, according to national procedural laws on actual enforcement (e.g. Vollstreckungsverfahren, voie d'exécution). Moreover, until the creation of singular European procedural codes, grounds available under national law for refusing or suspending enforcement of a judgment will continue to apply in addition to the grounds listed in the existing or new Regulation.

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