

## The Free Movement of Judgments within the European Union \*

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### I. Introduction

The main objective set out in the Treaty of Rome (1957) was to establish common markets and to create the European Economic Community through providing four freedoms: free movement of goods, services, capital and person.<sup>1</sup> For the free movement of goods, services and capital, it is necessary to provide legal certainty and legal security in the EU. Thus, the free movement of judgments between Member States should be regulated. In fact, the European States and later on the European Union Institutions have been working to harmonize the European Union conflicts of laws.<sup>2</sup> The EC Commission has promulgated a Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters known as “Brussels I” which replaces the Brussels Convention. The main goal of the EC Council Regulation no 44/2001 (Brussels I Regulation) is to facilitate the free movement of judgments between Member States. This study will examine as to what extent the Brussels I Regulation achieved the “free movement of judgments” between the Member States of the EU. In order to find out to what extent the Regulation achieved its aim mainly free movement of judgment, this study first of an analyzes the main principles of Brussels I Regulation. Then, it examines the grounds for refusal of recognition and enforcement, and the procedure of recognition and enforcement.

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1 Kathryn A. Russell, Exorbitant Jurisdiction and Enforcement of Judgments: the Brussels System as an Impetus for United States Action, 19 Syracuse J. Int'l L. & Com. 57, Spring, (1993).

2 Ronald A. Brand, The European Union's New Role in International Private Litigation, Loyola University Chicago International Law Review, Spring/Summer 2005; Susan M. Nott, For Better or Worse? The Europeanization of the Conflict of Laws, Liverpool Law Review, January 2002, 3-17.

## II. The Main Principles of the Brussels I Regulation for Recognition and Enforcement of Judgments

One might rightly argue that the Brussels I Regulation is based on the mutual trust of the EU Member States for their judicial system and basically for their court decisions. In fact, the Paragraph 16 of the Brussels Regulation provides that “Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognized automatically without the need for any procedure except in cases of dispute.”<sup>3</sup> The European Court of Justice rightly concluded that the mutual trust should exist between the courts of EU Member States so as to simplify for the recognition and enforcement of judgments.<sup>4</sup> Moreover, mutual trust “is the implication that Member States of the European Union not only respect, but also blind trust in each other’s court.”<sup>5</sup> For example, in *Gasser* case, the European Court of Justice stated that Member States have to trust each other’s legal system.<sup>6</sup>

The Regulation constitutes uniform rules on jurisdiction and recognition and enforcement which are effective among the Member States. One rightly may assert that the Regulation scheme is simple, single and unified. Thus, the regulation facilitates the free movement of judgements.

It can be argued that the aim of the Chapter II (Jurisdiction) of the Regulation is to simplify Chapter III (Recognition and Enforcement).<sup>7</sup> It can be asserted that the uniform rules on jurisdiction are “prerequisite for abrogating exorbitant bases of jurisdiction” within the EU, in order to eliminate the review of personal jurisdiction at the recognition and enforcement procedure.<sup>8</sup> Thus, it is necessary to abolish the exorbitant bases of jurisdiction in order to facilitate the free movement of judgments within the EU. Indeed, the Regulation does not have exorbitant bases of jurisdiction provisions.

The uniform rules on jurisdiction of the Regulation significantly facilitate the recognition and enforcement of judgments within the EU. Nationality of the defendant is not deemed as a connecting factor in the jurisdiction. The general rule for jurisdiction under the Brussels I Regulation is that persons should be sued in the courts of Member States in which they are domiciled. However, there

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3 Council Regulation (EC) No.44/ 2001.

4 Thalia Kruger, “The Anti-Suit Injunction in the European Judicial Space”, *International and Comparative Law Quarterly*, 2004, p.1034.

5 *Ibid*, p.1035.

6 *Ibid*.p. 1036.

7 C.M.V. Clarkson, Jonathan Hill, *The Conflict of Laws*, Third Edition, Oxford University Pres, 2006, p.160.

8 Peter Gottwald, *Principles and Current Problems of Uniform Procedural Law in Europe Under the Brussels Convention*, *Saint Louis- Warsaw Transatlantic Law Journal*, 1997,p.141.

are various provisions regarding the alternative jurisdiction.<sup>9</sup> In these provisions, there are several connecting factors that are utilized in order to either protect the weaker party in the transactions. Moreover, Article 23 of the Regulation includes the prorogation of jurisdiction issue which addresses the freedom of contract principle in the civil procedural law. In cases where the parties to the contract agreed on a certain jurisdiction in settling any dispute that may arise with respect to this specific relationship, the courts of that jurisdiction shall have exclusive jurisdiction unless the parties agreed otherwise.<sup>10</sup> This agreement can be “any communication by electronic means which provides a durable record of the agreement.” This is remarkable provision since it may increase the electronic commerce. Overall, it can truly be said that after the evaluation of the rules on jurisdiction of the Brussels Regulation, the free movement of judgments is achieved.

It must be noted that the same substantive requirements apply to both recognition and enforcement.<sup>11</sup> However, there is one additional substantive condition for enforcement that is to say the judgment should be enforceable in the original country in order to be enforced in other Member States.<sup>12</sup> Nevertheless it is immaterial whether the judgment can in reality be enforced in the State of origin. The Court in the *Coursier v Fortis Bank Case*<sup>13</sup> spelled out that “The term enforceable in Art.38 refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin”.

## A. Conditions Related to Judgments

The followings are the substantial requirements for the recognition and enforcement of judgments the under Brussels I Regime: 1. A judgment of Member State and the scope of the judgment, 2. The meaning of the judgment, and 3. The exceptional aspects of the jurisdiction

### 1. A Judgment of Member State and the Scope of the Judgment

The judgment must be rendered by a court of Member State so as to be recognized and enforced in other EU Member States. In addition, the scope of the Brussels Regulation is limited by its terms to “civil and commercial matters”.<sup>14</sup> Therefore,

9 Koji Takahashi, “Jurisdiction in Matters Relating to Contract: Article 5 (1) of the Brussels Convention and Regulation”, 27 E.L.Rev. 530 (2002).

10 Louise Merrett, The Enforcement of Jurisdiction Agreements within the Brussels Regime, International and Comparative Law Quarterly, 2006, p.323.

11 Peter Stone, EU Private International Law Harmonization of Laws, Edward Elgar Publishing, 2006, 210.

12 See Article 38, Article 45, 34-36.

13 Case C-267/97, (1999) ECR I-2543.

14 See Article 1 of the Regulation.

a judgment which falls within the scope of the regulation must be recognized and enforced in the courts of every member state. On the contrary, a judgment that is outside of the scope of the regulation is not be recognized or given effect under the Brussels I Regime. Thus, the determination of civil and commercial matters is important since it may reversely affect the recognition and enforcement of judgments. However, the regulation does not define “civil and commercial” matters. That is why, it is so significant to interpret and know through judicial practice what the civil and commercial matters mean under the Brussels I Regime. Moreover, the Regulation expressly excludes “revenue, customs or administrative matters, the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills”, and does not apply to the bankruptcy proceedings, social security and arbitration.<sup>15</sup>

## 2. The Meaning of the Judgment

Article 32 of the Regulation gives a very wide meaning to “judgment”. Pursuant to this article, “any judgment rendered 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 the determination of costs or expenses by an officer of the court”.<sup>16</sup> Thus, it is not important what the judgment may be called and there is no distinction made between judgments *in personam* and judgments *in rem*.<sup>17</sup> *In the Maersk Olie & Ga v.de Haan & de Boer Case*<sup>18</sup>, the European Court decided that the admiralty judgment ordering the establishment of a limitation of fund can be recognized. In the *Solo Kleinmotoren v. Bosch Case*<sup>19</sup>, the European Court held that a court settlement does not fall within the Chapter III of the Brussels Regulation, even though a court settlement is essentially ended the legal proceedings. However, there are special rules on the enforcement of court which settlements are laid down on the Regulation.

As have been mentioned above, “judgment” is very broadly defined. The importance of this is that proceedings for recognition and enforcement under the Brussels I Regulation are not limited to money judgments.<sup>20</sup> The Brussels I Regulation varies considerably from the national laws and international treaties on recognition and enforcement. Pursuant to Article 32, every decision rendered by a court of Member State must be recognized or enforced irrespective of its forms or the kind of procedure applied. In addition, the judgment should not necessarily

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15 See Article 1 of the Regulation

16 See Article 32 of the Regulation.

17 C.M.V. Clarkson, Jonathan Hill, *The Conflict of Laws*, Third Edition, Oxford University Press, 2006, p.158.

18 Case C-39/02, (2004) ECR I-9657.

19 Case C-414/92, (1994) ECR I- 2237.

20 Peter Stone, p. 208.

be final decision for recognition and enforcement.<sup>21</sup> However, if there is a review or appeal at the original court jurisdiction, Article 37 and 46 ensure that a court may decide stay in proceedings. Therefore, the preliminary and interlocutory judgments can be recognized and enforced in other Member States. However, the following judgments are not considered “judgment” in the sense of Article 32:

- a) Interlocutory decisions which regulate conduct of proceedings;
- b) provisional measures which are not given under article 31 of the Regulation, and
- c) provisional measures that are granted without notice for the defendants.<sup>22</sup>

### 3. The Exceptional Aspects of the Jurisdiction

Unlike bilateral treaties and national laws on the recognition and enforcement of judgments, the Brussels I Regulation did not require that the original court should have a competent jurisdiction. In other words, the reviewing of the jurisdiction of original courts is not required as a condition for the recognition and enforcement of judgments under the Brussels I Regime. On the other hand, there are three exceptional situations which require the court to review the jurisdiction of the original court and to refuse recognition and enforcement of judgments, if the original court do not have jurisdiction under the Regulation. These exceptions are:

1. The exception for insurance, consumer contracts and exclusive jurisdiction by subject matter. (These exceptions were stipulated in Articles 8-14, 15-17 and 22 of the Regulation),
2. The exception for existing agreements with external countries (Article 72 of the Regulation),
3. The transitional exception (Article 66(2) (b) of the Regulation.<sup>23</sup>

### B. Essential Issues Regarding Recognition and Enforcement

The Regulation has also specific provisions that are really essential for the free movement of judgments. Especially, Article 36 of the Regulation stipulates that there is no review of substance. The defendant in the enforcement case may not contest the essential validity of the original court judgment (the prohibition of revision *au fond principle*). It should be noted that it does not matter whether the error done in original courts is related the fact or law.<sup>24</sup> For example, the court in the *Renault v Maxicar Case*<sup>25</sup> held that the recognition can not be refused due to the fact that the original court did wrongly apply the Community Law.

21 Peter Stone, p. 208.

22 Peter Stone, p. 208-209, C.M.V. Clarkson, Jonathan Hill, p.158-159.

23 Peter Stone, p.219-222

24 Peter Stone, p.215.

25 Case C-38/98, (2000) ECR I-2973.

One of the most important aspects of the Brussels I Regulation regarding the facilitation of free movement of judgments is that the recognized judgment has the same conclusive effect of the original court judgment. Indeed, the court in the *Hoffman v Krieg*<sup>26</sup> Case stated that “a judgment which is recognized under Chapter III must in principle have the same effects in the State addressed as it has in the State in which it was given”.

### III. Grounds for Refusal of Recognition and Enforcement

As has been indicated above, the foreign judgment cannot be reviewed on its merits. Nevertheless, Articles 34 and 35 contain a number of grounds on which recognition and enforcement shall be refused. The grounds for refusal of recognition and enforcement are exhaustively spelled out in the Brussels I Regulation. The recognition and enforcement can be refused if it violates public policy in the Member State in which recognition is sought, or if a judgment by default has been given because the complaint has not been correctly served to the defendant, or if a judgment is irreconcilable with an earlier judgment.

The first ground for refusing of recognition is the concept of public policy. A judgment shall not be recognized, if such recognition is manifestly contrary to the public policy in the State in which recognition is sought. However, it is commonly accepted that this ground must be narrowly construed. For example; the European Court has interpreted the public policy issue narrowly in *Duyn v Home Office*<sup>27</sup> (1974) Case. Article 34(1) provides that a judgment shall not be recognized if such recognition is manifestly contrary to the public policy in the State in which recognition is sought. Nevertheless, the Regulation does not indicate under what circumstances the concept of public policy will be violated. The European Court in the *Krombach v Bamberski*<sup>28</sup> Case elucidates the limits of public policy concept stating that “a rule of law regarded as essential in the legal order of the state in which enforcement is sought or a right recognized as being fundamental within that legal order”. It is also important to note that for refusal of recognition or enforcement, it is the recognition of the judgment that the original judgment must be clearly contrary to public policy. Moreover, there are some issues that the invoking public policy exception is not allowed. The first one is that Article 35 (3) of the Regulation explicitly prohibits utilizing of public policy to extend jurisdictional review. The Second one is that public policy exception does not apply if any other paragraphs of Article 34(2) (on notification of the defendant) and 34(3) (on irreconcilability with a local judgment) of the Regulation already apply.<sup>29</sup>

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26 Case 145/86, (1988) ECR 645.

27 Van Duyn v Home Office [1974] 1 W.L.R. 1107 [1974

28 Case C-7/98, (2000) ECR I-1935.

29 Peter Stone, p.224.

The aim of Regulation is to ensure that the procedural rights of defendant are provided. Pursuant to Article 34 (2) of the Brussels I Regulation, recognition and enforcement of a judgment must be refused when the original court failed to respect certain procedural rights of defendant. This is the most commonly raised refusal grounds for recognition and enforcement.<sup>30</sup> For recognition to be refused under Article 34 (2), the judgment must have been rendered in default of appearance and the defendant was not served with the documents instituting the proceedings, and the defendant had no sufficient time to enable him to arrange for his defense, unless the defendant has failed to commence proceedings to challenge the judgment when it was possible for him to do so.<sup>31</sup>

One of the essential developments on the Regulation is that unlike the Brussels Convention, the defense of invalid service is no longer applied under the Regulation. This situation is helpful for the facilitation of free movement of judgment within the EU. Indeed, the Court in the *Application of Enforcement of Portuguese Judgment Case*<sup>32</sup> stated that “By contrast, Art.34 (2), last half sentence of the Brussels I Regulation contains significant change from the previous rule. The provision expresses the wish of author of the Regulation to restrict the defences available in enforcement proceedings and thereby to achieve a more efficient cross-border enforcement of the judgments of courts.”

This case deals with the conditions for non-recognition mainly default judgment. The appellant Portuguese creditor (C) obtained a default judgment in the Lisbon District Court on July 10, 2000 against the defendant debtor (D), who was resident in Germany. When (C) applied for enforcement order in Germany, (D) argued that he had not been properly served with the application, since it had been sent by post as a recorded delivery without any translation into German. The appeal court had rejected the application for enforcement since C’s claim was made before the Regulation came into force. Thus, in this case Article 27 of the 1968 Brussels Convention applied pertaining to the default judgment. D had not been properly served, so C can not enforce the Portuguese decision in Germany. However, if this case is occurred after the March 1 2002, date of entry into force of the Brussels I Regulation, the result would have been different based on the fact that, the defense of invalid service is no longer applied.

The Regulation tries to avoid contradictory judgments. There are various kinds of conflicts in this issue and Articles 34 (3) and (4) and 45 (1) of the Brussels I Regulation cover the problem of irreconcilable judgments. If the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which the recognition is sought, the recognizing court give

30 Ilse Couwenberg, Recognition and Enforcement of Judgments, Practical Issues, www.era.int

31 Peter Stone, p.229

32 Re Enforcement of Portuguese Judgment, 2005 I.L.Pr. 28.

preference to its own judgment. In the *Hoffmann v Krieg*<sup>33</sup> Case the European Court applied Article 27 (3) (of the Brussels Convention) and held that a foreign decision ordering a husband to pay maintenance to his wife was irreconcilable with a national decision decreeing a divorce between the same parties. The Court in the *Solo Kleinmoteren v. Boch*<sup>34</sup> Case decided that Article 27 (3) (of the Brussels Convention) must be strictly interpreted. According to Article 34 (4), the requirements to refuse recognition or enforcement are: “the judgments are between the same parties and must involve the same cause of action, they must be irreconcilable, and the judgment given in another Member State or in a third State is from an earlier date than the judgment of which enforcement is sought.”<sup>35</sup>

#### **IV. The Procedure of Recognition and Enforcement**

The Brussels I Regulation introduces a new and more expeditious procedure for recognizing and enforcing foreign judgments. It should be worthwhile to note that the recognition of a judgment given in one court of an EU Member State is automatic in another Member State unless challenged. Likewise, a declaration that a judgment is enforceable is nearly automatic after only formal checks of the documents. The enforcement can only be refused by the exceptional circumstances that exhaustively laid down in the Regulation. Thus, this procedure is simple, useful and expeditious for providing and facilitating the free movement of judgments in the EU.

The recognition of foreign judgments is automatic and directly effective in other Member States since the Regulation does not require any formal and special procedure for recognition proceedings. It should be noted that only the person who seeks recognition of a judgment could file an application for recognition. However, the party opposing recognition could present his/her grounds of refusal in later stage. Namely, the Chapter III (Recognition and Enforcement) procedure can not be utilized in obtaining a declaration of non-recognition.<sup>36</sup> As the First Instance Court of Athens truly concluded in the *Application by National Organisation System SA Case*<sup>37</sup> that the applicant, a Greek company can not apply for a finding that an order issued by the High Court of England and Wales had no legal effect in Greece since the application for non-recognition by judgment debtor not admissible according to Article 33 of the Regulation. The result of this case indicates that the Brussels I Regulation without allowing a declaration of non-recognition brings about the freedom of movement of judgments within EU Member States.

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33 Case 145786, (1988) ECR 645.

34 C-414/92, Solo Kleinmotoren GmbH v. Boch (1994) E.C.R. I-2237.

35 Ilse Couwenberg, Recognition and Enforcement of Judgments, Practical Issues, www.era.int

36 Peter Stone, p.239.

37 Re an Application by National Organization System Sa (Decision 3265/2003), [2005] I.L.Pr. 52

The Regulation has detailed and effective provisions on enforcement proceedings. These provisions are exclusive, thus additional requirements for the enforcement procedure cannot be imposed by Member States. Article 41 of the Regulation provides that “the judgment shall be declared enforceable immediately on completion of the formalities...without any review under Articles 34 and 35.” Namely, the defendant to the enforcement proceedings do not at this stage have an opportunity to argue that one of the exceptions to enforcement is applicable<sup>38</sup>. However, the person against whom enforcement is sought can lodge an appeal on this basis according to Article 43. Thus, this system is much faster and simpler than the enforcement procedures of most countries.<sup>39</sup>

It is worthwhile to mention that the enforcement procedure stipulated in Articles 38-56 is exclusive. Therefore, a claimant who got a judgment which is enforceable in another member state under the Brussels I Regulation in one Member State cannot file an ordinary action in latter state against the same defendant regarding the same cause of action.<sup>40</sup>

It must also be noted that according to Article 51 of the Regulation, no security or deposit is required in proceeding for recognition and enforcement. This provision not only simplifies the enforcement process but also secures swift enforcement process.

## V. Conclusion

The Regulation on jurisdiction and enforcement of judgments in civil and commercial matters ensures the free movement of persons and capitals since it allows the free flow of judgments among Member states of the EU. So as to provide free movement of judgment, the Brussels I Regime, creates a legal environment in the EU that facilities recognition and enforcement of judgments.

The main idea behind the Regulation is that there will be a simple way to recognize and enforce judgments of the national courts within the EU. Chapter III of the Regulation lays down the rules on recognition and enforcement. It must be noted that the judgment to be recognized and enforced must be within the scope of Article 1 of the Regulation. However, the issues that are not within the scope of the Regulation are regulated in other legal instruments. For example, the EC Council has adopted a Regulation No.1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibilities for Children of Spouses, known as “Brussels II”. Thus, the free movement of judgment can be achieved in these matters as well.

38 Johathan Harris, *The Brussels Regulation*, Civil Justice Quarterly, 2001, p.223.

39 Peter Gottwald, p. 162.

40 Peter Stone, p.211.

The regulation has a fast procedure for the recognition and enforcement of judgments since judgment given in EU Member State must be recognized without any special procedure being required. The grounds for refusal to recognition and enforcement are exclusively laid down in the Regulation and they are narrowly construed by the courts. Thus, this situation shows that the Brussels I Regulation achieved its aim of the free movement of judgments to a great extent.

In the light of the examinations of the conditions related to the judgment, and the procedure with respect to recognition and enforcement, it can be concluded that the Regulation's scheme is contemporary, simple and expeditious. Thus, it successfully provides the free movement of judgments within the EU Member States to a great extent.

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