



Free Movement of Judgments in the EU: Knock Down the Walls but Mind the Ceiling

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Brussels I Review Proposal
BIICL, 10 February 2011

The Current Regime

- No special procedure required for recognition of a MS judgment (Art 32.1)
- Declaration of enforceability required for enforcement of an enforceable MS judgment (Art 38)
- Recognition and enforcement opposable on grounds set out in Arts 34 and 35.1:
 - Enforcement manifestly contrary to public policy
 - Default judgment – not served in sufficient time and no failure to challenge
 - Irreconcilable judgments

The Commission's Proposals - Recognition

- Recognition of a MS judgment without any special procedure being required “and without any possibility of opposing recognition” (Art 38.1)
- Proceedings in which recognised judgment invoked may be suspended if judgment challenged in MS of origin or in the event of an application under Arts 45 or 46 (Art 39.3)
- No provision addressing impact on recognition of irreconcilable judgment? (Art 43 relates, apparently, only to enforcement)

The Commission's Proposals - Enforcement

- Enforcement of an enforceable MS judgment without the need for a declaration of enforceability (Art 38.2, 41)
- Applicant need only produce to the competent enforcement authority (a) an authentic copy of the judgment, and (b) a certificate in the form set out in Annex I
- Enforcement to be refused only in circumstances set out in Arts 43-46

Enforcement – the Exceptions

- Irreconcilable judgments (Art 43)
- Enforceability suspended in the MS of origin (Art 44.2)
- Challenge to default judgment in MS of origin – not served or *force majeure* etc, provided no failure to challenge (Art 45)
- Application in enforcing (recognising) MS to refuse enforcement (or recognition) contrary to “fundamental principles underlying the fair trial” (Art 46)

The Excluded Categories (Art 37.3)

- Status quo preserved for:
 - Non-contractual obligations arising out of violations of privacy and rights relating to the personality, including defamation
 - “Collective redress” for harm caused by unlawful business practices

What is Missing?

- The declaration of enforceability procedure
- A right to challenge on “substantive” public policy grounds
- Any right to review the jurisdiction of the MS of origin under the Regulation, even on the limited grounds set out in Art 35 of the Brussels I Regulation (breach of insurance or consumer contract provisions, exclusive jurisdiction provisions)
- These points can be dealt with separately – not “all or nothing”

The Commission’s Arguments

- The political case
- The economic case
- The legal and practical case
 - “Today, judicial cooperation and the level of trust among Member States has reached a degree of maturity which permits the move towards a simpler, less costly, and more automatic system of circulation of judgments, removing the existing formalities among Member States.” (Explanatory Memorandum, 6)

The Case for Retention of the Public Policy Exception

- “Mutual trust” and “mutual respect”
- The extended “mutual trust” argument:

“[T]he systems for recognition and enforcement of judgments handed down in a Member State which are established by *[the Brussels II bis Regulation]* are based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights.”
(Case C-491/10, Zarraga v Pelz, 22 December 2010)
- ECHR obligations (*Bosphorus v Ireland* (2005))
- Equal treatment of MS of origin and enforcement
- Consistency with EU “fundamental freedoms”
- A necessary safety valve (and the Commission’s proposed exceptions)

The Case for Retention of a Limited Right of Review of Jurisdiction

- Rights *in rem* in immovable property (TFEU, Art 345)
- Consumer contracts

Additional Functions of *Exequatur*

- Notification to the Judgment Debtor
- Clarification of the nature of the judgment (Art 66)
- Deterrent to fraud

Authentic instruments

- The Commission proposes that authentic instruments should also be enforceable without a declaration of enforceability (Art 70)
- Taking mutual recognition too far? Needs to be justified in its own right, and coupled with anti-fraud/exploitation measures

Summary

- The Regulation's enforcement procedures should be streamlined ...
- But not in the way that the Commission proposes