Sedlmeier, Johannes

International and European Procedural Law

Recent developments regarding mutual recognition of judgements in Europe and worldwide

The European Legal Forum (E) 1-2002, 35 - 46

© 2002 IPR Verlag GmbH München
I. Introduction

The term 'principle of mutual recognition' has been applied by the ECJ in the context of recognition of the free movement of goods and services in the famous judgment in *Cassis de Dijon.* By now, another common use of this term of art applies in a different context, namely referring to the recognition of judgments and other decisions of judicial authorities rendered in a foreign state. Historically, judgments are rendered by authority of the state, hence they are a display of its sovereignty. Therefore, the recognition of decisions handed down by foreign courts is not an obvious phenomenon. However, due to practical needs, ways had to be found and indeed have been established already for decades, in order to give effect to foreign judgments. The review of and decision on enforceability of foreign judgments is one of the last 'bastions of sovereignty' in an ever faster growing environment of more or less economically driven – integrative movements, both on a European and a world-wide scale.

At the EU level, certain parallels can be drawn between the free movement of goods and services on the one hand and the free movement of judgments on the other. The subject of this work will be the latter aspect of recognition as applied to judicial decisions. At the European summit in Tampere in October 1999, it was decided that the mutual recognition of judgments is to be established to the extent of complete abolition of *exequatur* procedures, which thence lead to significant changes in EC law.

The aim of this article is to give an overview of the status quo of the development of the principle of mutual recognition of judicial decisions in Europe and a description of the tendencies and aims in this field in the context of the latest European developments. To this end, the legislative competence of the EC in the area of judicial co-operation is outlined in III, after which new measures already adopted (IV) and those which are envisaged (V) on the way to abolition of *exequatur* orders are presented.

On a world-wide scale, mutual recognition has also been known for a long time. So far, mainly bilateral or multilateral agreements and some international conventions of rather limited scope of application are the basis for recognition of foreign judgments, which can easily lead to significant problems in identifying the correct set of rules applicable. At the moment, a major project is being discussed at the Conference for Private International Law in the Hague: the Hague Convention on jurisdiction and foreign judgments in civil and commercial matters. The current state of affairs regarding this very important measure will briefly be summarised and the likely evolution of mutual recognition and the influence thereof on the development of judicial co-operation will be outlined in VI.

II. Background: developments in the field of mutual recognition in the European Union

The principle of mutual recognition is not new to European legislation; in 1968, the so-called 'Brussels I Convention' (BIC) was established for EU Member States, establishing an almost automatic system of recognition for judgments in civil and commercial matters. This Convention is not

---

1. *Cassis de Dijon* (1979) ECR 649
4. Cf. e.g. Carpenter, *et al*., *ECJ (ed.) Tebbens, Kennedy, Kohler (counselling eds), Internationale Zuständigkeit und Urteilsanerkennung in Europa, Cologne (D), 1993, at 225 et seq.
a Community instrument, but closely linked thereto. It focuses, in parallel with the ‘four freedoms’ of the EC, on the ‘free movement of judicial decisions’. This Convention proved to be both important and successful, establishing an enforcement procedure which constitutes an autonomous and complete system of recognition, leaving no room for discretionary recognition. It is applied uniformly in all Member States due to the ECJ’s monopoly on interpretation which was established by the Protocol of 3 June 1971. Shortly thereafter, it was complemented by the Lugano Convention, expanding application of the Brussels I rules to the EFTA states.

Only quite recently and reluctantly, the necessity of _exequatur_ orders has become an object of abolition. The changes introduced to EC law by the Treaties of Maastricht and Amsterdam significantly altered the situation regarding policy aims and legislative competence in the area of judicial cooperation within the Community.

At the European Council of Tampere on 15 and 16 October 1999, mutual recognition has been recognised as one of the three main priorities for action and the ‘cornerstone of judicial co-operation in both civil and criminal matters within the Union’, which ‘should apply both to judgments and other decisions of judicial authorities’ in order to facilitate the creation of an ‘area of freedom, security and justice’ where people should be able to approach courts and authorities in any Member State as easily as in their own and where decisions should be respected throughout the Union. As a consequence of Tampere, the Council adopted a programme of measures for implementation of the principle of mutual recognition of decisions in civil matters as well as a similar programme for criminal matters, setting out a non-binding framework for the achievement of mutual recognition in these areas of law. As regards criminal matters, mutual recognition is a completely new and complex field of Community activities on various levels and at all stages of proceedings. The presentation thereof will be excluded here in order to focus on the aspects of mutual recognition relevant to international trade and civil (i.e. private) law cases.

New legislative instruments followed the Tampere Council session. Especially the year 2000 brought some major changes, most importantly, the Regulations Brussels I6 and II, as well as Regulations on the service of documents and on insolvency proceedings.

The informal meeting of Ministers of Justice and Home Affairs in Marseilles on 28 and 29 July 2000 did not introduce any major new aspects. Due to its informal nature, no conclusions were made. However, current trends were confirmed and the long-term aim of complete abolition of _exequatur_ proceedings was re-stated. Agreement was reached regarding accelerated implementation in areas where consensus already existed between the Member States. These include the extension of Brussels II to cover rights of access to children (in support of a French initiative), matrimonial property and the consequences of divorce, such as maintenance obligations and a simplified procedure for uncontested claims and further simplification of service. A German-British initiative regarding a European title for the enforcement of uncontested monetary claims was also introduced.

Also of importance was the subsequent meeting in Stockholm on 8 and 9 February 2001 where the implementation of the Tampere conclusions was reviewed and the above mentioned German-British initiative was basically accepted. However, mutual recognition is at the moment still subject to a number of limitations, mainly due to the limited scope of existing instruments which leave many areas of private law uncovered. Another reason for this is the fact that these instruments retain barriers to the free movement of judgments, such as intermediate proceedings facilitating enforcement. Even the Brussels I Regulation (‘BIR’) does not completely remove all these obstacles.

---

9 Namely the free movement of goods, services, people and capital.
13 The Lugano Convention of 16 September 1988 is almost an exact copy of the Brussels I Convention. Although, according to Protocol No. 2 of 16 September 1988, the interpretation of the Lugano Convention must be in line with that of Brussels I, this is not compulsory. As a result, the Lugano Convention is less effective due to the lack of uniform interpretation by a single authorised court and the lack of the Community’s institutional background; cf. e.g. Heß, Die Europäisierung des internationalen Zivilprozesses durch den Amsterdamer Vertrag – Chancen und Gefahren, [2000] NJW 23, 25 with references.
14 Along with better access to justice and increased convergence in procedural law, cf. paras 28-39 of the Tampere Presidency Conclusions ( _supra_ note 2).
15 Tampere Presidency Conclusions ( _supra_ note 2), para. 33.
16 Tampere Presidency Conclusions ( _supra_ note 2), para. 5.
17 Programme of measures for implementation of the principle of mutual recognition of decisions in civil matters of 30 November 2000, OJ 2001 C 12 at 1; in German also, [2001] IP Rex 163 et seq.
18 OJ 2001 C 12 at 10.
23 Going beyond Regulation 1348/2000/EC.
24 E.g. non-marital family situations, matrimonial property rights and succession.
III. The present legal situation: competence issues of the European Union in the field of judicial co-operation

1. Treaty framework

The Maastricht Treaty of 1993 incorporated in Title VI Article K.1 Nos 6 and 7 of the Treaty on the European Union judicial co-operation in civil and criminal matters as a field of common interest for the EC Member States at an intergovernmental level. The Amsterdam Treaty of 2 October 1997 has, for its part, linked co-operation in civil matters with free movement of persons under the EC Treaty. It introduced the new Title IV (Articles 61–69 EC) on ‘visas, asylum, immigration and other policies related to the free movement of persons’, giving the Community ‘insofar as necessary for the proper functioning of the internal market’ competence for legislation in the field of juridical co-operation in civil and commercial matters under Article 65 EC – expressly mentioning ‘the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases’ in Article 65(a) third indent. 29 Article 293 EC, on which – although exceeding its scope – the Brussels I Convention was based, still remains in force.

The latest change was introduced by the Nice Treaty; when this enters into force, qualified majority voting will replace the requirement of unanimity for measures referred to in Article 65 EC. Article 67(5) EC will then enable such measures under the Article 251 EC (co-decision) procedure. Family law matters are excluded; in this regard the requirement of unanimity (Article 67(1) EC) will remain in force. 30

2. Internal Community competence

It has been considered problematic that Article 65 EC forms only a weak base for the newly implemented measures since these have to serve the common market or the free movement of goods and are also subject to the proportionality and subsidiarity principle of Article 5 EC. Some commentators are even of the opinion, that Article 65 EC is not a valid basis to adopt Community measures in the area of Brussels I at all. 31 Also, some matters included in the Brussels I Regulation could have been based on other provisions, for example on jurisdiction in consumer matters under Article 153 EC, and could have thereby been dealt with separately. 32 Since Articles 65 and 67(1) EC grant the Commission and the Parliament so little influence, there is a certain eagerness to base measures, where possible, on other provisions in order to broaden the participation of these institutions. 33 However, this conflict is likely to diminish after the transitional period expires on 30 April 2004.

Another source of concern is contained in Article 69 EC; the special rules contained in the protocols for some Member States transpose the fragmentation of Schengen to the area of judicial co-operation, 34 which means that Brussels I and II need to be accompanied by conventions with these States in order to achieve harmonisation, leading to an ‘absurd amount of convention conflicts’. 35 Despite being harshly criticised 36 and unclear as regards interpretation, 37 Article 65 EC clearly enables the Community to harmonise private international law and procedural rules within the EU. 38

3. External Community competence

The scope of powers of the Community in relation to non-Member States (‘external competence’) and the residual powers of the Member States are not totally clear. 39 Where the Member States were initially exclusively competent to enter into conventions regarding matters of judicial co-operation with third party states, both the Maastricht and Amsterdam Treaties reduced these powers so that now, concurrent, if not exclusive power of the Community exists also externally, 40 in relation to both third party states and international organisation.
tions such as the Hague Conference. The ECJ accepts that, insofar as necessary to attain Community goals, external competence does exist where there is a corresponding internal competence. The Community’s external competence arises not only where a Treaty provision expressly notes its existence, but also where an internal provision is inseparable from unified international action. Competence, when based on Treaty provisions, is exclusive and irreversible. Such competence is questionable regarding the enactment of rules on choice of law and in the area of recognition and enforcement of judgments handed down outside the Community and also in the area of family law. Article 65 EC is limited by its wording to the proper functioning of the internal market. External competence may exist, when it is ‘inextricably linked’ to this objective. While this is the case to some extent, the fact that Article 293 EC fourth indent remains within the third pillar seems to indicate that the Article 65 regime is incomplete and that intergovernmental action regarding judicial co-operation in civil matters is still valid. However, Article 293 is not restricted to civil matters, which explains why it has not been deleted. In fact, there seems to be no space left for action under Article 293 EC fourth indent outside of Article 65 EC as far as judicial co-operation in civil matters is concerned. It is thus the Community rather than the Member States who is currently considering accession to the 1996 Hague Convention on parental responsibility.

In the context of external Community competence, the relative lack of expertise and insensitivity regarding national situations on the part of the Community in relation to questions of private international law is problematic. On the other hand, if the Member States were to retain their own powers to enter into, for example, the Hague Jurisdiction Convention, this could endanger the uniform interpretation of clauses designed to obviate conflicts between international and Community rules; single Member States could then influence the scope of Community law. The practicalities of negotiating international instruments thus call for a flexible approach, including both the Community and the Member States.

Although it will be the EC, rather than the Member States, entering into the Hague Convention on Recognition and Enforcement, the parallel participation of the Member States in negotiations appears to be adequate and desirable due to the Community’s aforementioned lack of experience and relative insensitivity regarding national matters.

4. Member States’ competence

The Brussels I Regulation is intended to carry on the Brussels I Convention, but also to limit the matters excluded from the scope of the Regulation. Hence, complete harmonisation is envisaged, leaving little, if any, room for unilateral national action in this field.

After the adoption of the Brussels II Regulation (‘BIIR’), it is questionable whether Member States still have competence to enter into any international Conventions regarding civil matters. Apparently, not even Community institutions are agreed on this question.

Clearly, there is no competence in areas where Community legislation is in force. This leaves virtually no room for the application of Article 293 EC fourth indent in civil matters. Still, the participation of Member States in the negotiation of international conventions is desirable due to the reasons mentioned above (external Community competence).

5. ECJ’s jurisdiction to interpret

The enormous success of the Brussels I Convention was, to a great degree, supported by the Protocol of 3 June 1971, ensuring uniform interpretation by the ECJ.

The future progress of mutual recognition seems now questionable since the ECJ’s competence to interpret by giving preliminary rulings is weakened regarding matters that are based on the new Title IV of the Treaty: Article 68 EC restricts preliminary questions – the Article 234 EC procedure – to courts of last instance. This may serve the purpose of limiting the workload of the ECJ, but especially in matters of civil procedure, this may prove to be troublesome: it may lead to unnecessary prolongation of proceedings. For this reason, the provision has been characterised as an integrative setback.

44 Regarding the latter only where the Community has exercised its powers under Article 65 EC, cf. Jayme/Kohler (supra note 27), at 455.
45 Basedow (supra note 31), at 704 with references.
46 Kotuby (supra note 12), at 9.
48 Basedow (supra note 31), at 702 et seq with references.
49 Schack (supra note 32), at 807.
50 Kotuby (supra note 12), at 15.
51 Cf. Kotuby, ibid.
52 Kotuby (supra note 12), at 18.
53 Basedow (supra note 31), at 701.
55 See Schack (supra note 32).
56 Cf. Kotuby (supra note 12), at 28.
57 Kotuby, idem at 29.
58 As can be seen from Recital 5 of the Regulation.
59 Idem para. 7.
60 Basedow (supra note 31), at 701; Jayme/Kohler (supra note 27).
62 Jayme/Kohler (supra note 27); see also ECJ 31 March 1971 – C-22/70 – AEGR, [1971] ECR 265.
64 Cf. Hoff (supra note 13), at 28 et seq; similarly Basedow (supra note 31), at 695; Besse (supra note 36), at 120 and Leible/Staudinger, Article 65 of the EC Treaty in the EC System of Competencies, (2000/01) EuLF (E).
IV. Recognition in civil and commercial matters today

The starting point for the new efforts to implement the principle of mutual recognition was the successful Brussels I Convention on which the further measures are based. The programme for implementation of these measures sets out three stages for achievement of the aim of mutual recognition of judgments in five areas of law, namely:

1. the one covered by Brussels I: all civil and commercial matters excluding revenue, customs or administrative matters (Article 1(1) BIIR); status, legal capacity, matrimonial property, wills and succession (Article 1(2)(a) BIR); bankruptcy, winding-up proceedings, judicial arrangements and analogous proceedings (Article 1(2)(b) BIR); social security (Article 1(2)(c) BIR) and arbitration (Article 1(2)(d) BIR);

2. the area of Brussels II: civil proceedings relating to divorce, legal separation or marriage annulment (Article 1(1)(a) BIIR) and parental responsibility proceedings occasioned by the former (Article 1(1)(b) BIR); family matters that arise through situations other than marriage are also considered a part of this field;

3. the area of matrimonial property rights and property questions arising out of separation of unmarried couples;

4. the area of wills and succession; and,

5. the measures ancillary to recognition.

The ancillary measures include the taking of evidence, minimum standards for civil procedure, the establishment of a European Judicial Network for civil and commercial matters, minimum standards for or harmonisation of service of judicial documents, easier access to justice, easier provision of information to the public, the harmonisation of conflict-of-law rules and measures to facilitate the enforcement of judgments.

As can be seen from this, the programme encompasses an overall coverage of civil law. The long-term goal in all areas as planned for ‘stage three’ is the complete abolition of exequatur orders for judgments; this is to be achieved by gradually broadening the areas of recognition, reducing the formalities associated therewith, replacing recognition procedures with automatic recognition and the possibility of appeal, and by reducing the grounds for challenging foreign decisions.

The status quo as regards the realisation of these aims is that measures have already been adopted in different areas, achieving different degrees of recognition.

Since publication of the programme, adoption of the Brussels I and II Regulations and the Regulations on insolvency proceedings, on service of documents and on the taking of evidence show that the Community is already making use of the new competence provided by Article 65 EC in order to extend mutual recognition to other areas of law. Furthermore, the European Judicial Network for civil and commercial matters has been established by Council Decision 2001/470/EC in order to simplify and expedite effective judicial cooperation between Member States.

1. Areas covered by existing measures

The concept of ‘judgment’ as laid down in the existing instruments (Article 32 BIR, Article 13 BIR) is broad and the understanding thereof rather liberal.

Since the Brussels I Regulation only brought minor changes to the areas covered by the long established BIC as stated above, a few remarks on the scope of the new BIIR should suffice here.

Judgments pronouncing divorce, legal separation or marriage annulment, as well as judgments relating to the parental responsibility of the spouses given on occasion of such matrimonial proceedings are covered by the Brussels II Regulation. It should be noted that the wording implies that only ‘positive’ decisions can be the subject of recognition, not ‘negative’ ones denying applications for divorce, legal separation or annulment of marriage.

Non-marital partnerships do not fit into the definitions of Article 1 BIIR; the preparatory materials also do not suggest that these should be covered. Furthermore, certain aspects of divorce litigation or legal separation, particularly decisions on

———

65 See supra note 22.
66 See supra note 21.
69 Cf. recital 6 of the decision.
70 According to Article 13(1) Regulation 1347/2000/EC and Article 13(1) Regulation 44/2001, it does not matter whether the judgment is given in the form of a decree, order, decision or the like.
71 Cf. Salerno (supra note 63), at 145 regarding Brussels I.
73 Article 13 Regulation 1347/2000/EC.
75 The Regulation is based on the Brussels II Convention of 28 May 1998, OJ 1998 C 221, at 1; the Explanatory Report of Borrás thereto, OJ 1998 C 221, at 27, does not mention applicability to family forms other than marriage; regulations do not have explanatory reports.
parental responsibility taken subsequent to and amending such decisions taken at the time of divorce or separation are not covered.

Neither areas 3 nor 4 as stated above, are covered in the BIIR and have also not yet been subject to separate regulation; recognition in insolvency proceedings is covered by Regulation 1346/2000/E.C.80

2. The degrees of recognition reached by existing instruments

The programme draws a distinction between two degrees of recognition.

The recognition81 (Articles 14 to 20) and enforcement (Articles 21 to 30) systems of the Brussels II Regulation are closely related to the ones of the Brussels I Convention. The Regulation provides for automatic recognition (Article 14(1) and (2)) while also allowing an application for decision on the question of recognition (Article 14(3)). It gives no competence to the courts enforcing the judgment to check the jurisdiction of the court82 or the law applied in the state of origin of the judgment (Articles 17, 18) and under no circumstance may the judgment be reviewed on its substance (Article 19).83 Article 14(3), which provides for an appeal procedure regarding recognition, also closely resembles Article 26(2) of the Brussels I Convention. Since no special procedure will be required to update civil status records, the Regulation will lead to the noticeable saving of time and money of the parties involved,84 which in itself is a considerable step forward.

Whether or not a decision is final, is not important for the question of recognition;85 hence provisional measures are also capable of recognition.86 The related decisions on costs (Article 13(2) BIIR) and documents that have been drawn up or registered as authentic instruments and are enforceable in one Member State, as well as settlements approved by a court are also covered under Article 13(3) BIIR. On the other hand only decisions in status proceedings are recognised; ancillary judgments (for example on maintenance, matrimonial property rights etc) are not even covered when incorporated in the judgment.87 Likewise, dicta on the fault of the spouses are excluded.88 The grounds for non-recognition are kept to the minimum and listed exhaustively in Article 15 BIIR. Reference is made to the principle of mutual trust between the Member States.89

The grounds for refusal of recognition in BIIR90 distinguish between matrimonial matters in Article 15(1)91 and custodial matters in Article 15(2) BIIR.

Firstly, if recognition would be manifestly contrary to the public policy of the recognition state, Article 15(1)(a) BIIR may be applied to matrimonial and Article 15(2)(a) BIIR to custodial matters as grounds for refusal of recognition. This provision is more narrow than the one which was contained in the BIC and is moreover limited to certain exceptional circumstances which are subject to review by the ECJ.92 The aim of both the EC legislator and the ECJ is to gradually eliminate the application of public policy clauses to refuse recognition.93

Secondly, insufficient service such that did not enable the respondent to adequately arrange for defence may be a ground for refusal of recognition under Article 15(1)(b) BIIR. This represents an improvement from the equivalent provision of the Brussels I Convention, by doing away with the examination of formalities of proper service – which were until now decisive, as can be seen from the case law of the ECJ on Article 27(2) BIC94 – and looking rather at the respondent’s opportunities to defend him or herself in the proceedings.95

Another ground is the existence of an irreconcilable judgment in the recognition State (Article 15(1)(c) BIIR) or an irreconcilable earlier judgment given in another State that is capable of recognition (Article 15(1)(d) BIIR). Questionable and so far unclear is, whether an earlier ‘negative’ decision can lead

80 Cf. Articles 16(1) and 25(1) of this Regulation. Not all cases are covered here. For the implementation of a separate instrument, see e.g. Eidenmüller, Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches Insolvenzrecht, [2001] IPRax 2, 9.
82 More detailed, Hausmann (supra note 77), at 348 et seq.
83 Cf. recital 17; review on the base of a change in circumstances are not precluded, cf. Borràs Report (supra note 78), para. 78. More detailed on the matter of refusal of recognition: Helms (supra note 77); Hausmann, ibid.; Wagner (supra note 77), at 77 et seq.
85 According to Article 13(1), the judgment only needs to be ‘pronounced’. Cf. Helms (supra note 77), at 266; Hausmann (supra note 77), at 348.
86 Cf. Helms and Hausmann, ibid. Whether or not provisional measures in urgent cases, taken according to autonomous laws of the forum Member State under Article 12 of the Regulation are covered is under debate: Hausmann speaks for, while Helms speaks against the inclusion thereof.
87 Cf. Articles 16(1) and 25(1) of this Regulation. Not all cases are covered here. For the implementation of a separate instrument, see Eidenmüller, Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches Insolvenzrecht, [2001] IPRax 2, 9.
88 Recital 10; Hausmann (supra note 77); see also Borràs Report (supra note 78), para. 64.
89 Recital 16 of Regulation 1347/2000/E.C, cf. Helms (supra note 77), at 262 et seq.
90 These are closely related to the ones of Articles 34 et seq. BIR.
91 The provisions of para. 1, lit (a) to (d) BIR are identical with Article 34 nos 1-4 BIR.
93 Cf. Helms (supra note 77), at 263.
94 See e.g. ECJ 3 July 1990 – C-305/88 – Lancray v Peters, [1991] IPRax 177.
95 Cf. Hausmann (supra note 77), at 349.
to refusal of recognition. The definition of ‘judgment’ in Article 13 BIIIR seems to point to the contrary.96 This exclusion of ‘negative’ decisions has been criticised because it puts the spouse who wants to hold onto a marriage in a position of undue disadvantage.97

Regarding custodial matters, the grounds for refusal of recognition are:

– if the judgment were given without the child having had the opportunity to be heard in violation of the fundamental principles of procedure of the recognition State (Article 15(2)(b) BIIIR);

– if the judgment were given in default of appearance where the person was not served in sufficient time and in such a way that he or she was not able to arrange defence unless the judgment was accepted unequivocally (Article 15(2)(c) BIIIR);

– on the request of a person claiming parental responsibility who had no opportunity to be heard (Article 15(2)(d) BIIIR);

– if the judgment is irreconcilable with a later judgment on parental responsibility in the recognition State (Article 15(2)(e) BIIIR), or such judgment of the state of habitual residence of the child or another Member State which fulfils the conditions of recognition (Article 15(2)(f) BIIIR).

Applications for declaration of enforceability of decisions on parental responsibility as covered by Article 13 BIIIR may, according to Article 24(2) BIIIR, only be refused if recognition is not possible. The catalogue of grounds for non-recognition tries to satisfy Article 23 of the Hague Convention No. XXXIV of 19 October 199698 and the requirements of the UN Convention of 20 November 1989.99

This system of recognition that is automatic unless contested, is referred to in the programme of measures as the ‘first degree’ of recognition.

As far as the Brussels I Regulation is concerned, further streamlining of this procedure has taken place to achieve the ‘second degree’ of recognition:100 Article 41 BIR provides that a judgment be declared enforceable upon completion of the formalities in Article 53 BIR without any review of the reasons for refusal of recognition (Articles 34, 35 BIR). This declaration may be contested only at the second stage in an appeal procedure (Articles 43-46). The responsibility for action is thus reversed. This streamlined *exequatur* procedure applies to all areas covered by the Brussels I Convention and to insolvency proceedings covered by the Brussels II Regulation.101

In contrast to Article 17 BIIIR, the Brussels I Regulation allows the court addressed to review jurisdiction – not as a rule (Article 35(3) BIR), but in certain cases (Article 35(1) BIR) – while being bound by the factual findings of the originating court (Article 35(2) BIR) and with the exception of public policy reasons (Article 35(3) second sentence BIR). The improved service provision of Article 15(1)(b) BIIIR was also adopted by the BIR in Article 43(2) (ex Article 27(2)).

Article 71(2)(b) BIR, regarding recognition of decisions for which jurisdiction is based on instrument(s) other than the Regulation, states that in terms of jurisdiction, such special conventions prevail, but with respect to recognition, the Brussels I Regulation prevails.102

V. Proposed measures in civil matters

The principle of mutual recognition develops along the lines of:

1. establishing mutual recognition in areas that are not yet covered by systems of recognition already in force;
2. establishing an ‘European Enforcement Title’ in the areas where agreement has already been reached;
3. simplification of procedures regarding claims of minor importance including those relating to family matters; and
4. harmonisation of the conflict of law rules of Member States.103

The next steps envisaged are as follows.

1. The extension of recognition to other areas

As regards new areas of law, the aim according to the programme of measures moves in the direction of firstly reaching the degree of recognition provided for in the BIIIR and then that provided for in the BIR; the aim is to ultimately progress beyond the level of recognition provided by these two regulations.104

The proposals to extend the scope of recognition as mentioned in the programme of measures, are to draft legislative instruments to cover recognition of judgments relating to:

– the dissolution of proprietary rights arising from a matrimonial relationship,

– the property law consequences arising from the separation of unmarried couples.

96 See Kohler (supra note 61), at 13; for differing views cf. Helms (supra note 77), at 265; Kohler (supra note 61), at 13; Hausmann (supra note 77), at 352.
97 Kohler (supra note 61), at 14.
98 Hague Convention No. XXXIV of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.
99 UN Convention of 20 November 1989 on the rights of the child; see Kohler (supra note 61), at 13 and Borrás Report (supra note 78), para. 73.
100 For details, see Kennett (supra note 75), at 733 et seq.
101 Cf. Programme of Measures (supra note 17), at 4.
102 Vasalli di Dachenhausen (supra note 8), at 229 referring to the identical provision of Article 57 BIC.
103 Borrás, Derecho Internacional Privado y Tratado de Amsterdam, [1999] REDI 383, 422.
104 Cf. Programme of Measures (supra note 17), at 5.
– succession, and
– parental responsibility and other non-property aspects of the separation of couples, independent of the marriage and matrimonial proceedings.105

Regarding the extended subject area of Brussels II, the introduction of new instruments is currently already under consideration. On 27 June 2001 the Commission held a hearing on a French initiative proposing a Council Regulation on the mutual recognition of judgments on rights of access to children106 on the basis of a working document from 27 March 2001.107 It will be lex specialis to the Brussels II Regulation, and provide for automatic recognition of the enforceability of decisions in that area of law and allow only very narrow exceptions to enforceability. This is intended to pave the way for, and eventually lead to the extension of mutual recognition, as enshrined in Brussels II, to all decisions on parental responsibility.108 However, the substantive scope of the Brussels II Regulation can only be extended when European conflicts of law rules regarding matrimonial and custody law are harmonised to a greater extent to eliminate the possibilities of forum shopping.109 Such an extension could then be achieved to include further consequences of divorce, like property law issues and thus create an ‘all encompassing European jurisdiction rule for divorce proceedings’.110 The application of the Regulation to the dissolution of non-marital partnerships could also be envisaged.111 While not yet mentioned in the Council and Commission’s Vienna Action Plan of 3 December 1999,112 the programme of measures aims at extending the principle of mutual recognition to non-marital family situations either by the adoption of a new instrument or by revising the Brussels II Regulation.113 In line with the trend of establishing free movement of decisions, the new German law on registered partnerships114 does not provide for a formal procedure for the recognition of foreign decisions on the annulment of homosexual partnerships, but rather accepts automatic recognition thereof.115

2. Achievement of further degrees of recognition

Further progress for existing instruments is to be achieved by two series of measures, namely:
– further streamlining of intermediate measures and the strengthening of effects of foreign judgments in the requested state, on the one hand, and
– abolition of intermediate measures in favour of true European enforcement orders on the other.

The streamlining could take the shape of limiting the grounds for challenging recognition, establishing provisional enforcement, establishing protective measures at the European level or improving attachment measures applicable to banks. As regards the areas of law covered by the existing instruments, it is proposed to reduce the current obstacles to the free movement of decisions by going beyond the BIR, which now covers these matters, and abolishing the intermediate measures in respect of small claims (consumer or commercial) and certain family matters (like maintenance claims). The abolition of exequatur for uncontested claims, which is presently sought by the German-British-Swedish initiative for a European Title for uncontested monetary claims, is amongst the priorities.

As regards ancillary measures, the programme proposes
1. the adoption of minimum standards for certain aspects of civil procedure,
2. the increase in efficiency of measures providing for improved enforcement of decisions, and
3. the improvement of judicial co-operation on civil matters in general.

The Service Regulation116 serves this aim. Also, Regulation 1206/2001/EC on the taking of evidence has been passed on 28 May 2001117 to improve, accelerate and simplify the cooperation between courts in the taking of evidence. Furthermore, a European Judicial Network in civil and commercial matters has been established by Council Decision 2001/470/EC.118 In relation to the creation of minimum standards for specific aspects of civil procedure, the Commission intends to present a Green Paper in 2002 in preparation for legislative action.119 The area of access to justice should also be mentioned in this context. In this field, Green Papers are currently in discussion120 as well as preparation.121 The Commis-

105 Idem at 3.


109 Cf. Hausmann (supra note 77), at 353.

110 Hausmann, idem.


112 On how best to implement the provisions of the Treaty of Amsterdam in the area of freedom, security and justice, see OJ 1999 C 19, at 1.

113 For the latter, Hausmann (supra note 111), at 265. Cf. also Wagner (supra note 79), at 282.

114 Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, BGBl. 2001 I 266, in force since 1 August 2001.

115 Cf. Wagner (supra note 79), at 288.

116 Regulation 1348/2000/EC (supra note 21).


sion intended to present a proposal for a directive on legal aid in September 2001.\(^{123}\)

Since it was acknowledged that strict deadlines for the realisation of the goals of the programme could prove to be counter-productive, the three stages for implementation which are contained in the programme of measures only present broad guidelines;\(^{123}\) in contrast, the Vienna Action Plan of 1998 included deadlines. Immediate action is envisaged now for the first stage in all areas of action (nos 1-4 as stated above), with ancillary measures being adopted in all areas and at all stages as appropriate. In all areas of action, the second stage provides for review of existing instruments while the last stage abolishes the *exequatur* for the areas covered by the reviewed instruments. The first stage for the area of law covered by Brussels I, is to realise the European enforcement order for uncontested claims, the simplification and speeding up of cross-border litigation on small claims and the abolition of *exequatur* for maintenance claims. The Commission intends to present at the end of 2001 a proposal for a Regulation on the creation of a European enforcement order for uncontested claims by way of setting minimum rules to enable abolition of interim enforcement measures.\(^{124}\)

For the area of Brussels II, stage one aims at the abolition of *exequatur* for judgments on rights of access, the adoption of the Brussels II machinery for non-marital family situations either by separate instrument or within Brussels II and the extension of the instruments adopted to embrace judgments modifying parental responsibility conditions as fixed in divorce judgments. Stage two intends to adopt the ‘second degree’ simplification of the Brussels I Regulation.

As regards area 3 (matrimonial property in the wide sense as stated) and area 4 (wills and succession), adoption of instruments for jurisdiction, recognition and enforcement of judgments using the Brussels II machinery is envisaged in stage one. The Commission is in the process of launching preparatory studies for this.\(^ {125}\)

The ECJ supports the implementation of mutual recognition by narrowing the applicable grounds for refusal; this can be seen in the latest decisions in *Renault v Maxicar* and *Dieter Krombach*\(^ {126}\) concerning refusal of recognition for ordre public reasons under the system of Article 27(1) Brussels I Convention.

This development has been viewed critically. While academic writers agree that automatic recognition in general is to be welcomed,\(^ {127}\) the fact that judicial review is supposed to be eliminated even in the area of grounds for refusal based on ordre public, has been subject to criticism; the principle of mutual recognition as developed since *Cassis de Dijon*\(^ {128}\) would not require abolition of ordre public review\(^ {129}\) which could even jeopardise the degree of harmonisation already achieved.\(^ {130}\) To avoid this negative effect, it has been stated that two conditions should be fulfilled before mutual recognition without *exequatur* is to be established.\(^ {131}\) On the one hand, the minimum procedural standards of Article 6 ECHR should be realised to their full extent in all Member States and on the other hand, the rules relating to formal requirements, structure and content of the actual judgments need to be harmonised.

VI. The bigger picture: mutual recognition world-wide

The extension of the Brussels I rules to the EFTA States in the Lugano Convention has already been mentioned. So far, on a larger international scale, co-operation only exists in a number of limited areas, mainly in the field of family law.

The instruments currently in force are the Hague Convention No. IX concerning the recognition and enforcement of decisions relating to maintenance obligations towards children of 15 April 1958, the Luxembourg ‘CIEC’ - Convention on the recognition in matrimonial matters of 8 September 1967,\(^ {132}\) the Hague Convention No. XVIII on recognition of divorces and legal separations of 1 June 1970, the Hague Convention No. XXIII on recognition and enforcement of decisions relating to maintenance obligations of 2 October 1973, the Council of Europe Convention on mutual recognition and enforcement of decisions concerning custody of children and on restoration of custody of children of 20 May 1980.\(^ {134}\) In the area of recognition of arbitral awards, there are the Geneva Convention on the recognition of arbitral awards of 1927,\(^ {135}\) the New York UN Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958\(^ {136}\) and the

---

\(^{122}\) Regarding procedures for extra-judicial dispute resolution, which was to be presented in October 2001.

\(^{123}\) Cf. Scoreboard Update (supra note 119), at 16.

\(^{124}\) Cf. Programme of Measures (supra note 17), at 6.

\(^{125}\) Cf. Scoreboard Update (supra note 119), at 16, 18.

\(^{126}\) Cf. Scoreboard Update (supra note 119).


\(^{128}\) This is the case even though it is questioned whether the complete abolition of *exequatur* is desirable; cf. Heß, Die Integrationsfunktion des Europäischen Zivilverfahrensrechts, [2001] IPRax 389, 391 et seq. and Heß (supra note 31), at 582; Jayme/Kohler (supra note 27), at 456.

\(^{129}\) See supra note 1.

\(^{130}\) Cf. Heß (supra note 31), at 582.

\(^{131}\) To this effect, Heß *idem*.

\(^{132}\) Heß (supra note 127), at 391 et seq.

\(^{133}\) All Hague Conventions are accessible via internet at http://www.hcch.net/e/conventions/index.html with full information on which States have signed.

\(^{134}\) Also Internation Commission on Civil Status Convention, both the authentic French and unofficial English versions are accessible via internet at http://perso.wanadoo.fr/ciec-ng/ListeConventions.htm.


\(^{136}\) Providing for a double *exequatur* procedure, i.e. conversion of the award into a judgment that can be recognised.

\(^{137}\) Providing for a simplified single *exequatur* procedure.
1965 Convention on the settlement of investment disputes between States and nationals of other States.\textsuperscript{132} Furthermore, the European Convention on international jurisdiction in commercial matters of 21 April 1961 in conjunction with the Paris Agreement on the application thereof of 17 December 1962 must be mentioned here. The Hague Conventions No. XXXIV of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children\textsuperscript{138} and No. XXXV on the international protection of adults of 13 January 2000; both contain a chapter on recognition and have not yet entered into force.

Apart from this, bilateral agreements exist between a number of States. However, until now, no instrument as far reaching as the Brussels I Convention is in force between a large number of States.\textsuperscript{139} The current negotiations on the implementation of a Hague Convention on jurisdiction and foreign judgments in civil and commercial matters, are thus a major step towards the implementation of mutual recognition on a world-wide scale; it is even seen as the most important convention on the rules of private international law ever undertaken by the Hague Conference.\textsuperscript{140} Although the implementation of the draft of 30 October 1999\textsuperscript{141} was initially envisaged for October 2000, a substantial setback was suffered mainly due to the strong orientation of the draft towards the Brussels Convention with which the USA strongly disagreed.\textsuperscript{142} The Brussels and Lugano Conventions were the European bases for contributions to the Hague Convention draft. Given the different legal backgrounds and the lack of institutional infrastructure of the Hague Conference Member States, which do not promote uniform interpretation as in the cases of the BIC and the BIR, it is understandable that the European system based on the principle of mutual trust, is viewed critically not only by European 'outsiders'. This controversy led to a re-scheduling of the 19th Diplomatic Session from autumn 2000 to 6-22 June 2001 and early 2002. During the first part of the session, critical areas where consensus was lacking were identified and it was decided that intense consultations should begin immediately.\textsuperscript{143} As a result, it is to be expected that the final Convention will differ substantially from the draft version. However, the main area of conflict was considered to be the rules on jurisdiction. As regards Chapter III (Articles 23-36) of the draft, which deals with recognition, no fundamental objections were raised.\textsuperscript{144} It is hence likely, that this chapter will remain largely unchanged. The summary of the June 2001 session\textsuperscript{145} reporting on the current state of the discussion, appears to strongly support this assumption since no substantial changes have been introduced in the summary document itself.

The Convention’s substantive scope will be slightly more limited than the one of the Brussels I Regulation due to the exclusion of maintenance obligations.\textsuperscript{146} If Chapter III remains as proposed in its current state, this Convention will introduce mutual recognition for judgments, including decrees, orders and decisions on costs as well as provisional measures of the courts which have jurisdiction on the merits of the case (Article 23);\textsuperscript{147} this is however, subject to the proviso that the jurisdiction was not based on national laws (Article 24) or on grounds that conflict with the rules of the Convention (Article 26). A further requirement for recognition is the necessity that the judgment is effective in the originating state as res judicata (Article 25(2)), otherwise enforcement may be postponed in case the judgment is reviewed (Article 25(4)). In contrast to Brussels II, the court addressed may verify the jurisdiction of the originating state, and thereby be bound by the findings of fact of the court of origin, unless it was a default judgment (Article 27). Recognition or enforcement may only be refused in the cases listed in Article 28. These are:

- where proceedings are pending between the same parties regarding the same subject matter before a court of the addressed state that was first seised (Article 28(1)(a));
- where the judgment is inconsistent with a judgment that was rendered in the state addressed or is capable of being recognised or enforced there (Article 28(1)(b));
- where the judgment results from proceedings which are incompatible with fundamental principles of procedure of the state addressed, including the right to be heard by an impartial and independent court (Article 28(1)(c));
- where the defendant was not served with the initiating document or notified of an equivalent document in sufficient time and in such a manner as to enable him to arrange for his defence (Article 28(1)(d));

\textsuperscript{132} International Convention on the settlement of investment disputes between States and nationals of other States, in force since 14 October 1966.

\textsuperscript{133} For details thereto, Pirring, in: Diederichsen et al (eds.), Festschrift Rolland, Cologne (D), 1999, at 277 with remarks on recognition on pages 287 et seq.

\textsuperscript{134} The Hague Convention No. XVI of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was only ever signed by three states, namely Cyprus, the Netherlands and Portugal.


\textsuperscript{136} Accessible at www.hcch.net/e/conventions/draft36e.html.

\textsuperscript{137} Cf. Heß (supra note 142), at 343 with references.

\textsuperscript{138} Summary of the June 2001 Session of the Hague Conference dated 2 August 2001; may be downloaded from ftp://hcch.net/doc/jdgm2001draft_e.doc.

\textsuperscript{139} Cf. Article 1(2)(b) of the 1999 Draft (supra note 141).

\textsuperscript{140} There is some debate about the inclusion of provisional measures which may lead to the exclusion thereof, cf. Summary of the June 2001 session of the Hague Conference (supra note 145).
– where the judgment was obtained by fraud in connection with a procedural matter (Article 28(1)(e)); and finally,

– where recognition would be manifestly incompatible with the public policy of the state addressed (Article 28(1)(f)).

As can be seen, these grounds broadly resemble the ones of the Brussels I and II Regulations. Recognition under the Hague Convention will be subject to a procedure which will be governed by the law of the State addressed in so far as the Convention does not provide otherwise (Article 30 of the draft Hague Convention). A number of documents must be produced, if so required by the addressed court, in translation (Article 29). The draft also provides for clauses which guarantee the applicants national treatment regarding security for the costs of proceedings (Article 31) and legal aid (Article 32). Settlements authorised by a court are put on an equal footing with judgments (Article 36). The recognition of authentic instruments is left to the discretion of the Contracting States (Article 35).

If this system is accepted amongst a large number of States including such major players as the USA, this will facilitate a simplification and speeding up of the recognition and enforcement of foreign judicial decisions that has long been necessary.  

VII. Conclusion

The EU, being pushed by the Commission, is moving forward fast. The complete abolition of exequatur, which is gradually being realised, will be a major step because in order to achieve this, the Member States must surrender a part of their sovereignty. The issue is still highly debated, both within Community institutions and in academia. At the last European Council meeting in Göteborg, it was resolved that efforts to implement the Tampere policy be strengthened with the preparatory Council meeting in Laeken. However, the fast and seemingly ill-considered legislative process which is currently taking place and which has not evolved on the basis of a wide academic debate, has been harshly criticised as being not only ignorant of differences in national laws but also of the competence problems of Article 65 EC; it has also been criticised for not undergoing a coherent development and for being incomplete due to the exclusion of – at the least – Denmark. The confused manner in which legislation in this area is enacted and implemented leads to a situation where measures are to be revised and supplemented, sometimes even before they are in force. The unfortunate effect of this is that academic discussion can neither take place properly nor can this discussion and practical experience be adequately considered in the legislative process; this may consequently hamper the process of integration.

The principle of mutual recognition, which could be seen as an integrative motor for the establishment of an ‘area of security, freedom and justice’ as envisaged by both European institutions and Member States, is thus not free from problems. It must be awaited to see how the implementation of the Brussels II Regulation will evolve; this may take some time due to the restriction of ECJ supervision to courts of last instance. However, in spite of this procedural drawback, which will also apply to the Brussels I Regulation and other measures based on Article 65 EC, the implementation of Brussels I as a Regulation must ultimately be welcomed because it simplifies and speeds up the review process and facilitates direct application of the Brussels I rules without lengthy ratification procedures in new Member States which are expected to shortly follow as a result of the EU enlargement process.

On the other hand, the pressure behind a speedy abolition of exequatur procedures is alarming. The Brussels I Convention was already considered a major step forward at the time it was agreed. Its success could not have been taken for granted; however, the BIC, due to its nature as a convention, emerged from a broad and lengthy academic debate and a great deal of its success may well be attributed to the fact that this convention could ‘grow’ over the years. The new Regulations, however, seem rather to be the result of a fairly hasty legislative process which so far, has not left much space for academic debate nor paid much attention to academic concerns where expressed. Fundamental questions regarding the desirability of the envisaged aims have so far been neglected. As a result, the recent legislation seems precipitate. In addition, the limitation of the ECJ’s jurisdiction to courts of last instance may lead to a slowing down of the uniform interpretation which has already been achieved in the application of the BIC and hence may even lead to a diversification of interpretation thus destroying the unity which has already been reached; this may result from a great deal of cases not being decided by the ECJ simply because parties will not take the financial risk of litigating through to the final instance and due to the national lower instance courts neither having the means nor the authority to decide questions of interpretation of the new measures.


See Heß (supra note 13), at 31; Schach (supra note 43).

Kohler (supra note 61), at 14; Passzakalr, Das internationale Scheidungs- und Sorgerecht nach Inkrafttreten der Brüssel II Verordnung, [2001] IPRAx 81, 84; Jayme/Kohler (supra note 27), at 458.

Cf. Jayme/Kohler (supra note 27), at 465; Heß (supra note 13), at 31.

Basedow (supra note 31), at 695; Kohler (supra note 27), at 8; Besse (supra note 36), at 121.

Cf. Heß (supra note 106), at 363 with references.

Idem and also Heß (supra note 13); Passzakalr (supra note 151), at 84.

See also Heß (supra note 127), at 396; Heß (supra note 31), at 582 et seq.

Similarly Heß, ibid; Heß, Die Anerkennung eines Class Action Settlements in Deutschland, [2001] JZ 373, 383.
The development of mutual recognition on a world-wide scale is not as advanced as that within the EU. Both due to the lack of institutional background and mutual trust in one another's judicial systems on the part of the Hague Conference Member States, more flexibility is needed in the adoption of instruments on mutual recognition; hence less ambitious projects are more likely to be successful until there is a broader acceptance of more ambitious projects. The abolition of *exequatur* orders is not seen as a necessity here. It is rather the standardisation of recognition proceedings that is of importance.

Perhaps it is too early to talk about a 'principle of international private law' in respect of mutual recognition, even though it does impinge on cross-border private law cases. However, it is fully possible, that this principle will develop at the European Union level into a system similar to the US 'full faith and credit clause'. The further use of this principle may prove to be helpful in solving, for example, problems associated with the substitution of notary deeds: formal requirements of that kind could become the object of recognition. Especially in areas where the harmonisation of substantive laws is unattainable or undesirable due to cultural differences or the like, the harmonisation of procedural rules such as recognition is a welcome alternative. In order to work effectively though, the uniform jurisdiction and recognition provisions need to be accompanied in the long run by harmonised conflicts of law rules in order to avoid forum shopping and its negative consequences. Whether the complete relinquishment of order public review is desirable remains questionable. Surely, mutual trust in each other's judicial systems must be possible to achieve; however, this needs to grow in the minds of those applying the law. Since the different cultures within Europe will and should continue to exist, it would also be sensible to retain the option for public policy review.

---

**Formal Invalidity of Arbitration Agreements at the Stage of Enforcement of the Arbitral Award Under the New York Convention: The Italian Judicial Approach**

Leonardo Graffi

1. The decision of the Court of Cassation of 21 January 2000

This article stems from a recent decision of the Italian Court of Cassation (Corte di Cassazione) in which Italian judges were once again confronted with the issue of the formal invalidity of an arbitration agreement at the enforcement stage under the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or New York Convention (hereinafter, “NYC”). In this case, a British company (Interskins Ltd.) initiated an action in 1994 against an Italian company (Conceria De Maio) in the Naples Court of Appeals (Corte d’appello) for the recognition and enforcement of a foreign arbitral award made by the Skin, Hide & Leather Association in London. The award settled a dispute arising from a contract for the supply of leather to the Italian company. The Italian defendant refused to recognise the settlement, claiming the lack of a valid arbitration agreement. Two years later, the Naples Court of Appeals rejected the defendant’s claims in a decision issued 13 November 1996. The appeals court ruled that the claims were inadmissible and that the invalidity of the arbitration agreement did not in any event constitute a ground for refusal of recognition of the award under Article V of the NYC. The Italian company turned to the Court of Cassation, claiming, *inter alia*, that the arbitration agreement was formally invalid under Articles 807 and 808 of the Italian Code of Civil Procedure and Article V of the

---

1. An extract from this decision appears at page 51 of this issue.

5. Ibid.
6. Ibid.