

THE ENFORCEMENT OF MALTESE JUDGMENTS IN OTHER EU MEMBER STATES UNDER THE EUROPEAN UNION'S 'BRUSSELS I' REGULATION, WITH PARTICULAR REFERENCE TO JUDGMENTS DELIVERED AFTER 1ST MAY 2004 IN CASES COMMENCED BEFORE THAT DATE

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1. Introduction

On 1 January 2012, some 17.2 million European Union (Hereinafter referred to as 'EU') citizens were living and officially residing in another Member State. In the same year, it was reported that some 6.5 million persons were working in another Member State. Moreover, 45% of individuals aged 16-74 had purchased goods online from within the EU.¹³¹²

These statistics are not only extraordinary in their own nature, but they evidence the increased importance that Private International Law has come to bear. In a world where the global, and especially the intra-Union, movement of persons, goods, services and capital is taking place at a rate that is higher than ever before, the European legislator anticipated the legal disputes and issues that could, and so often do, arise from such movement by introducing several legal instruments, most prominently the Brussels I Regulation (Hereinafter referred to as the 'Regulation').¹³¹³

These instruments, therefore, are both anticipatory and reactionary, in that the primary motive of such instruments, as often evidenced in the preambles themselves, is to ensure that the legal conditions in the Union are improved to allow the internal market to continue to grow, which motive is in turn based on the past experience and knowledge that a lack of legal approximation prevents such growth.¹³¹⁴

The Regulation, therefore, seeks to standardise both the determination as to which Court has jurisdiction over the particular issue and the determination as

¹³¹² 'EU Citizenship Statistics on Cross-Border Activities' (eurostat) <http://ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities> accessed 13 August 2016.

¹³¹³ Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L 12,

¹³¹⁴ *ibid* Recital 2.

to how a judgement may be subsequently recognised and enforced by a Court in another Member State, should this be required.

This essay shall focus on the latter function of the Regulation. The purpose shall be not only to examine the procedure by which a Maltese judgement may be recognised and enforced in another Member State, but also to determine the kind of judgements that may be effectively enforced under the Regulation. This shall involve a discussion on the scope of the Regulation and the defences that could be raised by a defendant to stop such enforcement. It shall additionally examine the changes brought about by the recast Regulation.¹³¹⁵

2. Distinguishing Recognition from Enforcement

It should be noted that recognition and enforcement are not one and the same thing. As explained in the fourteenth edition of *Private International Law*,¹³¹⁶ recognition is the prelude to enforcement. If the courts of a Member State are called upon to enforce the rights that one has acquired through a foreign judgement, those same courts must first recognise the decision of the foreign court, which is however automatic.¹³¹⁷ Following recognition, the creditor must use the enforcement procedure laid out in the Regulation to bring about the enforcement of that judgement. 'National rules cannot be used as an alternative.'¹³¹⁸

Furthermore, the purpose of recognition is not merely enforcement. The recognition of a foreign judgement prevents the re-litigation of the merits on which the *res judicata* lies. This was made amply clear in the *De Wolf vs. Cox case*,¹³¹⁹ where it was held that the winning party to a case could not file an action on the same merits.

The fact that there may be occasions on which, according to the national law applicable, the procedure set out in articles 31 et seq. of the [1968] convention may be found to be more expensive than bringing fresh proceedings on the substance of the case does not invalidate these considerations.¹³²⁰

¹³¹⁵ Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1.

¹³¹⁶ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008).

¹³¹⁷ *ibid* 603.

¹³¹⁸ *ibid* 605.

¹³¹⁹ Case 42/76 *Jozef De Wolf vs. Harry Cox* [1976] ECR 1759.

¹³²⁰ *ibid* para 14.

3. The Process of Enforcement

The Regulation dedicates the third chapter to the process by which a judgement delivered in a Member State may be recognised and enforced in another Member State. It creates a simple general rule,

A judgement given in a Member State shall be recognised in the other Member States without any special procedure being required.¹³²¹

There are very limited instances where the recognition of a judgement delivered in a Member State may be blocked in another Member State. These instances shall be discussed further below. However, once the judgement has been recognised,

A judgement given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.¹³²²

The enforcement of a judgement, therefore, begins through an application submitted either to a court or to a competent authority, as the case may be.¹³²³ This is known as the Exequatur procedure, which is regulated by the law of the Member State in which enforcement is sought.¹³²⁴ The application for a declaration of enforceability requires that one present an authentic copy of the judgement in question along with a certificate issued by the Court of the Member State of origin that the said judgement is enforceable against the defendant.¹³²⁵

It is important to note that the creditor has the right to apply for provisional, including protective, measures to the Court of the Member State where enforcement is sought without requesting a declaration of enforceability.¹³²⁶

Once the judgement has been declared enforceable, the declaration is served on the defendant, who may then appeal the decision. Prior to this stage, the debtor does not seem to have any opportunity of making submissions. The appeal must be lodged within one month from the date on which service of the declaration is affected, which is extended by another one month if the defendant is domiciled in

¹³²¹ Regulation 44/2001 art 33(1).

¹³²² *ibid* art 38(1).

¹³²³ *ibid* art 39(1).

¹³²⁴ *ibid* art40(1).

¹³²⁵ *ibid* arts 53,54.

¹³²⁶ *ibid* art 47.

a Member State other than that in which the declaration of enforceability was issued.¹³²⁷

Once the appeal has been lodged, the Court of the Member State in which enforcement is sought may take one of two routes. Firstly, the Court may stay proceedings where an appeal from the judgement to be enforced has been filed before the Courts of the Member State of origin.¹³²⁸ Case law has shown that should the defendant appeal, the party seeking enforcement,

may not, during that time, take any measures of enforcement properly so called but must confine itself to taking, if it considers that there is a need for them, protective measures against the property of the party against whom enforcement is sought.¹³²⁹

Alternatively, the Court may proceed to determine whether or not to refuse a declaration of enforceability. The grounds on which the Court may refuse to enforce a judgement are the same as the grounds of non-recognition.¹³³⁰

4. Grounds of Non-Recognition

Articles 34 and 35 of the Regulation provide the judgement debtor with some prospect of impeding the recognition and enforcement of a judgement. Given that the defences listed hereunder are exceptions to the general rule of recognition, they should be interpreted restrictively.

This was stated clearly in *Case C-414/92*,¹³³¹ a preliminary reference decided under the 1968 Brussels Convention.¹³³² The question referred to the European Court of Justice (Hereinafter referred to as the 'ECJ') was whether a court settlement could fit within the definition of "judgement" under the Convention's Articles 25 and 27(3) (Articles 32 and 34(3), respectively, of the Regulation). The Court answered in the negative.

The Regulation provides four grounds of non-recognition.

4.1 Ground 1: Public Policy

¹³²⁷ *ibid* art 43.

¹³²⁸ *ibid* art 46(1).

¹³²⁹ Case 119/84 *Capelloni vs. Pelkmans* [1985] ECR 3143, para 18.

¹³³⁰ Regulation 44/2001 art 45(1).

¹³³¹ Case C-414/92 *Solo Kleinmotoren GmbH vs. Boch* [1994] ECR I-2253.

¹³³² Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1968] OJ L299/32.

Article 34(1) of the Regulation states that a judgement shall not be recognised ‘if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.’¹³³³

In understanding the applicability of this defence, reference to the Jenard Report is apt.¹³³⁴ The report makes clear that this defence must be used not when the judgement itself is contrary to public policy, but rather when its recognition is contrary to public policy:

It is no part of the duty of the court seised of the matter to give an opinion as to whether the foreign judgment is, or is not, compatible with the public policy of its country. Indeed, this might be taken as criticism of the judgment. Its duty is rather to verify whether recognition of the judgment would be contrary to public policy.¹³³⁵

As explained in *Cheshire, North & Fawcett's Private International Law*, the wording of the provision suggests that each Member State is to apply its own notion of public policy, according to its own rules and customs. However, this could create discord in the application of the Regulation given that each Member State may have a unique understanding of the term. Therefore, the national Court must interpret ‘public policy’ in a sense that is ‘appropriate in the context of the Regulation, and the Court of Justice may intervene if they fail to do so.’¹³³⁶

Needless to say, this is a rather undesirable situation. It seems that the balance between ensuring legal certainty on the one hand and strengthening harmonisation among the Member States on the other has not been correctly struck. It would make it very difficult for any practitioner to comfortably advise one’s client as to the true meaning of the term. There have, in fact, been various cases dealing with the interpretation to be given to the term.

In the *Krombach case*,¹³³⁷ for instance, the referring Court asked whether the provisions on jurisdiction in the Brussels Convention could be interpreted as part of public policy for the purposes of Article 27(1) (Article 34(1) of the Regulation). The ECJ held that the Court before which enforcement is sought cannot refuse the recognition and enforcement of a judgement purely on the basis ‘that the court of origin failed to comply with the rules of the Convention

¹³³³ Regulation 44/2001 art 34(1).

¹³³⁴ Paul Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968) [1968] OJ C 59/79.

¹³³⁵ *ibid* 44.

¹³³⁶ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 611-615

¹³³⁷ Case C-7/98 *Dieter Krombach vs. André Bamberski* [2000] ECR I-01935.

which relate to jurisdiction.¹³³⁸ One could only have recourse to the public policy defence,

where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.¹³³⁹

4.2 Ground 2: Default of Appearance

Article 34(2) of the Regulation states that the judgement shall not be recognised if it were delivered in default of appearance, where the defendant was not served with the documents instituting the proceedings in such a way as to allow him to prepare his defence, 'unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.'¹³⁴⁰

The law generally presumes that any person served with a document that implies his liability at law would take positive action to fight such claims. Through this defence, the Regulation seeks to protect the rights of those persons who have not had the opportunity to defend themselves.¹³⁴¹

A close reading of the article shows that it is made up of several elements. Firstly, the judgement must have been delivered in default of appearance. In other words, the defendant must not have appeared to defend himself at any level, not even to contest the jurisdiction of the Court.¹³⁴² One interesting issue arose in the *Sonntag case*,¹³⁴³ where the defendant had been aware of the civil law claim made against him in the criminal proceedings to which he answered. The Court held that at the moment that the defendant answers to the charges brought against him in the criminal proceedings, he is presumed to have answered also to

¹³³⁸ C-7/98 *Dieter Krombach vs. André Bamberski* [2000] ECR I-01935 para 32.

¹³³⁹ *ibid* para. 37.

¹³⁴⁰ Regulation 44/2001 art 34(2).

¹³⁴¹ Case 166/80 *Klomps vs. Michel* [1980] ECR 1593.

¹³⁴² Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 617.

¹³⁴³ Case C-172/91 *Volker Sonntag vs. Hans Waidmann* [1993] ECR I-01963.

the civil law claim made against him, unless he specifically declines to appear in the civil action.¹³⁴⁴

Secondly, the defendant must not have been served with the documents instituting proceedings. The wording of the provision under the Brussels Convention had been slightly amended to eliminate the term “duly” and leave only ‘served’. The resulting effect is that the Regulation would not condone the non-recognition and enforcement of a judgement on a mere technicality. Under the Regulation, if service was effected, albeit irregularly, and the defendant had sufficient time to prepare a defence, then this ground may not be relied upon.¹³⁴⁵

The documents referred to in the provision have been interpreted as, ‘the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin.’¹³⁴⁶

Thirdly, the documents must have been served in such a time and in such a way to allow the defendant to arrange for his defence. Jurisprudence has consistently held that it is for the Court before which enforcement is sought to determine whether or not the conditions are satisfied.¹³⁴⁷

4.3 Ground 3: Irreconcilability #1

Article 34(3) states that a judgement shall not be recognised ‘if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.’¹³⁴⁸

This ground of non-recognition requires that a previous judgement has been delivered between the same parties in the Member State in which recognition is sought, and that this judgement is irreconcilable with the judgement that is sought to be enforced.

It is therefore not necessary for the same cause of action to be involved. Thus, for example, a French court in which recognition of a Belgian judgment awarding damages for failure to perform a contract is sought will be able to refuse recognition if a French court has

¹³⁴⁴ *ibid* para 41.

¹³⁴⁵ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 618.

¹³⁴⁶ Case C-474/93 *Hengst Import BV vs. Campese* [1995] ECR I-2113.

¹³⁴⁷ Case 49/84 *Debaecker and Plouvier vs. Bouwman* [1985] ECR 1779.

¹³⁴⁸ Regulation 44/2001 art 34(3).

already given judgment in a dispute between the same parties declaring that the contract was invalid.¹³⁴⁹

Needless to say, the bone of contention would lie with whether or not the two judgements are irreconcilable. In the *Hoffman judgement*,¹³⁵⁰ the ECJ held that to determine whether the two judgements are irreconcilable, one must examine whether the judgements lead to legal consequences that mutually exclude one other. 'Applying this test, it was held that a German judgement ordering a husband to pay maintenance to his wife as part of his conjugal obligations was irreconcilable with a subsequent Dutch judgement pronouncing a divorce.'¹³⁵¹

4.4 Ground 4: Irreconcilability #2

Article 34(4) states that a judgement shall not be recognised,

if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.¹³⁵²

Whereas subarticle 3 was concerned with irreconcilable judgements delivered in the same Member State, subarticle 4 looks at irreconcilability arising out of judgements delivered in different Member States or in third States.

This is especially important in situations of *lis pendens* with third States. The *lis pendens* rules in the Regulation apply only to proceedings in two Member States. Thus, in a situation of *lis pendens* between the Court of a Member State and the Court of a third State, wherein neither Court stays proceedings in favour of the other, the judgement delivered earlier by the third State takes precedence, provided that it satisfies the conditions of being recognised in the Member State addressed.

4.5 Ground 5: Judgement conflicts with Chapter II of the Regulation

¹³⁴⁹ Paul Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968) [1968] OJ C 59/79, 45.

¹³⁵⁰ Case 145/86 *Hoffman vs. Krieg* [1988] ECR 645.

¹³⁵¹ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 623.

¹³⁵² Regulation 44/2001 art 34(4).

Sections 3, 4 and 6 of the Regulation provide for special jurisdiction rules. If a Court, in delivering judgement, ignores or otherwise breaches the provisions of these sections, then the Court of another Member State has the power not to recognise that judgement. Therefore, though this ground is not listed as a non-recognition ground under Article 34, the effects are ultimately the same.

The existence of this ground is understandable but somewhat difficult to apply given the existence of Articles 36 and 45(2),¹³⁵³ which explicitly state that the Courts before which recognition is sought shall not review the substance of the judgement to be recognised. Cheshire, North & Fawcett explains that, '[i]n examining jurisdiction, the recognising court is bound by the findings of fact on which the court which gave the judgement based its jurisdiction; this avoids unnecessary duplication of effort.'¹³⁵⁴

5. Temporal Scope

One particular issue, which requires further examination, relates to the applicability of the Regulation itself. At what point do judgements of the Maltese Courts become enforceable in other Member States? The answer to this question emerges from Chapter VI of the Regulation, wherein Article 66(1) states simply that it applies only to proceedings instituted or documents formally drawn up or registered after the entry into force thereof.¹³⁵⁵

In other words, the Regulation applies only to those proceedings that began after 1 March 2002,¹³⁵⁶ the latter being the date of entry into force of the Regulation. This simple answer, however, raises two major problems. Firstly, how is it to be applied in situations where a country, like Malta, joins the EU after the abovementioned date? Secondly, what happens where proceedings began prior to that date, but the judgement was delivered afterwards? Sub-Article 2 of the same Article provides some light to the second question,

However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention

¹³⁵³ *ibid.*

¹³⁵⁴ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 626.

¹³⁵⁵ Regulation 44/2001 art 66(1).

¹³⁵⁶ *ibid* art 76.

both in the Member State or [sic] origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.¹³⁵⁷

In seeking to understand Article 66, one must undoubtedly refer to the preliminary reference of 21 June 2012, which defined the phrase 'entry into force'.¹³⁵⁸ A reference for a preliminary ruling was made by the Supreme Court of the Czech Republic in proceedings instituted by an Austrian company seeking the recognition and enforcement in the Czech Republic of a judgement delivered in Austria against the Czech defendant company.

Both the first and second instance Courts in the Czech Republic dismissed the plaintiff company's application on the ground that Regulation 44/2001 was binding on the Czech Republic as from the date that the country acceded to the EU (1 May 2004). The judgement that Wolf Naturprodukte sought to enforce was a judgement delivered on 15 April 2003, thus preceding the aforementioned date of accession.

The referring Court therefore asked whether Article 66(2) should be interpreted as meaning that for the Regulation to take effect for the purposes of recognition and enforcement of judgements, it must have been in force both in the State of origin and in the addressed State at the time of delivery of the judgement.

The Court concluded that the phrase 'entry into force' found in Article 66(2) must be interpreted as meaning the date from which the Regulation starts to apply in both the Member States concerned. Consequently, for the purposes of the recognition and enforcement of judgements, the application of the Regulation depends on whether it was in force both in the Member State of origin and the Member State addressed at the time that the judgement was delivered.

The rationale behind this interpretation lies in the safeguards that the Regulation contains to protect the interests of the defendant. As stated by the Court, there is a close link between the rules on jurisdiction and the rules on the recognition and enforcement of judgements. In fact, the simplification of the process to the recognition and enforcement of judgements,

¹³⁵⁷ *ibid* art 66(2).

¹³⁵⁸ Case C-514/10 *Wolf Naturprodukte GmbH vs. SEWAR spol. s. r. o.* (ECJ, 21 June 2012).

is justified only to the extent that the judgment which is to be recognised or enforced was delivered in accordance with the rules of jurisdiction in that regulation, which protect the interests of the defendant.¹³⁵⁹

In this case, the defendant company was, at the time of the original proceedings, domiciled in a State that had not acceded to the EU. In light of this, the Austrian Court will have established jurisdiction on the basis of its own domestic rules, not the rules contained in Regulation 44/2001. Consequently, certain safeguards, such as those in Articles 26(1)¹³⁶⁰ and 26(2)¹³⁶¹ of the Regulation, would not apply, thus jeopardising the fundamental principles upon which the Regulation was established. Had the defendant company been domiciled in Malta, the Court would have reached the exact same decision given that Malta and the Czech Republic acceded to the EU on the same day.

So how would this translate to Maltese judgements seeking enforcement in other Member States? Following this judgement, the first thing to note is that any foreign Court called upon to enforce a Maltese judgement must ensure that the judgement was delivered after the date of accession, not the date of entry into force of the Regulation.

Furthermore, if proceedings in Malta began prior to 1 May 2004 but the judgement was delivered after the aforementioned date, that judgement could be only recognised and enforced if the Court of the Member State addressed is satisfied that the rules upon which the Maltese Court established jurisdiction 'accorded' to those established in the Regulation.

It is the opinion of the author that the term 'accorded' is rather unsatisfactory and vague. An English dictionary definition of the term is, "To be in agreement, unity, or harmony."¹³⁶² Does this mean that the bases of jurisdiction under national law must be the same as those established in the Regulation or that they are simply not contrary to the rules established therein? Needless to say, the consequences of each interpretation are different, with the

¹³⁵⁹ *ibid* para 27.

¹³⁶⁰ Regulation 44/2001 art 26(1): "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation."

¹³⁶¹ *ibid* art 26(2): "The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end."

¹³⁶² The Free Dictionary By Farlex <<http://www.thefreedictionary.com/accorded>> accessed 1 September 2016.

latter interpretation being less stringent than the former. The research carried out by the author did not throw light on the proper interpretation to be given.

The only other way that a Maltese judgement, delivered after the date of accession on proceedings that began before, may be recognised and enforced in another Member State is if a convention had been signed between the two States prior to the start of the proceedings.

Having clarified the issues relating to the temporal scope of the Regulation, it is important to note that the temporal scope is but one aspect of the applicability of the Regulation. Determining the actual scope of the Regulation is of paramount importance in determining how the enforcement of Maltese judgements in other Member States may take place.

6. Scope

The Regulation is not intended to govern the recognition and enforcement of all and any judgements delivered by the Courts of the Member States. In fact, one could argue that the applicability of the Regulation is indeed limited, which view is substantiated through an examination of the provisions of the Regulation and the relative jurisprudence.

The first chapter of the Regulation is devoted to its scope of application. The very first statement made by the Regulation is that it applies only to civil and commercial matters.¹³⁶³ In other words, any matter that falls within the realm of Criminal law, Public law or any law other than that which is civil or commercial in nature cannot be caught by the provisions of this Regulation.

What would be the resulting effect? If a judgement relates to a matter that falls beyond the scope of the Regulation, then the recognition and enforcement thereof must be regulated either by another EU legal instrument, by an international convention or else by the national laws of the Member State in which recognition and enforcement of that judgement is sought.

However, the nature of the Court itself has no bearing on the application of the Regulation.¹³⁶⁴ In other words, if a Criminal Court were determining a civil issue, the judgement delivered by it on that civil issue would still fall within the ambit of the Regulation. This was the case in *Sonntag*, referenced earlier, where a Criminal Court determined a civil claim for damages.¹³⁶⁵

¹³⁶³ Regulation 44/2001 art 1(1).

¹³⁶⁴ *ibid.*

¹³⁶⁵ Case C-172/91 *Volker Sonntag v Hans Waidmann* [1993] ECR I-01963.

Furthermore, certain matters that would normally be classified as civil or commercial, listed in Article 1, are specifically excluded from the ambit of the Regulation.¹³⁶⁶

The ECJ has had ample opportunity to expound on the meaning of ‘civil and commercial matters’, which is to be given an autonomous interpretation.¹³⁶⁷ In the *Ruffer case*,¹³⁶⁸ for instance, the claimant was the Netherlands State, which brought a claim for damages sustained by it after having to remove wreckage from a public waterway following a collision between Mr Ruffer’s vessel and another vessel, which sank. The Court held that such removal was carried out in the exercise of public authority and, therefore, fell outside the scope of application of the Convention, and would likewise fall outside the ambit of Regulation 44/2001.

The *Bayer case* also provided some important insight into the understanding of this phrase.¹³⁶⁹ The question raised was whether the phrase ‘civil and commercial matters’ would include an order for the payment of a penal fine to the State for a breach of private intellectual property rights. The Court held,

In the present case, even if [...] the fine at issue in the main proceedings is punitive and the reasoning in the order imposing it explicitly mentions the penal nature of that fine, the fact remains that, in those proceedings, there is a dispute between two private persons [...]. The action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute. In other words, the legal relationship between Bayer and Realchimie must be classified as ‘a private law relationship’ and is therefore covered by the concept of ‘civil and commercial matters’ within the meaning of Regulation No 44/2001.¹³⁷⁰

¹³⁶⁶ Regulation 44/2001 art 1: ‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

- (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- (c) social security;
- (d) arbitration.’

¹³⁶⁷ Case 10/77 *Bavaria vs. Germanair* [1977] ECR 1517.

¹³⁶⁸ Case C-814/79 *Netherlands State vs. Reinhold Ruffer* [1980] ECR 3807.

¹³⁶⁹ Case C-406/09 *Realchemie Nederland BV vs. Bayer CropScience AG* [2011] ECR I-9773.

¹³⁷⁰ *ibid* 41.

7. Abolition of the Exequatur Procedure

The main subject matter of this essay has been Regulation 44/2001. It should, however, be noted that the Regulation has now been repealed and replaced by Regulation 1215/2012, which has brought about major changes to the manner in which judgements in the EU are recognised and enforced in the Member States. Of course, Regulation 44/2001 retains an important position given that the recast Regulation applies only to legal proceedings instituted or instruments drawn up on or after 10 January 2015.¹³⁷¹

One major change brought in by the new Regulation is the abolition of the Exequatur procedure. In other words, any judgements delivered on or after 10 January 2015 will now be recognised and enforced in other Member States without any need for a declaration of enforceability.¹³⁷² Needless to say, the procedure by which a Maltese judgement may be enforced in another Member State has been greatly facilitated.

A close reading of the Stockholm Programme leaves little doubt as to the reasons behind the introduction of these changes.¹³⁷³ The Stockholm Programme explains that one of the most fundamental tools in the increased cooperation between the Member States in the Area of Freedom, Security and Justice is that of Mutual Trust: 'Mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area.'¹³⁷⁴ It is explained that,

As regards civil matters, the European Council considers that the process of abolishing all intermediate measures (the exequatur), should be continued during the period covered by the Stockholm Programme. At the same time the abolition of the exequatur will also be accompanied by a series of safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules.¹³⁷⁵

As indicated above, these changes have not eliminated the possibility of the defendant challenging the judgement, as the grounds for non-recognition remain the same.¹³⁷⁶ The safeguards, therefore, remain very much in force.

¹³⁷¹ Regulation 1215/2013 art 66(1).

¹³⁷² *ibid* art 39.

¹³⁷³ The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/1.

¹³⁷⁴ *ibid* point 1.2.1.

¹³⁷⁵ *ibid* point 3.1.2.

¹³⁷⁶ Regulation 1215/2012 art 45(1).

8. Concluding Remarks

This essay has effectively analysed the recognition and enforcement of Maltese judgements in other Member States, exposing the issues that do arise in this process.

It is to be expected that business will continue to seek opportunities abroad, and EU citizens will continue to move to other Member States, be it for personal or professional reasons. Therefore, reliance on efficient judicial processes will continue to increase.

As a result, deeper integration in this area is highly probable. Undoubtedly, the question academics are asking is, to what extent will the result of the UK's referendum to leave the EU slow down this process? Given the uncertainty around the true meaning of 'Brexit', and the steps that the UK will take to effectively leave the EU, the answer to this question is even harder to determine.¹³⁷⁷

¹³⁷⁷ Denis MacShane, 'We won't trigger Article 50 until after 2017 – and that means Brexit may never happen at all' *Independent* (19 August 2016) <<http://www.independent.co.uk/voices/brexit-article-50-leaving-eu-wont-happen-after-2017-european-elections-france-germany-a7198736.html>> accessed 2 September 2016.