

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

In today's highly globalised world, it is becoming increasingly common for cases to include elements from different jurisdictions. Naturally, the ultimate goal of obtaining a favourable judgment is to be able to successfully have that judgment recognised and enforced, either in one's own country, typically in the case of declaratory judgments, or, perhaps more frequently, in another country where the judgment debtor has his assets.

Owing to the difficulties arising from the incompatibilities of various legal systems, it was not always an easy task to have a judgment recognised and enforced by a foreign court which did not decide the dispute itself. The need was felt for an international instrument that regulates not only the question of jurisdiction pertaining to a court over a particular case, but more importantly the issue of recognition and enforcement of judgments once these have been delivered.

The aim of this essay is to provide an overview of the European Regime regulating recognition and enforcement of judgments across Member States, with a focus on Maltese judgments delivered after 1st May 2004, that is, after Malta became a member of the European Union; and to subsequently illustrate the procedure for enforcement of these judgments.

2. The Brussels Regime: Historical Background and Overview

The Brussels Convention of 1968 was the first European instrument to regulate the jurisdiction and recognition and enforcement of judgments across the Member States of (what was then) the European Community (Hereinafter referred to as 'EC').¹³⁷⁹ The competence of the EC to legislate in this sphere

¹³⁷⁹ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1968] OJ C 27.

stemmed from the Treaty of Rome.¹³⁸⁰ The Brussels Convention primarily aimed to facilitate the free movement of judgments throughout the EC. Such goal was achieved by establishing common rules on jurisdiction, thereby limiting the need for judgment review and creating an uncomplicated system of recognition and enforcement of sister-state judgments.¹³⁸¹

The Convention was amended several times as new States joined the Community. In 1988, a parallel convention was also brought into force; the Lugano Convention,¹³⁸² which bound the states of the European Free Trade Area, and Iceland, Norway and Switzerland. As the process of amending an international convention is not a quick and simple task, a decision was made to allow the European Union (Hereinafter referred to as 'EU') to legislate in the manner of a Regulation, whereby the rules therein would be directly applicable in all Member States. A regulation entitled *Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (also known as the 'Brussels I Regulation'; Hereinafter referred to as the 'Regulation'), based upon, and largely replacing, the Brussels Convention and the Lugano Convention, came into force in 2002. The latter Conventions have since been amended and brought in line with the Regulation and only remained in force in limited circumstances for States that have not ratified the Regulation.

Various discussions to amend the Regulation have led to the adoption of the Brussels I Recast,¹³⁸³ which came into force in 2015.¹³⁸⁴ The most important amendment therein was the abolishment of the exequatur procedure. Although the amendments will be discussed further below, for the time being the focus of this essay will be on Regulation 44/2001 since it contains provisions addressing the issue of transition from pre-Regulation to post-Regulation, and the relevant dates concerned.

Since the United Kingdom (Hereinafter referred to as 'UK') has recently opted to leave the EU,¹³⁸⁵ upon the expiration of the two-year period under Article 50(3) TEU, the Brussels Regime will no longer be directly applicable to it. It is not yet clear what the consequences of this decision will be, but the UK has various

¹³⁸⁰ Treaty establishing the European Economic Community, March 25 1957, 298 U.N.T.S. 11, art 220: 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: - the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards.'

¹³⁸¹ Adrian Briggs, *The Conflict of Laws* (2nd edn, Oxford University Press 2008) 56.

¹³⁸² Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1988] O J L 319.

¹³⁸³ 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] O J L 351/1.

¹³⁸⁴ *ibid* art 81.

¹³⁸⁵ United Kingdom European Union Membership Referendum, 23 June 2016.

options to consider. For instance, it might adopt the Recast Regulation by agreement, or ratify the Lugano, Hague, or Brussels Conventions. Alternatively, the UK could negotiate a new bilateral agreement with the EU Member States with similar effects to the Brussels Regime. At this stage it is impossible to predict the exact outcome, as this will all depend on the negotiations currently underway between the EU and the UK.¹³⁸⁶

3. Aims of the Regulation

The motivating factors of the Brussels Regulation are largely the same as those of the previous Conventions, that is, to 'unify rules of conflict of jurisdiction in civil and commercial matters' and to 'simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States'.¹³⁸⁷ The Maltese Court in *Elwira Maria Opatcka vs. Andrew Francis Ciantar*¹³⁸⁸ expounded on the objectives of the Regulation,

[I]r-Regolament irid li, fuq il-bażi tal-fiduċja reċiproka, sentenzi mogħtija fi Stat imsieheb jingħataw għarfien awtomatiku bla ħtieġa ta' proceduri għajr f'każ ta' kontestazzjoni. B'dan il-mod, ir-Regolament irid li d-dikjarazzjoni li sentenza mogħtija minn qorti ta' Stat imsieheb hija eżegwibbli għandha tingħata kważi awtomatikament minn qorti ta' Stat imsieheb ieħor, fuq il-bażi biss tal-eżami tad-dokumentazzjoni preskritta mressqa, u mingħajr ma din l-aħħar qorti tista' tqajjem minn rajha r-raġunijiet maħsuba fl-istess Regolament biex iżommu s-sentenza milli tiġi eżegwita, u mingħajr ma din l-aħħar Qorti terġa' tistħarreg il-kwestjoni fil-mertu.¹³⁸⁹

Cheshire, North and Fawcett mention two safeguards built into the Brussels Regime that increase the mutual trust among the Member States. The first is the

¹³⁸⁶ Sara Masters and Belinda McRae, 'What Would Brexit Mean for the Brussels I Regulation?' (*LEXOLOGY*, 20 June 2016) <www.lexology.com/library/detail.aspx?g=e7f973d8-44bf-408f-ba07-76a430e9e8a5> accessed 28 August 2016.

¹³⁸⁷ 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, Recital 2.

¹³⁸⁸ *Elwira Maria Opatcka vs. Andrew Francis Ciantar*, Court of Appeal (Superior), per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, 27 January 2006.

¹³⁸⁹ *ibid* 4, 'The Regulation aims that, on the basis of mutual trust, judgments delivered in Member States are recognised automatically without any additional procedures except in cases of contestation. In this way, the Regulation aims that the declaration that a judgment delivered by a court in a Member State is enforceable, is given almost automatically by another Member State, upon a mere examination of the documents provided, and without the possibility on the part of the Enforcing Court to ex officio raise any grounds in the Regulation on which a judgment may not be enforced, and also without examining the merits.'

fact that the rules of the Regulation on both jurisdiction and recognition and enforcement are directly applicable to the Member States, ensuring compliance and uniform application among all courts. Secondly, Member States retain a certain amount of discretion through defences that may be brought forward in the courts in the Member State addressed.¹³⁹⁰

4. Temporal Scope of the Regulation

The Brussels I Regulation became directly applicable to Malta on 1st May, 2004, the date of Malta's accession to the EU, by virtue of Article 249 of the EC Treaty. Prior to this date, Maltese rules on Private International Law were always regulated by the Code of Organization and Civil Procedure (Hereinafter referred to as 'COCP'),¹³⁹¹ and any *lacunae* were addressed by looking at rules of British Common Law. Nowadays, the COCP only regulates jurisdiction and recognition and enforcement of judgments that are not within the scope of the Regulation.

The Regulation deals with the recognition and enforcement of judgments, which naturally have already been delivered. Consequently, an issue arose as to whether it would apply retroactively to cases instituted and/or delivered by a Maltese Court before 1st May 2004, since before that date the Regulation was not directly applicable to Malta. The temporal scope of the Regulation is explained under Article 66, although the wording of this provision leaves much to be desired. Article 66 states that,

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.
2. 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 both in the Member State of 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

¹³⁹⁰ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 597.

¹³⁹¹ Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, art 742 *et sequitur*.

the Member State addressed which was in force when the proceedings were instituted.

There are three main possible scenarios that may arise when one is trying to have a judgment recognised and enforced under the Regulation. Firstly, a judgment may be both instituted and decided before the entry into force of the Regulation, that is, 1st May, 2004 in Malta (date of accession into the EU). Secondly, a judgment may have been initiated before the 1st May, 2004, but decided after that date. Thirdly, it may have been both instituted and delivered after 1st May, 2004.

From a reading of Article 66, the outcome of the third scenario is clear – the rules under the Regulation would apply, as they undoubtedly apply to proceedings instituted after the coming into force of the Regulation. However, the first and second scenarios are not as straightforward. Moreover, a further complication arises regarding whether the relevant date of entry into force should be of the Member State addressed (where the enforcement is sought) or of the Member State of origin (where the judgment was obtained), or of both.

This essay will focus mostly on the second scenario, that is, judgments delivered after 1st May, 2004, in cases commenced before that date. Nevertheless, for the sake of completeness, the situation in the case of the first scenario will first be briefly addressed. The European Court of Justice (Hereinafter referred to as the 'ECJ') has recently given a definite answer regarding the interpretation of Article 66 in such circumstances. In a preliminary reference by the Nejvyšší soud, the Supreme Court of the Czech Republic, submitted during the proceedings of ***Wolf Naturprodukte GmbH v SEWAR spol.***, the issue arose whether 'for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed'¹³⁹².

The ECJ noted that Article 66 of the Regulation does not specify whether the date of entry into force refers solely to the Member State of origin, or to both the Member State of origin and the Member State addressed.¹³⁹³ In reaching its decision, the Court reasoned that the 'simplified mechanism of recognition and enforcement set out [in the Regulation] ... which leads ... to the lack of review of the jurisdiction of courts of the Member State of origin, rests on mutual trust between the Member States'.¹³⁹⁴ This mutual trust could only be present if the

¹³⁹² Case C-514/10 *Wolf Naturprodukte GmbH vs. SEWAR spol. s r.o.* [2012] para 18.

¹³⁹³ *ibid* para 23.

¹³⁹⁴ *ibid* para 25.

Member States all abide by the same rules on jurisdiction, thereby guaranteeing the same safeguards to defendants.¹³⁹⁵ As a result, it follows that the simplified rules for recognition and enforcement should only be available to a claimant if the judgment sought to be enforced offered full protection to the interests of the defendant, that is, through the rules on jurisdiction implemented in the Regulation.

The ECJ thus concluded that in view of the above, the delivery of the judgment must have taken place after the entry into force of the Regulation. Moreover, the concept of 'entry into force' in Article 66 must be interpreted as the date of application of the Regulation 'in both the Member States concerned'.¹³⁹⁶

The outcome of the second scenario (judgments delivered after 1st May, 2004, in cases commenced before that date) is perhaps more difficult to envisage. Although Article 66(1) states that proceedings must have been instituted before the entry into force of the Regulation, Article 66(2) makes an exception to this rule, if one of the two conditions specified therein are satisfied. These state that a judgment may be enforced in a Member State, despite the fact that proceedings were instituted before the relevant date, provided that the judgment follows the rules on jurisdiction set out either in Chapter II of the Regulation, or in another Convention between the Member State of origin and the Member State addressed, which was in force when the proceedings were instituted.

The Maltese Courts had to invoke this section in the judgment of *Avukat Stephen Muscat nomine vs. Express Tours & Packages Limited*.¹³⁹⁷ The proceedings in question had been instituted in 2003, and the judgment was delivered in 2006 by a German Court. The Maltese Court quoted Article 66, and stated that for the German judgment to be enforced in Malta, the German Court had to have established its jurisdiction in line with the rules in the Regulation. It thus examined the establishment of jurisdiction in the German Court, and found that it did follow the same mechanism as the Regulation, hence enforcement was allowed.

Therefore, it seems clear that the exercise that the court of the Member State addressed must undergo, when faced with an application for recognition and enforcement of a judgment delivered after the entry into force of the regulation but instituted before that date, is to examine whether or not the judgment

¹³⁹⁵ Case 125/79 *Bernard Denilauler vs. SNC Couchet Frères* [1980] ECR 01553 para 3.

¹³⁹⁶ Case C-514/10 *Wolf Naturprodukte GmbH vs. SEWAR spol. s r.o.* [2012] para 33, 34.

¹³⁹⁷ *Avukat Stephen Muscat nomine vs. Express Tours & Packages Limited*, First Hall Civil Court, per Mr Justice Valenzia, 30 June 2008. This was confirmed by the Court of Appeal (Superior) on 3 December 2010.

follows the same rules of jurisdiction, and affords the same safeguards to the defendant, as envisaged in the Regulation.

In a nutshell, the rules of jurisdiction under the Regulation are as follows. The general rule of jurisdiction is that if a defendant is domiciled in a Member State, regardless of his nationality, the plaintiff must bring his action in that Member State. The domicile of natural persons is not defined in the Regulation, so its meaning is left up to national law. The Regulation does however set out rules regarding the domicile of legal persons.

There are several exceptions to this general rule of domicile. Articles 5 and 7 respectively, regulate the jurisdiction arising from contractual and tortious¹³⁹⁸ relationships. Moreover, the Regulation seeks to protect the weaker party, providing special safeguards for the insured, the consumer and the employee. The Regulation also recognises choice of court agreements, albeit their application may be limited when a weaker party is involved. In addition, a defendant may always submit voluntarily to the jurisdiction of a court, by entering an appearance without contesting the jurisdiction. Lastly, the Regulation also provides for the exclusive jurisdiction of certain courts, irrespective of the domicile of the parties, in some specific circumstances such as matters relating to ownership of immovable property.

Regulation 1215/2012 has by and large followed the same pattern of its predecessor in matters of jurisdiction. Nevertheless, there were some minor amendments, such as the addition of a new head of jurisdiction which facilitates the recovery of stolen or illegally removed works of art or similar items of historic, archaeological or cultural value.¹³⁹⁹ Moreover, an additional safeguard sought to protect the weaker party was added, whereby courts are now obliged to 'ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance'.¹⁴⁰⁰ The temporal scope of Regulation 1215/2012 is defined in Article 66,¹⁴⁰¹ which is worded similarly to Article 66 of Regulation 44/2001 (except from the

¹³⁹⁸ The term 'tortious' here includes matters relating to tort, delict, quasi-tort or quasi-delict, and has been interpreted autonomously by the ECJ. See cases: Case 34/82 *Martin Peters Bauunternehmung GmbH vs. Zuid Nederlandse Aannemers Vereniging* [1983] ECR 00987; Case C-172/91 *Volker Sonntag vs. Hans Waidmann and Others* [1993] ECR I-01963 and; Case C-271/00 *Gemeente Steenberg vs. Luc Baten* [2002] ECR I-10489.

¹³⁹⁹ Regulation 1215/2012 art 7(4).

¹⁴⁰⁰ *ibid* art 21(2).

¹⁴⁰¹ *ibid* art 66(1), 'This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. (2) Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to

relevant date therein, which is now the 10th January, 2015). A comparison of the two articles of the Regulations, respectively, shows that the Recast does not include any exceptions to proceedings instituted after the relevant date. Therefore, Regulation 1215/2012 would not apply to the enforcement of a judgment delivered after its entry, if it has been instituted before the relevant date.

5. Scope of the Brussels Regime: Civil and Commercial Matters

One should however keep in mind that not all judgments coming from a Member State may be recognised and enforced in another Member State under the Brussels Regime. Apart from having a temporal scope, the Regulations are also limited by subject. A prerequisite to recognition and enforcement under the Brussels Regime is the ascertainment of whether the matter under consideration is civil or commercial in nature. Article 1 states that the Regulation applies to 'civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'. The Regulation does not define the term 'civil and commercial matters', but it expressly excludes certain areas from its scope, such as social security and arbitration.¹⁴⁰²

The ECJ has continuously held that the phrase 'civil and commercial matters' must be given an autonomous meaning, and must be regarded as an 'independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the *corpus* of the national legal systems'.¹⁴⁰³ Therefore, the meaning of this phrase is not defined according to national law, but within the context of the Regulation.

authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.'

¹⁴⁰² Regulation 44/2001 art 2, 'This Regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (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; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death.' (There were a number of complexities with regard to the scenario for arbitration under Regulation 44/2001. Regulation 1215/2012 sought to clarify the situation. It kept the same provision, but added an explanation in the Preamble, Recital 12)

¹⁴⁰³ Case 133/78 *Gourdain vs. Nadler* [1979] ECR 733 para 3; Case 29/76 *LTU vs. Eurocontrol* [1976] ECR 1541 paras 3, 4; and Case 814/79 *Netherlands vs. Rueffer* [1980] ECR 3807 paras 7, 8.

Moreover, the nature of the court or tribunal is irrelevant to the ascertainment of whether the dispute falls within the scope of the Regulation. In fact, in the Jenard Report, it is stated that the Regulation ‘covers civil proceedings brought before criminal courts, both as regards decisions relating to jurisdiction, and also as regards the recognition and enforcement of judgments given by criminal courts in such proceedings’.¹⁴⁰⁴ This situation arose in a Maltese judgment: *Elf Aquitaine vs. Andre Guelfi*,¹⁴⁰⁵ wherein the Court of Appeal concluded that although the damages were awarded in criminal proceedings, they were still civil in nature, and hence fell within the scope of the Regulation.

6. Definition of a judgment

The Enforcing Court must also ascertain that the nature of the judgment itself fits the definition provided in Article 2(a), which defines it as ‘any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.’ This definition has been interpreted broadly by the ECJ, and even by the Maltese courts. The former has included in the definition even decisions given without the defendant being summoned to appear.¹⁴⁰⁶

Another important question to ask in relation to the definition of a judgment is whether the pendency of an appeal is a bar to the recognition and enforcement of a judgment. In the Maltese case of *Avukat Hugh Peralta vs. ZET Limited*, the Court of Appeal concluded that a judgment which is not *res judicata* may still be enforced under the Regulation. It overturned the decision of the First Hall Civil Court, which had reasoned that since the judgment of the Tribunal of Udine was not a ‘definitive’ judgment, it was not enforceable under the Regulation. The Court of Appeal noted that: ‘sentenza mogħtija in prim istanza minn Qorti estera, hija enforzabbli f’Malta, anke jekk kontra dik is-sentenza ikun ġie intavolat appell u dan kemm-il darba kif il-Qorti estera tkun iddikjarat is-sentenza tagħha enforzabbli’¹⁴⁰⁷. This reasoning was again confirmed in another Maltese case of

¹⁴⁰⁴ 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.

¹⁴⁰⁵ *Elf Aquitaine vs. Andre Guelfi*, Court of Appeal (Superior), per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, 28 July 2006, Court of Appeal.

¹⁴⁰⁶ Case 125/79 *Bernard Denilauler vs. SNC Couchet Frères* [1980] ECR 01553 para 11; See also Case C129/79 *Owens Bank Ltd vs. Fulvio Bracco and Bracco Industria Chimica SpA* [1994] ECR I-00117 217.

¹⁴⁰⁷ *Avukat Hugh Peralta vs. ZET Limited*, Court of Appeal, per Mr Justice Camilleri, Mr Justice Magri, Mr Justice Mallia, 31 January 2011: ‘a judgment given by a foreign Court is enforceable in Malta, even if an appeal has been filed against such judgment, provided that the foreign Court would have declared its judgment enforceable’.

*GIE Pari Mutuel (PMU) vs Bell Med Limited et.*¹⁴⁰⁸ Apart from final judgments, one may also enforce 'provisional, including protective, measures ordered by a court or tribunal [... except if] ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement'.¹⁴⁰⁹

7. Other International Instruments for Recognition and Enforcement

Those judgments coming from Member States that do not fall within the remit of the Brussels Regime, due to its limited scope, might still be enforceable under another EU Regulation. For example, judgments concerning matrimonial matters and the matters of parental responsibility may be enforced under the Brussels II bis Regulation.¹⁴¹⁰ For the purpose of this essay, only the manner of enforcement under the Brussels I Regulation and the Recast will be examined.

8. Enforcement Procedure under Regulation 44/2001

The exequatur procedure was firstly adopted by the Brussels Convention in 1968. The term 'exequatur' is Latin for 'let it be executed',¹⁴¹¹ and has been defined as 'a concept specific to the private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlements given abroad'.¹⁴¹² In brief, it involves the requirement of an application to the Member State addressed in order for a judgment from another Member State to be declared enforceable. The Enforcing Court then assesses the application, and ensures that it follows all the formal requirements, in which case it would issue a declaration of enforcement.

The procedural formalities required when applying for this declaration of enforcement are listed under Article 53 of the Regulation. The party applying for recognition of a judgment needs to produce a copy of the judgment, and a copy of

¹⁴⁰⁸ *GIE Pari Mutuel Urbain vs. Bell Med Ltd and Computer Aided Technologies Ltd*, 28 September 2007, Court of Appeal 92/2006/1

¹⁴⁰⁹ Regulation 44/2001 art 47.

¹⁴¹⁰ Council Regulation (EC) No 2201/2003 of 1 August 2004 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, OJ L 338, 1-29.

¹⁴¹¹ Jeanella Grech., 'Abolishing Exequatur in the Brussels I Regulation (Recast) While Safeguarding Debtor's Rights' (Faculty of Law thesis, University of Malta 2013) 21.

¹⁴¹² Glossary (European Judicial Network in Civil and Commercial Matters) <http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#Exequatur> accessed 16 August 2016.

the certificate issued pursuant to Article 54.¹⁴¹³ A translation of these documents may be requested by the court or authority of the Member State addressed. Once these formalities are complied with, the Enforcing Court must declare the judgment enforceable. In other words, 'the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents'.¹⁴¹⁴

Maltese judgments followed the same logic, confirming that the judgment must be declared enforceable 'immedjatament wara t-twerttieq tal-formalitajiet rikjesti'.¹⁴¹⁵ The Maltese Court of Appeal stated in another case that the only test that must be undergone at this stage is a 'semplici eżami tad-dokumenti esebiti, minghajr hteiga li tisma' lid-debitur jew tara x'għandu xi jgħid fuq il-każ'.¹⁴¹⁶

Notwithstanding the foregoing, the Enforcing Court does not simply act as a 'rubber stamp'; it must ensure that the documents demonstrate the fulfilment of the following conditions,

- a) that the case falls within Regulation 44/2001, or the Brussels or Lugano Conventions, as the case may be, both as to its subject matter and by reference to the transitional provisions;
- b) that the judgment is one falling within the definition provided by Article 32;
- c) that the judgment is at least provisionally enforceable in its state of origin; and
- d) that the application for an order authorizing the enforcement is made by an 'interested third party'.¹⁴¹⁷

The applicant may also apply to the court for provisional or protective measures to avoid dissipation of assets.¹⁴¹⁸

9. Grounds on which Recognition and Enforcement may be denied

¹⁴¹³ In Annex V; This should confirm inter alia the date of service of the document instituting proceedings in the case of a judgment delivered by default, and that such judgment is enforceable in the Member State of origin.

¹⁴¹⁴ Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2008] para 3.

¹⁴¹⁵ *Advocate Dr Simon Cachia noe vs. Ancams Ltd*, First Hall Civil Court, per Mr Justice Meli, 24 April 2012.

¹⁴¹⁶ *Advocate Hugh Peralta noe vs. ZET Limited*, Court of Appeal (Superior), per Mr Justice Camilleri, Mr Justice Magri, Mr Justice Mallia, 31 January 2011.

¹⁴¹⁷ *Dr. John Refalo bhala mandatarju speċjali għan-nom u in rappresantanza ta' l-assenti John u Susan Gray vs. Garden of Eden Limited*, 13 March 2007 Court of Appeal. per Mr Chief Justice de Gaetano, Mr Magri, Mr Justice Mallia.

¹⁴¹⁸ Regulation 44/2001 art 47.

Once the court has issued the declaration of enforceability, it orders the service of all the necessary documents, including its decree accepting the application for enforcement, to the judgment debtor. It is only at this stage that the latter has the opportunity to appeal from this decree, on very limited grounds found in the Regulation. Whilst ‘any interested party’ may apply to have a judgment recognised and/or enforced,¹⁴¹⁹ the application for appeal may solely be filed by the ‘party against whom enforcement is sought’,¹⁴²⁰; it may not be filed by co-defendants or any other interested party, unless the judgment is also being enforced against them. This limitation is meant to reduce challenges against the enforceability of judgments, since one may only contest such enforcement if the judgment is sought to be enforced against him personally.¹⁴²¹

The *raison d’être* behind the availability of the defences stems from the Regulation’s aim to strike a balance between, on the one hand, the principle of mutual trust and the reduction of costs and time-consumption, and on the other hand, the respect for the right of the judgment debtor to appeal if one of the grounds for non-enforcement is present.¹⁴²² AG Kokott opined that respect for the right of the judgment debtor ‘is a fundamental right forming part of the general principles of Community law’¹⁴²³.

Articles 34 and 35 list the defences, namely: a breach of public policy in the Member State addressed; default of appearance due to non-service; irreconcilability with a judgment between the same parties in the Member State addressed; or with an earlier judgment in another Member State or in a third State if certain conditions are fulfilled; and inconsistency with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72. These defences have been reasonably narrowed and restricted, compared to the ones found in the Brussels Convention.¹⁴²⁴

9.1 Public Policy

The defence of public policy is not defined in the Regulation, leaving it up to the Member States addressed to adopt their own meaning. Nevertheless, the ECJ has intervened when the term is not defined appropriately in accordance with the

¹⁴¹⁹ *ibid* art 33(2) and art 38 (1).

¹⁴²⁰ *ibid* art 42 (2).

¹⁴²¹ Jeanella Grech, ‘Abolishing Exequatur in the Brussels I Regulation (Recast) While Safeguarding Debtor’s Rights’ (Faculty of Law thesis, University of Malta 2013) 87.

¹⁴²² Case C-283/05 *ASML Netherlands BV vs. Semiconductor Industry Services GmbH (SEMIS)* [2006] ECR I-12041 paras 23-24; Opinion of AG Kokott in Case C-3/05 *Gaetano Verdoliva vs. J.M. Van der Hoeven BV and others* [2005] ECR I-01579 para 39.

¹⁴²³ Opinion of AG Kokott in C-394/07 *Marco Gambazzi vs. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company Case* [2009] ECR I-02563, para 48.

¹⁴²⁴ Brussels Convention art 27, 28.

Regulation. The ECJ emphasised the need to limit this defence to very 'exceptional cases' where the recognition or enforcement would lead to a 'manifest breach of an essential rule of law in the legal order of the State in which enforcement is sought'.¹⁴²⁵ This defence must not interfere with the primary aim of the Regulation which is to achieve free movement of judgments.

In the Maltese case *Schoeller International vs. Mario Ellul*, the Court stated that just because a judgment would have been decided differently by a Maltese Court does not mean it should not be enforced. The defence of public policy can only be invoked if there is a conflict with 'il-principji ewlenin ta' l-ordni ġuridiku li huma l-qofol tas-sistema legali billi jharsu l-valuri l-aktar fundamentali tas-soċjetà'.¹⁴²⁶ The ECJ in *Krombach vs. Bamberski* specified that procedural irregularities, such as a breach of Article 6 of the European Convention on Human Rights, would also be caught under the defence of public policy.¹⁴²⁷

9.2 Default

The second defence involves a scenario where the defendant was unable to defend the case as a result of not being served with the necessary documents. Cheshire, North and Fawcett, refer to this as the defence of natural justice.¹⁴²⁸ It may only be instated if the defendant did not appear. Moreover, the ECJ held in *Sonntag vs. Waidmann* that 'it is for the Court where enforcement is sought to determine whether service was effected in sufficient time and in such a way as to enable the defendant to arrange for his defence'.¹⁴²⁹

9.3 Irreconcilable Judgments

The rules on irreconcilable judgments are very comprehensive, however the Regulation does not define the threshold for judgments to be considered irreconcilable. The ECJ has interpreted the meaning of irreconcilability as entailing 'legal consequences that are mutually exclusive'.¹⁴³⁰

¹⁴²⁵ Case C-145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645; See also: Case C-78/95 *Hendrikman and Feyen v Magenta Druck & Verlag* [1996] ECR I-4943, and Case C-38/98 *Renault v Maxicar* [2000] ECR I-02973.

¹⁴²⁶ *Schoeller International GmbH noe vs. Ellul Mario et* 26 October 2001, First Hall Civil Court per Mr Justice Caruana Demajo.

¹⁴²⁷ Case C-7/98 *Dieter Krombach v Andre Bamberski* [2000] ECR I-01935.

¹⁴²⁸ Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* [14th edn, Oxford University Press 2008] p 615.

¹⁴²⁹ Case C-172/91 *Volker Sonntag v Hans Waidmann* [1993] ECR I-01963, para 39.

¹⁴³⁰ Case C-145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645, para 22; Case C-539/03 *Roche Nederland BV and others v Frederick Primus and Milton Goldenberg* [2006] ECR I-06535, para 23.

9.4 Sections 3, 4, and 6

Another defence may be invoked if a judgment conflicts with the rules of jurisdiction under sections 3 and 4 which protect the interests of insurers and consumers. This safeguard seeks to protect the interests of vulnerable groups. This defence runs counter to the general rule that the Enforcing Court cannot review the jurisdiction of the Court of Origin. A further exception to this prohibition is the defence relating to a breach of Section 6, which grants exclusive jurisdiction to specific courts in certain circumstances.

9.5 Article 72

The final defence involves conflict with Article 72, wherein a judgment may not be enforced due to there being a bilateral Convention between the Member States in question, which was ratified before the entry into force of the Regulation, if the enforcement of such judgment runs counter to the Convention.

9.6 Possibility of Appeal

The decision of the court, whether it upholds or rejects the defence/s brought forward by the judgment debtor, may be appealed against by either party. Articles 43 to 46 designate the procedure for appeal, including *inter alia* the time limit for lodging the appeal,¹⁴³¹ and the possibility of staying the proceedings if there is an ordinary appeal from the judgment in the Member State of origin.¹⁴³² The Appellate Court may not review the substance of the judgement,¹⁴³³ and may only refuse enforcement on the basis of one of the grounds in Articles 34 and 35.¹⁴³⁴

¹⁴³¹ Regulation 44/2001 art 43(5): An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

¹⁴³² *ibid* art 46(1): The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

¹⁴³³ *ibid* art 45(2): Under no circumstances may the foreign judgment be reviewed as to its substance.

¹⁴³⁴ *ibid* art 45(1): The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

10.Changes to Recognition and Enforcement under the Recast Regulation

The Recast Regulation brought significant changes in the sphere of recognition and enforcement. It simplified the process considerably, by abolishing the exequatur procedure, eliminating the need to obtain a declaration of enforceability from the Enforcing Court. In addition, the Recast Regulation also allows a review of jurisdiction in case of a breach of Section 5 (regarding employees), which was not so in 44/2001. Nevertheless, it limits this defence in the sense that it may only be raised by the weaker party.

11.Conclusion

The EU has made great strides in the area of Private International Law, bringing to light a newfound freedom – the free movement of judgments – which, like other freedoms of the EU, is not absolute, and must operate within the diverse multicultural backgrounds of Member States. This is why a system of clear rules, applied uniformly among Member States is crucial to the attainment of mutual trust that is central to the functioning of the Brussels Regime.

The enforcement of Maltese judgments in other EU Member States has been substantially simplified by the Brussels I Regulation, but only for those judgments that are caught under its restricted scope, both as regards subject matter and also temporally. Judgments that were instituted before Malta's accession into the EU could potentially still be enforced under the Brussels Regime if decided after the entry into force of the Regulation, provided that the rules on jurisdiction which the judgment is based on are in line with those in the Regulation.