

Extension of the “Brussels I” Regulation to judgments given in a State which is not a member of the European Union

PROPOSED POSITION OF THE SUB-GROUP

(Paris, 19/02/2010)

Following proposals adopted in Bergen in 2008, which considered the possibility of including in the Brussels I Regulation direct jurisdictional rules for proceedings concerning a defendant domiciled in a State which is not a member of the European Union, or property within the terms of Article 22 situated in such a State, or a choice-of-court agreement not covered by Article 23, the European Group for Private International Law examined the related question of extending the Regulation to cover judgments given by a State which is not a member of the European Union.

The desirability, political as well as legal, of adopting EU rules covering all cross-border litigation, including that involving a court of a third country, which affects the operation of the internal market and the exercise of free movement within the area of freedom, security and justice established by the EC Treaty, has not been the subject of a detailed analysis. The following comments are based on the working hypothesis that such effect is established by reason of the diversity of the national rules of the Member States concerning the recognition of foreign judgments. In its conclusions of 11 December 2009 (§ 32), the European Council referred to the external dimension of the area of freedom, security and justice as an essential factor in the promotion of business relations of EU citizens in States that are not members of the Union.

The purpose of such an extension of the scope of application of the Regulation would be primarily to ensure the international circulation of judgments, as already occurs in the case of Member-State judgments, but also to harmonize national legislation to the extent necessary for the functioning of the internal market, without denying the two-fold difficulty of reconciling the often important differences between some national laws and of taking account of the great variety of legal institutions found in third countries.

CHAPTER III. — RECOGNITION AND ENFORCEMENT

A new Section, to read as follows, is proposed:

SECTION 4. — JUDGMENTS GIVEN IN A NON-MEMBER STATE

Article 56-1

1. For the purposes of this Section, ‘judgment’ means any judgment given by a court or tribunal of a non-member State, whatever the it may be called, including a decree, order or decision as well as a determination of the costs of the proceedings.

2. Nevertheless, the above paragraph shall not apply to:

- (a) a writ of execution;
- [(b) a judgment against which an ordinary appeal could be, or has been, lodged.] (NB harmonize with Article 56-9, 2)
- [(c) provisional or protective measures.]

Article 56-2

1. A judgment shall be recognised in a Member States without any special procedure being required.
2. Any interested party may, in accordance with the procedures provided for by the law of the Member State addressed, apply for a decision that the judgment be recognised or not recognised.

Article 56-3

1. A judgment shall not be recognised if the court of the State of origin took jurisdiction when the court of a Member State would have had jurisdiction by reason of the provisions of Sections 3 to 7 of Chapter II.

2. A judgment may not be recognized if the court of the State of origin took jurisdiction in the absence of a sufficient connection between the State of origin and the dispute, in particular when the jurisdiction of the court of that State could have been based only on:

- the nationality of one of the parties; or
- the service on the defendant or the notification to him of the document by which the proceedings were commenced when the defendant is temporarily present in the territory of that State; or
- the presence within that State of property belonging to the defendant which is not connected with the dispute; or
- the seizure of property situated within that State which is not connected with the dispute; or
- the carrying on of commercial or professional activities by the defendant in that State which are not connected with the dispute.

3. The provisions of the preceding paragraphs shall not apply when the defendant has pleaded to the substance of the claim before the court of origin without challenging the jurisdiction of the court, except where a court of a Member State has exclusive jurisdiction under Article 22.

Article 56-4

A judgment shall not be recognized if:

(1) where it was given in default of appearance, the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; or

(2) it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; or

(3) it is irreconcilable with an earlier judgment given in another 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; or

[(4) the claim was brought in the State of origin after a claim, which is still pending, was brought in a Member State involving the same cause of action and between the same parties.]

Article 56-5

A judgment may not be recognized to the extent that:

(1) it was granted in contravention:

- of a mandatory provision respect for which is regarded as crucial by the State addressed to such an extent that it is applicable to any situation falling within its scope, irrespective of the law otherwise applicable to the legal relationship; or
- a mandatory rule of Union respect for which is regarded as crucial by the Union to such an extent that it is applicable to any situation falling within its scope, irrespective of the law otherwise applicable to the legal relationship; or

(2) it awards excessive non-compensatory damages, including exemplary or punitive damages.

Article 56-6

A judgment shall not be recognized if such recognition is manifestly contrary to the substantive or procedural public policy of the State addressed or of the European Union, in particular if the judgment is the result of an infringement of the principles governing the right to a fair trial or of fraud regarding a matter of procedure.

Article 56-7

Without prejudice to Article 56-5, the judgment may not be reviewed as to its substance.

Article 56-8

1. A judgment given in a non-member State and enforceable in that State shall be enforced in a Member State when, on the application of any interested party, it has been declared enforceable in that Member State.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in the part of the United Kingdom in question.

Article 56-9

1 The procedure for making an application for obtaining a declaration of enforceability of a foreign judgment shall be governed by the law of the Member State addressed.

[2 A judgment which could be, or is, the subject of an ordinary appeal in the State of origin may form the basis of protective measures only. The court [may] [shall] make these conditional on the provision of security.]

Article 56-10

Foreign judgments for a periodic penalty payment shall be enforced in the Member State addressed only if the amount has been definitively fixed by the courts of the State of origin.

Article 56-11

Where the judgment has been given in respect of several matters, it may be recognized or declared enforceable for all of them, or for one or more of them, either of the court's own motion or on the application of a party.

Article 56-12

1. A party seeking recognition of a judgment given in a non-member State or applying for a declaration of its enforceability shall produce:

- (1) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
- (2) in the case of a default judgment, the original or a certified copy of a document certifying that the judgment debtor was served with the document which instituted the proceedings or with an equivalent document;
- (3) all documents necessary to establish that the judgment [is not subject to an ordinary appeal in the State of origin, that it] was served on, or notified to, the party against whom it was given and that it is enforceable in that State.

2. A certified translation of these documents shall be produced if the court or competent authority so requires ex officio or if a party so requests.

[Article 56-13

A judgment given by a court of a Member State on the recognition or enforcement of a judgment given by a court of a non-member State shall be taken into account by courts of other Member States [when considering the conditions laid down in Articles 56-3 to 56-6].]

Article 56-14

If the existence has been established in a non-member State of serious violations or the imminent risk of serious violations of the principles governing the sound administration of justice, the Commission may temporarily suspend the application of this Chapter to judgments given in that State. These safeguard measures shall be maintained no longer than strictly necessary and, in any event, shall be lifted when the violations have ceased.

The Commission shall inform the European Parliament and the Council in good time before the adoption or the rescinding of safeguard measures. It shall give due consideration to any observations by the European Parliament and the Council.

CHAPTER VII. — RELATIONS WITH OTHER INSTRUMENTS

A new Article is proposed, to read as follows:

Article 72-1

This Regulation shall not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are parties when Section 4 of Chapter III of this Regulation is adopted and which govern the recognition or enforcement of judgments given in non-member States

which are parties to such conventions, subject to the obligations of Member States under Article 351 of the Treaty on the functioning of the European Union.

The above paragraph is without prejudice to the application of Regulation n° 0000 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In addition, in view of the Bergen document, Article 72 should be deleted.

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