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Discussion paper for workshop September the 4th, 2021

You are kindly asked to reflect on the following outlines from the point of view of your own expertise and legal background.

1. Broad definition of the term »judgment«

To have cross-border effects, there first must be a qualified document that produces effects in the State of origin. This requires elaboration of the concept of a judgment.

Regulation B IA incorporates a rather broad definition of the term 'judgment', to ensure that judgments issued in the EU will fall within its scope. Specifically, Art. 2 defines *judgment* as follows:

"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".

The CJEU case Pula Parking d.o.o. demonstrates the problem of including payment order within the scope of judgments under Art. 2. It depends on the fact that a decision is issued by a "court or tribunal" corresponding the definition of B IA as well.[1]

The understanding of the terms *a decree, order, decision or writ of execution needs further elaboration in Member states. In Germany, the decision or writ of execution corresponds with the second decision in summary procedure for payment order?*

The regulation explicitly refers to only a few exceptions, which do not qualify as a *judgment* for its purposes. In particular, the definition in Art. 2

includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is 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.

[1] CJEU C-551/2015, from the reasoning: In its chapter I, entitled 'Scope and definitions', Article 1(1) of that regulation provides that that regulation is to apply in civil and commercial matters whatever the nature of the court or tribunal. Article 2 of that regulation defines the concept of 'judgment' as any judgment given by a court or tribunal of a Member State, whatever the judgment may be called. It means any of listed decisions but must be given by a court or tribunal.

Does Art. 2/2 cover orders, which means that freezing injunction orders and discovery orders issued in Cyprus can be enforced through the Regulation in any EU Member State?

In any case, in practice a discovery order may not have any effect if the Respondent is located in another EU Member state, as the consequences of being in contempt of court can be evaded if the Respondent does not enter Cypriot jurisdiction?

If the freezing injunction is provisional it falls within the second paragraph of Art. 2. A discovery order will always be an interim order. A final freezing injunction is interesting from the point of view of adaptation for the purposes of enforcement.

There are limited grounds on which the enforceability of a judgment can be opposed. It should also be noted, that the Court at which enforcement is sought should take the judgment as such and must not revisit its merits.

2. There are still open issues related to requirements in form and substance that the judgment must satisfy in order to be recognized and enforceable under B IA

2.1. Formal requirements

The judgment must:
Fall within the scope of B IA (at this occasion discussion is not foreseen)
Satisfy the requirements for authenticity (at this occasion discussion is not foreseen)
Be followed by the correct certificate under B IA (focus of discussion)
Be enforceable in the state of origin (focus of discussion).

2.2. Certificate problems

The certificate is presumed to be accurate. Any challenge to accuracy can be raised by way of the appeal procedure in the state of origin or an application by the debtor in the enforcement state invoking grounds against the foreign title in a separate procedure. The question thus arises: what exequatur conditions is the certificate meant to certify? What elements benefit from this binding presumption until overturned in the appeal procedure?

How far can doubts about the certificate's accuracy arise with respect to the content of the judgment? A judgment is an enforcement title but may contain a claim that is insufficiently determined. The certificate must not upgrade or correct the judgment.

The courts often receive the wrong certificate from abroad (e.g. Brussels I instead of Brussels IA certificate), or a certificate that is not filled-in properly, resulting in a difference of information between the certificate and the judgment. Interest may not be expressly indicated (e.g. interest according to the law), or some information may be missing (e.g. the name of the defendant or of the claimant, costs, the judgment, the amount that the court has ordered). Issues

of translation of the certificate also arise: there are some doubts about the language in which the certificate should be completed and issued. There are also questions concerning whether a certificate can be issued in relation to decisions concerning provisional and protective measures ordered by the court having jurisdiction on the merits and concerning the authority competent to draft the certificate (e.g. drafted by the court, drafted by the lawyer and submitted with the request to the court).[2]

2.3. Scope of enforceable claim

Our previous project indicated some practical problems regarding the determination of a claim and, consequently, the lack of a sufficiently determined ruling/operative part of a judgment for the purposes of enforcement in the state addressed. There is, furthermore, a concern in respect of the calculation of interest, as this has to be calculated during enforcement by a judicial officer who is unfamiliar with the calculations applied in the Member State of origin of the judgment. And there are questions concerning the issue of a certificate in respect of a decision in summary proceedings, when the summary proceedings are not followed by main proceedings.

The more complex certificate required under B IA is still binding with regard to the judgment's enforceability in the state of origin, thereby exempting the enforcement authority from further investigation.

2.4. Elements of a judgment

It is critical for litigants to understand with complete certainty not only what a judgment does and does not encompass but also what constitutes the actual entry of judgment, since the date of entry of judgment starts the time running for making post-trial applications and lodging appeals and allows enforcement of judgments.

In all Member states, the ruling/operative part of the judgment includes the decision on the claim (petitum) one or more of them. But it can include further matters. For example, Art. 319 of the Slovenian ZPP provides that a judgment that can no longer be challenged on appeal shall become final in so far as it decides on the **claim** or **counterclaim**, and if the judgment decides on a claim which the defendant has asserted with an objection due to **set-off**, the **decision on the existence or non-existence** of such a claim becomes final.

In some national cases the binding effect of the decision might arise from the reasoning of the judgement/ ratio decidendi as well.

[2] Xandra Kramer, Alina Ontanu, Michiel de Rooij, assisted by Erlis Themeli and Kyra Hanemaayeri, The application of Brussels I (Recast) in the legal practice of EU Member States, Synthesis Report.

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3. Effects of a judgment

The legal effect of the automatic recognition of a judgment is that the foreign judgment obtains the same binding force as any judgment rendered in the country of origin. The exact nature and scope of such binding force will thus be determined by the law of the country of origin where the judgment was rendered, apart from measures unknown in the country of enforcement.

3.1 Res judicata

The term "*res judicata*" has been used in different ways. It is "a portmanteau term which is used to describe a number of different legal principles with different judicial origins".[4] In modern European civil procedure, however, there is a broad acceptance that a judgment is *res judicata* 'when ordinary means of recourse are not or are no longer available' (ELI-UNIDROIT Model European Rules of Civil Procedure r.148).

B IA does not build its rules on recognition and enforcement on the *res judicata* principle. The origin of this is found in the Jenard Report, which explains that the words *'res judicata'* which appear in several conventions have expressly been omitted, since judgments given in interlocutory and ex parte proceedings may be recognized, and these do not always have the force of *res judicata*.[5] The Committee preferred a form of wording which did not decide whether the judgment should have become *res judicata* or should merely be final and conclusive, and left this question to the discretion of the court in which recognition is sought. The form of words used also covers the situation referred to in Art. 5(3)(c) of the Hague

[3] Xandra Kramer, Alina Ontanu, Michiel de Rooij, assisted by Erlis Themeli and Kyra Hanemaayeri, The application of Brussels I (Recast) in the legal practice of EU Member States, Synthesis Report.
[4] Per Lord Sumption in *Virgin Atlantic Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46.
[5] Jenard report, p. 79.

Convention on the recognition and enforcement of foreign judgments, under which recognition of a decision may be refused if proceedings between the same parties, based on the same facts and having the same purpose have already resulted in a judgment which was given in a third State and which would be entitled to recognition and enforcement under the law of the State in which recognition is sought.

Nevertheless, B IA endorses the idea that, to be recognized and enforced a judgment should be *res judicata* in the sense identified above. Arts 38 and 51 B IA allow a court in the state addressed to suspend or stay the proceedings upon the principal issue of which it is seized where recognition and/or enforcement of the judgment of another MS is involved and that judgment subject to challenge, or is still open to an ordinary appeal, in the State in which it was given.

The oft-stated requirement that a judgment should be "final and conclusive" is terminology used by English law. The finality of a judgment is contrasted with "interim" decisions. For a judgment to be used in subsequent proceedings, it must be conclusive on the relevant issue. Thus, Halsbury's Laws of England states that "Every final judgment is conclusive evidence against all the world of its existence, date and legal consequences". This terminology is not particularly helpful in discussing *res judicata* in comparative perspective.

All the legal systems involved in the project recognize two facets of *res judicata*, positive and negative.[6] The positive effect of *res judicata* is that the judgment is binding between the parties in later administrative or judicial proceedings. It becomes enforceable (enforceability effect) and may produce other effects (constitutive, declaratory effects). The negative effect of *res judicata* is that it is preclusive of any further litigation with respect to the same '*res*'. The precise preclusive effects of a judgment nevertheless vary from one legal system to another.

3.2 Enforceability effect

Although there is a significant overlap between the enforceability effect of a judgment and its character as *res judicata* the two are not identical. A judgment that is not *res judicata* may nevertheless be 'provisionally' enforceable, and a judgment that is *res judicata* may not be enforceable where a stay of enforcement (*delai de grâce*) is granted.

Provisional enforceability: Once a judgment on the merits has been handed down at first instance, but before the judgment becomes final, measures to secure the position of the creditor are commonly available. Legal systems vary as to how far they permit provisional enforcement. Thus, the default position may be that a judgment is not provisionally enforceable, but the judgment creditor may apply for provisional enforcement, or (as in e.g. France and Belgium) the default position may be that a first instance judgment is provisionally enforceable, but a stay of enforcement may be sought. Security may be required from a creditor

[6] The ELI-Unidroit Model Rules refer to the positive and negative effects of *res judicata* in somewhat different terms (see r.149).

seeking to enforce, or from a debtor seeking a stay of enforcement. Alternatively, in some jurisdictions (e.g. Austria, Slovenia) provisional enforcement may not be permitted, but only the securing of assets of the debtor pending enforcement.

For a judgment on the merits of a case, a confirmation of enforceability is necessary before enforcement can take place – whether in the form of an endorsement on the judgment or a separate document. In cross-border cases under B IA, Art. 33 requires that the judgment is enforceable in the MS of origin. This is confirmed via the certificate of enforceability (Art.42).

3.3. Preclusive effects

An area of particular difficulty in comparing national legal systems is the determination of the preclusive effects of a judgment. Broadly speaking, a distinction is drawn between claim and issue preclusion. Preclusive effects are accepted with respect to claims, whereas issue preclusion is much less commonly accepted. Nevertheless, precise distinctions between claim and issue preclusion are problematic in comparative perspective since much depends on the particular structure of the relevant substantive law, and on the way that judgments are drafted. For example, although German law does not recognize issue preclusion, if the claimant or defendant wish to extend the preclusive effects of a judgment, it is open to them to request declaratory judgment on preliminary legal relationships such as the existence of a contract etc. (§ 256 (2) ZPO).

The ELI-UNIDROIT Model Rules seek to promote a limited recognition of issue preclusion. Thus Rule 149 states:

> **Rule 149. Material Scope of res judicata**
>
> (1) The material scope of res judicata is determined by reference to the claims for relief in the parties' pleadings, including amendments, as decided by the court's judgment.
>
> (2) Res judicata also covers **necessary and incidental legal issues that are explicitly decided in a judgment** where parties to subsequent proceedings are the same as those in the proceedings determined by the prior judgment and where the court that gave that judgment could decide those legal issues.
>
> (3) Res judicata also applies where a defendant brings a defence based on set-off and
>
> (a) the claim and that defence are upheld by the court, or
>
> (b) the claim is admitted and the defence of set-off is rejected.
>
> (4) Where a claim is rejected on grounds other than set-off, so that the court does not decide the set-off defence, only the judgment on the claim becomes res judicata.

The approach to issue and claim preclusion in the US makes an interesting point of comparison:

> "Claim preclusion aims at limiting the number of lawsuits that may be brought with respect to the same controversy. If claim preclusion applies, a second lawsuit on the same claim will

> wholly terminate, regardless of what issues were or were not litigated in the first lawsuit. By contrast, U.S. issue preclusion concerns only repeated litigation of the same issues. Thus, issue preclusion would apply only if claim preclusion were inapplicable, either because an exception to claim preclusion applied or because a different claim was in suit. While the core of claim preclusion is necessary, issue preclusion in the United States is not a necessary doctrine, but rather the product of policy determinations in favour of finality."[7]

This doctrinal statement implies three requirements for application of issue preclusion: (1) same issue, (2) actually litigated and determined, and (3) essential to judgment.

3.4 Identity of many claims

Although the preclusive effects of judgments reduce the scope for relitigation of the same claim, they do not prevent parallel litigation – which may be particularly problematic in the international context. B IA therefore contains rules to deal with such parallel litigation, primarily based on a principle of temporal priority. In particular, Art.29 regulates the situation where 'proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States'.

The question arises as to how far the requirement of the 'same cause of action' and 'same parties' is correlated to the requirements for claim preclusion.[8]

Same parties (subjective identity): In *The Tatry*, the European Court of Justice (ECJ) ruled, among other things, that the identity of the parties must be understood regardless of their respective position in the two proceedings, so that the claimant in the first case can be a defendant in the second case. This is notably relevant in cases where a claim is brought in one MS and a declaration of non-liability with respect to the same claim (negative declaration) is brought in another MS.

Same cause of action (objective identity): In different language versions there are different wording for the objective identity of the claims (Art 29(1) B IA): in German "wegen desselben Anspruch", in English "same cause of action", in French "le même objet et la même cause" and in the Spanish language "el mismo objeto y la misma causa". The same wording can be found in the Brussels Convention 1968. Therefore, the matter was heard by the European Court of Justice (ECJ) in *The Tatry*. For the purposes of Art. 21 of the Brussels Convention, the "cause" of the claim includes the facts and the law on which the action is based and the "objet" is the purpose of the action. In that case, 'cause of action' in a case seeking to determine that the defendant was liable for damage and to require him to pay damages was held to be the same the same as a previous action brought by that defendant to find that he was not liable for that damage.

[7] Thomas Heller, The current status of the preclusive effects of judgments in the federal court system of the United states of America. Lexonomica, 2021, p. 14.

[8] In the context of B II see Case C-296/10, *Purrucker v Vallés Pérez* per AG Jääskinen.

This decision by the CJEU that proceedings for a negative declaratory action were included with the rule 'lis pendens', overturned the previously held view in some jurisdictions, especially in the Germanic legal community. Until then, the approach of national procedural rights in Germany and Austria was that this was not possible. A negative declaratory claim could not prevent a subsequent claim for performance. Slovenia took a similar view.

In German and Austrian national law it is still the case that a positive declaratory action does not constitute a lis pendens with respect to a subsequent performance action, although it relates to the same 'cause'. A performance action represents the more holistic legal protection in terms of content. In Slovenia, even if the claims are not entirely identical, a lis pendens exists if they are mutually exclusive. Mutually exclusive claims are when the acceptance of the first claim automatically means that the second claim is unfounded and vice versa: when the rejection of the first claim automatically means that the second claim is well founded. The relationship between positive and negative declaratory actions is thus a typical case of mutually exclusive claims. The claims of two positive declaratory actions are not mutually exclusive.

3.5 Irreconcilable judgments

The application of the provisions of Title II regarding lis pendens and related actions impact greatly reducing the number of irreconcilable judgments, as anticipated.[9] Nevertheless, such judgments may occur. In relation to the original Brussels Convention 1968, the Jenard Report observed that, for refusal of recognition, it would be sufficient if the judgment whose recognition was sought were irreconcilable with a judgment given between the same parties in the State in which recognition was sought. It was 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 already given judgment in a dispute between the same parties declaring that the contract was invalid. It remains the case under B IA that a foreign judgment can be refused if it is irreconcilable with either (a) a judgment rendered in the enforcement state in a dispute between the same parties or (b) an earlier recognizable judgment rendered in another state in a dispute between the same parties and involving the same cause of action. This ground for review has not been changed, despite criticism in legal commentaries and the fact that consistent changes were made in EU regulations that abolished exequatur.

The criticism relates mainly to two issues. The first issue is the priority of a domestic judgment over the foreign judgment even if the foreign judgment was rendered earlier. This priority was abolished in the aforementioned EU regulations. The second criticism relates to the priority of an earlier judgment regardless of whether it was obtained in violation of the *lis pendens* rule of the Regulation. At least three different solutions were proposed to fix this problem, which could lead to different results. However, the European Parliament and Council decided not to

[9] Jenard Report, p. 79.

make any changes.[10]

3.6 Other effects of a judgment

Other effects of a judgment include the effects of a declaratory or a constitutive judgment (e.g. declaring the invalidity of a contract or the dissolution of a company). Declaratory or constitutive effects are usually recognised by a court, though the judgment may also by handled by e.g. an administrative authority having to determine a preliminary issue of private law.

4. Definition of Provisional and security measures

According to the CJEU the expression 'provisional, including protective, measures' in B IA must be understood as referring to measures which, in matters within the scope of that regulation, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter (C-261/90, *Reichert and Kockler*, EU:C:1992:149, [34]; cited in Case C-186/19, *Supreme Site Services*, ECLI:EU:C:2020:638, [50]).

It may be interesting to observe that the ELI-UNIDROIT Model Rules contain detailed regulation of provisional and protective measures. A general definition is provided in Rule 184:

> (1) A provisional or protective measure is any temporary order that has one or more of the following functions:
> (a) to ensure or promote effective enforcement of final decisions concerning the substance of the proceedings, whether or not the underlying claim is pecuniary, including securing assets and obtaining or preserving information concerning a debtor and his assets; or
> (b) to preserve the opportunity for a complete and satisfactory determination of the proceedings, including securing evidence relevant to the merits or preventing its destruction or concealment; or
> (c) to preserve the existence and value of goods or other assets which form or will form the subject-matter of proceedings (pending or otherwise); or
> (d) to prevent harm from being suffered, to prevent further harm, or to regulate disputed issues, pending final judgment.
> (2) A provisional or protective measure ordered should be suitable for its purpose.

5. Definition of Court settlement under BIA

In view of the numerous unanswered questions, the practical significance of the provisions on court settlement has remained small.

The term court settlement is to be interpreted autonomously (C-414/92, *Solo Kleinmotoren GmbH v. Emilio Boch*). Characteristics of the settlement are its contractual nature, the

[10] Dorothee Schramm, Enforcement and the abolition of exequatur under the 2012 Brussels I Regulation, p. 165.

intention of the parties to end the legal dispute and its effect of an enforcement title (procedural effects of the termination of proceedings and enforceability).

The distinction between procedural settlements and "consent judgments" presents practical difficulties. In addition, a procedural settlement as an enforcement title must be distinguished from the contractual settlement.

"Consent judgments" and "jugements d'expedient" fall under Article 2a).

In general, the court examines whether the result is appropriate and whether certain procedural minimum standards have been complied with. Ultimately, however, what matters it is not the judicial approval of the settlement, but rather its prior conclusion by the parties that creates its binding nature. Thus, the agreement between the parties, not the judicial review, is decisive.[11] But the presence of a judge at the conclusion of settlement is required.

6. Definition of authentic instrument under BIA

Authentic instruments have been defined by the CJEU in C-260/97, *Unibank* (following the Jenard-Möller Report) and by the EU legislature (Art.4(3)(a) of Reg 805/2004 on the European Enforcement Order). According to these definitions, an authentic instrument is an instrument which has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates which adopts a certain required form. Its authenticity under national law must relate not only to the signatures but also to the content of the document.[12] The particular designation of a relevant public authority, scope of authority and authentication procedures adopted are a matter of national law.

Obligations arising from authentic instruments are enforceable. In some States this is by operation of law. In other States authentic instruments are enforceable if a specific submission to enforcement is contained in a declaration in the authentic instrument.

7. Having non-judicial authorities carry out the judgment import function without *exequatur* is potentially problematic

Potential problems include questions about the level of training of the competent officer; the fact that expertise is not concentrated in one place, leading to the greater possibility of inconsistent approaches and inefficient procedures; problems relating to the adaptation of the imported judgment; and varying regulation of the instances of recourse in the case of a challenge to the recognition of the judgment; problems of identifying the scope of adjudicated claim that need to be enforced due to the different types and structures of judgments and due to the problems with correspondence of certificate with the judgment itself

[11] Burkhard Hess, Europäisches Zivilprozessrecht, 2nd Ed., De Gruyter, Berlin/Boston, 2021, p. 480.

[12] See e.g. Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, *Comparative Study on Authentic Instruments National Provisions of Private Law, Circulation, Mutual Recognition and Enforcement, Possible Legislative Initiative by the European Union: United Kingdom, France, Germany, Poland, Romania, Sweden* PE 408.329 (2008).

8. Common core after all

An advantage of attention to general principles is that it can help legal systems move closer together, by reference to 'best practice.' Local detail can have a paralyzing effect.

In Europe, harmonisation can be perceived at two levels: (i) adjustment of national systems to ensure compliance with the procedural guarantees contained in, or implied by, Article 6(1) of the European Convention on Human Rights; (ii) regulations introduced to ensure pan-European Union adoption of rather more specific procedural institutions or practices.[13] The terms, concepts and provisions of the Regulation are to be interpreted **autonomously**. The same holds true for the expression 'civil and commercial matters' referred to in Article 1(1). The concept of 'civil and commercial matters' is autonomous and independent of corresponding national legal concepts. However, the clear distinction between matters of private law and those pertaining to public law is not always easily made. It may prove particularly difficult to define the meaning and the reach of 'civil and commercial matters' within the context of disputes between a private party and a public authority. The decisions of the ECJ/CJEU provide for some guidance in that respect. The same holds true for the matters expressly excluded from the Regulation's scope, as it may sometimes be difficult to determine whether the subject-matter in a particular case qualifies for designation as an 'excluded matter' (e.g., the issue of the validity of an arbitration agreement raised to challenge jurisdiction). In that context, difficulties may be encountered in 'drawing the line' regarding the substantive scope of application between different EU legal instruments (e.g., between the Brussels I regime and the Insolvency Regulation or Regulation Brussels II bis).[14]

[13] Neil Andrews, Fundamental Principles of Civil Procedure: Order Out of Chaos, p. 20.
[14] Vesna Lazić, Regulations Brussels Ibis and Regulation creating a European Enforcement Order (Prepared for the purpose of the Legal English seminar, Judicial Academy, Zagreb, 5-9 June 2017).