Brussels I Review – The Abolition of Exequatur?

This is the first of a series of posts soliciting comment on the proposals for reform of the Brussels I Regulation in the Commission's recent Report and Green Paper. It concerns the possible abolition of all intermediate measures to recognise and enforce judgments (*exequatur*).

According to the Commission in its Green Paper:

> *The existing exequatur procedure in the Regulation simplified the procedure for recognition and enforcement of judgments compared to the previous system under the 1968 Brussels Convention. Nevertheless, it is difficult to justify, in an internal market without frontiers, that citizens and businesses have to undergo the expenses in terms of costs and time to assert their rights abroad. If applications for declarations of enforceability are almost always successful and recognition and enforcement of foreign judgments is very rarely refused, aiming for the objective of abolishing the exequatur procedure in all civil and commercial matters should be realistic. In practice, this would apply principally to contested claims. The abolition of exequatur should, however, be accompanied by the necessary safeguards.*
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> *In the area of uncontested claims, intermediate measures have been abolished on the basis of a control, in the Member State of origin, of minimum standards relating to the service of the document instituting proceedings and to the provision of information about the claim and the procedure to the defendant. In addition, an exceptional review should remedy situations where the defendant was not served personally in a way to enable him/her to arrange for his/her defence or where he/she could not object to the claim by reason of force majeure or extraordinary circumstances ('special review'). Under this system, the claimant must still go through a certification procedure, be it that this procedure takes place in the Member State of origin rather than in the Member State of enforcement.*
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> *In the area of contested and uncontested claims, on the other hand, Regulation 4/2009 on maintenance obligations abolishes exequatur on the basis of*

harmonised rules on applicable law and the protection of the rights of the defence is ensured through the special review procedure which applies once the judgment has been issued. Regulation 4/2009 thus takes the view that, in the light of the low number of "problematic" judgments presented for recognition and enforcement, a free circulation is possible as long as the defendant has an effective redress a posteriori (special review). If a similar approach were followed in civil and commercial matters generally, the lack of harmonisation of such a special review procedure might introduce a certain degree of uncertainty in the few situations where the defendant was not able to defend him/herself in the foreign court. It should therefore be reflected whether a more harmonised review procedure might not be desirable.

In light of this analysis, the Commission asks the following questions:

Question 1:
Do you consider that in the internal market all judgments in civil and commercial matters should circulate freely, without any intermediate proceedings (abolition of exequatur)?

If so, do you consider that some safeguards should be maintained in order to allow for such an abolition of exequatur? And if so, which ones?

One may, without too much difficulty, accept the proposition that that abolition the requirement to obtain a declaration of enforceability of a judgment obtained in another Member State would represent the logical end of the process that began with the 1968 Brussels Convention, aimed at ensuring the free movement of judgments within the Member States.

Nevertheless, it may be questioned whether this step would, in fact, produce practical benefits for the Community and might, indeed, increase the complexity and cost of enforcement, and create additional legal and political difficulties.The object of any cross-border enforcement regime in the EC must be to assimilate a judgment from one Member State as efficiently and effectively as possible into the legal order of one or more other Member States.

In this connection, it could well remain advantageous for the import of judgments initially to be channelled through a court or courts designated for this purpose

(i.e. as specified in Annex II to the Regulation), rather than proceeding directly to measures of execution, which may take place in a local court with little or no experience of cross-border matters. It must be recalled that the Brussels I Regulation does not apply only to money judgments, and the process for obtaining (and challenging) a declaration of enforceability provides an opportunity for any queries as to the nature and content of the judgment to be addressed before time and expense have been incurred in attempts to enforce that judgment.

That is not to say that the present enforcement process cannot be improved with the object of reducing cost and delay. Information technology could play an important part, most obviously by creating an online, central "clearing system" through which applications to enforce in several Member States could be lodged simultaneously, transmitted to the Member States' responsible authorities, and their progress monitored, with standardised fees and communication between Member State courts and the judgment creditor by e-mail. Other posssible improvements to the enforcement regime put forward by the Commission elsewhere in the Green Paper (i.e. creation of a standard form containing all relevant information as to the nature and terms of the judgment and removal of the requirement in Art. 40(2) of the Regulation to have an address for service within the jurisdiction) also appear sensible.

As to reform of the grounds for refusal of enforcement, it may be argued that (with the possible exception of the special treatment in Art. 34(2) of judgments in default of appearance, which could equally be dealt with as an aspect of public policy) the existing grounds should remain. As to the public policy ground, there appears no obvious reason why the "free movement of judgments" should be any the less open to qualification on the overriding grounds of national interest than any of the freedoms explicitly established by the EC Treaty. The circumstances in which this ground may be invoked have, in any event, been greatly circumscribed by the ECJ (see, recently, the judgments in *Gambazzi v. Daimler Chrysler* and *Apostolides v. Orams*). As to the effect of irreconcilability between judgments, it does not appear to be an adequate answer for the Commission to assert that "[i]rreconcileability between judgments is to a great extent avoided, at least at European level, by the operation of the Regulation's rules on *lis pendens* and related actions". That may be so, but those rules cannot guarantee that there will be no irreconcileable decisions, and they do not apply to situations involving judgments from third countries.

Accordingly, and subject to the views of others, Question 1 could receive the following answer:

> *No, but the process for obtaining a declaration of enforceability should be streamlined, with the use of information technology where appropriate.*