Regulation EC nº 4/2009, Art. 40

Article 40

Invoking a recognised decision

1. A party who wishes to invoke in another Member State a decision recognised within the meaning of Article 17(1) or recognised pursuant to Section 2 shall produce a copy of the decision which satisfies the conditions necessary to establish its authenticity.

2. If necessary, the court before which the recognised decision is invoked may ask the party invoking the recognised decision to produce an extract issued by the court of origin using the form set out in Annex I or in Annex II, as the case may be.
The court of origin shall also issue such an extract at the request of any interested party.

3. Where necessary, the party invoking the recognised decision shall provide a transliteration or a translation of the content of the form referred to in paragraph 2 into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where the recognised decision is invoked, in accordance with the law of that
Member State, or into another language that the Member State concerned has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the completion of the form.

4. Any translation under this Article must be done by a person qualified to do translations in one of the Member States.

What does art. 40, Regulation 4/2009, mean? Let's take its factual assumption: a party who wishes to invoke in a Member State a decision recognised in another Member State. The different language versions of the Regulation do not aid to determine which is the situation the rule aims to regulate. In a first reading, it

evokes the banned *exequatur on exequatur*, enforcement on enforcement. This would be the case of, for example, invoking in Spain a German resolution that has already been recognized in France. But is this really so? We follow Prof. Santiago Alvarez, *La Ley 31 July 2009,* when he rejects this opinion arguing several reasons. To start with, from a systematic point of view, because the rule refers to a situation contemplated by the preceding sections (recognition and execution without any intermediate procedure, and declaration of enforceability of the resolution). This could result at first sight from the first paragraph: "The party wishing to invoke in another Member State a decision recognized within the meaning of Article 17, paragraph 1, or under section 2 …".

Second, the rule speaks of the "court of origin" as the court which will issue an extract using the form set out in Annex I or in Annex II, as the case may be. The definition of art. 2.1. No. 9) of the Regulation states that the "court of origin" is the one which has given the decision to be enforced, and not the court that would have issued a decision on recognition (unnecessary, on the other hand, for resolutions of Section 1). That is, art. 40 only refers to the court of origin and to another Member State: not to an intermediate State (one might say, the State where a first recognition took place). Accepting this, the assumption would be that when a resolution of a Member State is invoked in another Member State in the context of art. 17.1 and Art. 23.1, for purposes other than its recognition (Section 1) or a declaration of enforceability (Section 2) –for instance, to ask for its amendment-, the invoking part must be equipped with an authentic copy, either of the extract foreseen by the forms; or, where appropriate, of the translations.

The term "Member State" is equated in other rules -such as art. 44, referring to legal aid- to any Member State or Member State other than the Member State of origin (and not necessarily a 'third' Member State). The concept of "decision recognized" is more complex to integrate into the proposed interpretation: but this seems to be due to its strangeness to our usual terminology; the difficulty would be overcome if we succeed to understand that automatic recognition has both an active and a passive dimension (a recognizable decision, a recognized decision- except opposition in the cases of Section 2). In any case, art 40 itself speaks of "… The party wishing *to invoke in another Member State* a recognized decision …"; and not "… The party wishing to invoke a decision *recognized in another Member State* …". In this case, the order of the statement's elements is

not innocuous.