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Brussels I Regulation (recast) – provisional measures, recognition and enforcement – and the European Enforcement Order[1]

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Case study

"Info", a computer company with its statutory seat in Warsaw enters into a contract with "Auditur" with its statutory seat in Hamburg. According to this contract, Info is supposed to create a particular accounting software for Auditur and install it on Auditur's computers. The contract contains a choice of court agreement in favour of the tribunal of Hamburg.
The first tests are performed after a few months, and it appears that the software does not function properly. Info believes that the specifications given by Auditur were unclear and led to unnecessary delays. Auditur is dissatisfied with the result of the contract, refuses to pay the price and wants to terminate the contract. Auditur starts proceedings before the courts in Hamburg. The first instance court in Hamburg issues a document to initiate the proceedings but the address is wrong, and Info never receives the document. Info does not appear in court and the German judgment is given in default of appearance in January 2022.
The notification of the judgment, however, is sent to the right address. The judgment declares the termination of the contract and orders Info to pay damages to Auditur.
Info contests the enforcement and argues that (i) it did not know about the proceedings; (ii) the judgment is biased in favour of the claimant; and (iii) the judgment has violated Info's intellectual property rights on its software, including a violation of Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs.
Auditur seeks enforcement of the judgment in Poland.

Questions

1. Would the enforcement of the German judgment be based on the Brussels I Regulation (recast) or on the European Enforcement Order?

2. Assume that the European Enforcement Order was issued for the German judgment by the court office (staff member), but not a judge. Would such European Enforcement Order be enforceable?

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3. What kind of procedure should be used to
   a. enforce the judgment in Poland?
   b. resist the enforcement of the judgment in Poland?

Exercises

a. Find, using the e-justice portal, the proper form to be obtained in the country of origin.

b. Find, using the e-justice portal, the competent court to resist enforcement in your own Member State.

3. If Info wants to block enforcement in Poland, discuss the arguments raised.
   a. Does the absence of notification of the document initiating the proceedings have an impact on enforcement?
   b. Does the argument that the judgment was biased in favour of the claimant have an impact on enforcement?
   c. Does the alleged violation of EU law have an impact on enforcement?

4. Assume that while the proceedings in Germany were on-going the court dismissed the request to seize the bank account of Info in Poland. Auditor seeks to apply to the competent court in Poland with the same request for the provisional measures. Auditur raised a claim in Warsaw in order to get a temporary seizure of the assets of Info in Poland.
   a. Do the Polish courts have jurisdiction to order the seizure of the assets?
   b. Do the Polish courts have jurisdiction to decide on such request when the same request has been already dismissed by the court in Germany?

5. Assume that, after the decision in the court of Germany was rendered, Auditor applied to the court to issue the certificate of enforceability to enforce the judgment in Poland. Info applied to the court and demanded not to issue the certificate.
   a. Does Info have a right to ask the court not to issue the certificate because the court allegedly lacked jurisdiction to hear the dispute?
   b. Should be court examine whether the judgment may violate public policy out of duty (ex officio) before issuing the certificate of enforceability?

Exercise

Find the relevant forms for the enforcement of an authentic act, a court settlement or a judgment through the Brussels I (recast) procedure or through the European Enforcement Order procedure in the e-justice portal.

Methodological advice

Training Aims:

- Familiarise the participants with scope of application of the regulations.
- Explain the objectives underlying the main rules in the regulations.
- Clarify the functioning of the various jurisdiction rules.
- Explain the potential difficulties of multiple actions.
- Explain the various possibilities of decision circulations.
- Make the participants feel at ease with the application of the European instruments.
- Familiarise the participants with some key decisions of relevant EU case law.

Advanced questions:

- Does EU law establish the rules on jurisdiction for application of provisional measures when the application is filed in different Member State?
- What is the legal relevance of the decision to refuse to apply provisional measures in one Member State when the same request is later filed to the court another Member States?
- What are the requirements for issuance of the European Enforcement Order?
- Should the court assess whether the rules on jurisdiction were not violated before issuing the certificate of the European Enforcement Order?

Methodology

In any case with a cross-border component, the following steps can assist in finding the right provisions to be applied:

Step 1. Identify the area of law concerned.

Step 2. Consider which aspect of private international law is at issue.

Step 3. Find the relevant EU and international legal sources.

Step 4. Check the substantive, geographical and temporal scope of the respective EU and international instruments; where more than one instrument is relevant, check their relation to each other.

Step 5. Find the correct provisions.

Please note, where no EU instrument, international multilateral or bilateral instrument is applicable in a cross-border case, the autonomous private international law rules of the State concerned will have to be considered.

Suggested solution

1. Would the enforcement of the German judgment be based on the Brussels I Regulation (recast) or on the European Enforcement Order?

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims has set up a new transnational enforcement procedure.
The purpose of this Regulation is to promote the free circulation of judgments by laying down certain minimum standards (Article 1). The European Enforcement Order is a simple procedure that can be used for uncontested cross-border claims. It is important that enforcement of the judgment can take place without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement.

The European Enforcement Order does not suppress 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 (the "Brussels I Regulation (recast)"). As a result, the two instruments now co-exist. The principle of the European Enforcement Order is the mutual recognition of judgments (and authentic instruments) between Member States. The judge who has given a judgment in a country certifies it as a European Enforcement Order and so makes it enforceable in EU territory.

The following requirements have to be fulfilled:
This Regulation applies – like the Brussels I Regulation (recast) – in civil and commercial matters (Article 2), a term which has to be interpreted autonomously. The Regulation on the European Enforcement Order does not apply to revenue, customs or administrative matters, or the liability of the State for acts and omissions in the exercise of State authority.
The Regulation only applies to "uncontested claims" (see below for a more detailed explanation).
Finally, to fulfil the requirements for certification as a European Enforcement Order, the decision must fulfil the cumulative conditions according to Article 6:

- the decision (judgment, court settlement and authentic instrument) must be enforceable in the Member State of origin
- the decision must not be incompatible with the jurisdiction rules in Brussels I Regulation (recast)
- the procedure must comply with minimum standards set out in Chapter III

The very notion of "uncontested claim" is difficult to grasp. A definition is given in Article 3 Section 1 of the Regulation. For instance, a claim shall be regarded as uncontested if the debtor has expressly agreed to it or has never objected to it.

A claim is regarded as uncontested if:

- the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or
- the debtor has never objected to it in the course of the court proceedings; or
- the debtor has not appeared at or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings; or
- the debtor has expressly agreed to it in an authentic instrument.

In the present situation, a default judgment was given, i.e. the claim was uncontested. The fact that Info contested the claim before the proceedings started is irrelevant.
However, the minimum standards for uncontested claims procedures were not fulfilled: According to Articles 13 and 14, certain minimum standards have to be fulfilled when serving the document instituting the court proceedings.
According to Recital 12 "[m]inimum standards should be established for the proceedings leading to the judgment in order to ensure that the debtor is informed about the court action against him, the requirements for his active participation in the proceedings to contest the claim and the consequences of his non-participation in sufficient time and in such a way as to enable him to arrange for his defence."
In our case, the address mentioned in this document was wrong, so Info never received this document. Therefore, the default judgment cannot be certified as a European Enforcement Order.

Note: Even if the creditor was looking for enforcement of the costs of the German judgment, the European Enforcement Order Regulation could not be used.
The CJEU stated that Article 4(1) and Article 7 of the Regulation must be interpreted as meaning that "an enforceable decision on the amount of costs related to court proceedings, contained in a judgment which does not relate to an uncontested claim, cannot be certified as a European Enforcement Order" (CJEU, 14 December 2017, C-66/17, Chudas).
Therefore, the route of the Enforcement Order does not work for Info.

Brussels I Regulation (recast) allows for recognition and enforcement of any judgment given by a court in a Member State in another Member State. The scope of application requires that the judgment was rendered in civil and commercial matters (Article 1) and the proceedings were initiated after 10 January 2015 (Article 66). The domicile or the nationality of the parties is not relevant.
Article 2a as well as Article 32 Brussels I Regulation (recast) give a broad definition to the notion of "judgment" encompassing "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."
Therefore, the enforcement of the German judgment should be sought for through the Brussels I Regulation (recast) provisions.

Note: The importance of the distinction between the procedure in the European Enforcement Order Regulation and the Brussels I Regulation (recast) was very important when the exequatur procedure still existed, *i.e.* when Regulation 44/2001 (Brussels I) was still in place.
Now that the exequatur procedure has been abolished, the importance is less striking. One remaining difference, however, is that there are more grounds to resist enforcement in the addressed country under the Brussels I (recast) regime (see *infra*, Q2).

2. Assume that the European Enforcement Order was issued for the German judgment by the court office (staff member), but not a judge. Would such European Enforcement Order be enforceable?

The question concerns authority to issue a European Enforcement Order. Article 6 of the Regulation establishes the rrequirements for certification as a European Enforcement Order. However, the Regulation does not establish clearly whether only a judge or another person of the court personnel, such as judge's assistant has the right to issue a European Enforcement Order. To answer this question, it would be relevant to also to discuss the legal nature of European Enforcement Order, what information should be found in this order.

The relevant case law of the CJEU is the case *Imtech Marine Belgium NV* in which the arose whether the certification of a judgment as a European Enforcement Order is a judicial act, which can therefore be carried out only by a judge and must be requested in the document initiating proceedings. The CJEU found that "<…> the legal qualifications of a judge are essential to the correct assessment – in a context of uncertainty as to the observance of the minimum requirements intended to safeguard the debtor's rights of defence and the right to a fair trial — of the remedies under national law in accordance with paragraphs 38 to 40 of the present judgment. Moreover, only a court or tribunal within the meaning of Article 267 TFEU is capable of ensuring, by means of a reference for a preliminary ruling to the Court of Justice, that the minimum requirements laid down by Regulation No 805/2004 are interpreted and applied uniformly throughout the European Union" (para. 47).

Accordingly, the CJEU concluded that "Article 6 of Regulation No 805/2004 must be interpreted as meaning that the certification of a judgment as a European Enforcement Order, which may be applied for at any time, can be carried out only by a judge" (para. 50).

Thus, following the interpretation in the *Imtech Marine Belgium NV* case only a judge has authority to issue certification of a judgment as a European Enforcement Order. In such case, if the requirements for an uncontested claim had been met, only a judge in the German court would have had a right to issue certification of a judgment as a European Enforcement Order.

Note. The notion of a "judge" may also raise questions in some Member State depending how this profession is defined in the national law. In some countries trainee judges also act as judges in some capacity (perform some procedural actions). It could be discussed how *Imtech Marine*

Belgium NV case should be interpreted and who may have a right to issue certification of a judgment as a European Enforcement Order in different countries.

2. What kind of procedure should be used to
a) enforce the judgment in Poland?

Article 36 Brussels I Regulation (recast) provides that judgments issued in one Member State are automatically recognised in other Member States without any prior proceedings or formal steps. The principle of automatic recognition (*ipso iure*) is one of the cornerstones of European civil procedure.
A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member State without any declaration of enforceability being required (Article 39). This is to say that the Brussels I Regulation (recast) eliminated the "exequatur" procedure which was maintained under the previous version of the text.
Therefore, no particular procedure should be used by Auditur in Poland. The German company can go to the local enforcement authorities and follow the Polish enforcement procedures.
However, Auditur must prove the very existence and the enforceable nature of the judgment obtained in Germany (Article 42).
To ease enforcement, a model form has been elaborated. According to Article 42 and 53, the enforcement seeker should provide a certificate obtained before the court of origin certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.
The certificate, which is very precise, is laid down in Annex 1 of the Regulation.
Therefore, in order to obtain enforcement in Poland, Auditur should ask for this certificate in Germany.

b) resist the enforcement of the judgment in Poland?

The party against whom enforcement is sought can initiate proceedings in the state addressed (Article 46). Therefore, in that situation, Info can apply before Polish courts that the enforcement of the German judgment shall be refused.
The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted (see exercises, *infra*).

Exercises:
a. *Find, using the e-justice portal, the proper form to be obtained in the country of origin.*
Regulation (EU) No 1215/2012 provides for two forms: a certificate concerning a judgment and a certificate concerning an authentic instrument/court settlement.

The forms can be found here:

https://e-justice.europa.eu/content_judgments_in_civil_and_commercial_matters_forms-273-en.do

In the present situation, the certificate which needs to be obtained concerns a judgment. The specific form can be found here:

https://e-justice.europa.eu/dynForms.do?1557141740784&introMemberState=1&introTaxonomy=273&form4BC=jccm&subform4BC=dynform_br_a&currentPage=dynform_br_a_1&selectedFormPage=dynform_br_a_1_action&redirectPath=/jsp/dynforms/br/dynform_br_a_1_tile.jsp

b. *Find, using the e-justice portal, the competent court to resist enforcement in your own Member State*

Information about the available courts in Europe can be found on the e-justice website of the EU : https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do.

Click on the national flag to get the complete references of the available courts.

For example, in Warsaw the competent court would be the "Sąd Okręgowy w Warszawie".

3. If Info wants to block enforcement in Poland, discuss the arguments raised.

The reasons for refusal of recognition and enforcement are very strictly defined in Articles 45 and 46. As stated in Article 45:

"On the application of any interested party, the recognition of a judgment shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

(b) where the judgment was given in default of appearance, if 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;

(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third 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

(e) if the judgment conflicts with:

(i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or
(ii) Section 6 of Chapter II."

Therefore, the grounds for non-recognition can be classified in three main categories:

- Public policy (a and b)
- Irreconcilability of judgements (c and d)
- Control of the jurisdiction of the court of origin (e).

Public policy is a traditional exception of private international law, by which a court will not enforce norms or acts if the performance contravened fundamental moral principles or offended some other overriding public interest. In the context of recognition and enforcement of judgments, it allows the Court of the State addressed to refuse recognition and enforcement of a judgement from another Member State.

It is important to understand that the public policy concept it is based upon is extremely narrow. This narrow concept does not cover all internal rules of public policy, rather only the core principles and values that cannot be derogated from. Denying recognition or enforcement can only be based on the identification of a fundamental principle which would be violated in the State of enforcement (effet atténué).

Irreconcilability of judgments refers to the situation where more than one judgment has been rendered in different States. In this situation, both judgments cannot be simultaneously enforced, one must choose. The Brussels regime favours the judgment of the forum or, in the situation in which conflicting judgments were issued in two foreign States, the first judgment rendered. The other judgment, therefore, cannot be recognised or enforced.

Finally, the jurisdiction of the court of origin can be controlled in certain exceptional situations (mainly: weaker party protection and exclusive jurisdiction) by the court of the State addressed to refuse recognition and enforcement if the jurisdiction rules mentioned have not been applied.

In the present situation, there is no irreconcilable judgment, and the dispute is not one of the rare cases where the judge addressed should control the jurisdiction of the judge of origin.

The only reason for resisting enforcement could be the public policy exception.

The very notion is to be defined according to national law, since Article 45-Ia refers to "the public policy (ordre public) in the Member State addressed". However, it is clear from case law that the concept is to be understood strictly. According to the Court of Justice, the public policy exception *"ought to operate only in exceptional cases"* (CJEU, 4 February 1988, Hoffmann, 145/86). Therefore, there is a strict control of the exercise of the public policy exception by the Court of Justice, and the threshold is very high.

This is the reason why the arguments raised by Info have very little chance of success.

The arguments raised by Info concern both the substantive and the procedural aspects of the public policy exception and should be analysed separately.

a) Does the absence of notification of the document initiating the proceedings have an impact on enforcement?

Article 45 Section 1 b provides that recognition and enforcement can be refused: "where the judgment was given in default of appearance, if 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."
Info could therefore argue that their rights have been violated because they had not been served properly with the document initiating the proceedings and, therefore, could not arrange for theirs. However, the conditions set forth in Article 45 Section 1 b are strict, and particularly, the last part of the sentence is to be interpreted in the sense that if the defendant had the possibility to appeal the judgment in the country of origin and failed to do so, enforcement should be granted (CJEU, 16 July 2015, Diageo Brands, C-681/13), even if the judgment was not properly served (CJEU, 14 December 2006, C-283/05, ASML).
The defendant who did not challenge the decision in its State of origin loses the possibility of later raising the argument opposing its recognition. In the present situation, the judgment was properly served and Info failed to lodge any appeal against it. Accordingly, Info cannot argue that it did not know about the judgment.
Therefore, the Polish courts should dismiss the action for refusal of enforcement against the German judgment on those grounds.

b) Does the argument that the judgment was biased in favour of the claimant have an impact on enforcement?

Despite the rather narrow wording of Article 45 Section 1 b, the CJEU found that any violation of the parties' fundamental procedural rights could lead to a refusal of recognition and enforcement (CJEU, 28 March 2000, Krombach, C-7/98).
The Court held that "recourse to the public-policy clause in Article 27, point 1, of the Convention [as it then was] can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle" (n° 37) and the right to a fair trial is undoubtedly one of these fundamental rights. The claimant must prove that there is "a manifest breach of a rule of law, regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order" (CJEU, Krombach, *ibid*).
Basically, in *Krombach* and in the following cases, the CJEU imported the case law under Article 6 ECHR, and now Article 47 of the European Charter (CJEU, 25 May 2016, C-559/14, Meroni) and applied it to the public policy exception. In essence therefore, under the public policy exception, Info must prove that its right to a fair trial in the sense of Article 6 ECHR has been violated.
In the present situation, this argument has very little chances of success, since arguing that the judge was biased is in itself insufficient, without more specific proof of the violation of the right to a fair trial.
Therefore, the Polish courts should dismiss the action for refusal of enforcement against the German judgment on those grounds.

c) Does the alleged violation of EU law have an impact on enforcement?

A possible (even gross) violation of national or EU law is not sufficient in itself under the public policy exception. This solution was clearly stated by the CJEU in the Renault case (CJEU, 11 May 2000, Renault, C-38/98), which held that:

> "Recourse to the clause on public policy (…) can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order" (n°30) and therefore "The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the grounds that it considers that national or Community law was misapplied in that decision" (n° 33).

In the present situation, therefore, the fact that EU law arguably could have been violated is irrelevant under the public policy exception. This solution has been recently reaffirmed by the CJEU (CJEU, 16 July 2015, Diageo Brands, C-681/13).
Thus, it is unlikely that Info could invoke the substantive aspect of the public policy exception and hence the Polish courts should dismiss the action for refusal of enforcement against the German judgment on that grounds. As a whole, it does not seem that Info can invoke convincing arguments in order to object the enforcement. Its action should be dismissed, and the German judgment enforced.

4. Assume that while the proceedings in Germany were on-going the court dismissed the request to seize the bank account of Info in Poland. Auditor seeks to apply to the competent court in Poland with the same request for the provisional measures. Auditur raised a claim in Warsaw in order to get a temporary seizure of the assets of Info in Poland.

a) Do the Polish courts have jurisdiction to order the seizure of the assets?

In addition to the jurisdictions rules in Articles 4-26, the Brussels I Regulation (recast) provides a further jurisdiction ground for provisional including protective measures. It enables the applicant to seek such measures from a court even if another court has jurisdiction as to the substance of the matter.
Provisional and protective measures are measures normally sought for in order to ensure that certain rights are safeguarded and to maintain the status quo, so that the parties can have a chance to argue their claims on the merits. In essence, they are only meant to be temporary. They are of utmost importance in the international litigation arena, are dealt with in Article 35 of the Regulation and led to several important cases from the CJEU.
As stated in Article 35:

"Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter".
In other words, Article 35 provides for a specific ground of jurisdiction based on the necessity to obtain provisional and protective measures and the measures will be those available under national law. Accordingly, the standard of proof and the procedural requirements will be determined by national law.
However, the measures sought for have to fit the European definition given by the CJEU in the Reichert case, that is "measures which, in matters within the scope of the Convention, 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" (CJEU, 26 March 1992, C-261/90, Reichert, n° 34).
Moreover, there must be a link between the measure sought and the court seised. As the Court of Justice put it in the famous Van Uden case:

> "the granting of provisional or protective measures (…) is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought" (CJEU, 17 November 1988, C-391/95, Van Uden, n°48).

In the present situation, Info wants the freezing of the assets of Auditur in Poland. Therefore, the two conditions set up by the CJEU seem to be met. The freezing of assets complies with the requirement of the Reichert definition, and if the assets frozen are in Poland, the real link connection of the Van Uden case is also respected. Therefore, if Info respects the requirements of Polish law, it could obtain provisional and protective measures from a Polish court.

Note: It is generally accepted that the effect of provisional and protective measures is limited to the country where they have been granted. As the Court said in the *Denilauler* case:
"the conditions imposed by Title III of the Convention on the recognition and the enforcement of judicial decisions are not fulfilled in the case of provisional or protective measures which are ordered or authorized by a court without the party against whom they are directed having been summoned to appear and which are intended to be enforced without prior service on that party. It follows that this type of judicial decision is not covered by the simplified enforcement procedure provided for by Title III of the Convention" (CJEU, 21 May 1980, 125/79, n°17, *Denilauler*).
Moreover, it is generally understood that the "real connecting link" referred to in the *Van Uden* case implies that the court only has jurisdiction if enforcement in the same Member State is possible. This is the reason why decisions on provisional and protective measures do not fall under the regime of free movement of decisions; they do not circulate. Hence, a court cannot deliver a certificate of enforceability if its jurisdiction is solely for granting provisional and protective measures.

b) Do the Polish courts have jurisdiction onto decide on such request when the same request has been already dismissed by the court in Germany?

The question concerns request of the application of the same provisional measures in a few Member States when the court in one Member State which has jurisdiction over the substance of the case has already dismissed the application and the same application (requesting the same provisional measures) is filed to the court in another Member State.

Article 35 of the Brussels I Regulation (recast) lacks guidance how the court in different Member States should cope with such question. The regulation only provides the basis for the jurisdiction to impose provisional measures but does not regulate whether the courts in different Member States should coordinate the actions when hearing the applications for provisional measures. The practical problem arises what are the legal consequences of a decision of the court of the Member State which have jurisdiction over the substance of the case to refuse to impose provisional measures in the other Member States. Also, the practical problem arises how to avoid double litigation on the same subject matter and ensure proportional application or provisional measures in the same dispute across the Member States.

The question of jurisdiction to hear application for imposition of provisional measures in case the court of the Member State which has jurisdiction over the substance of the case dismissed such application by the court of another Member State has been addressed in the *TOTO SpA* case.

Although from Regulation no. 1215/2012 structure, the consequences of the decisions taken by the courts of a Member State with jurisdiction over the substance of the case differ from those taken by the courts of other Member States, however, this regulation does not establish a hierarchy of these courts. In particular, it is not apparent from the wording of Article 35 of the said Regulation that it generally confers jurisdiction on the courts of a Member State with jurisdiction over the substance of the case to adopt provisional measures, including protective measures, and as a result courts of other Member States no longer have jurisdiction to adopt such measures when the first courts were approached with a request to apply such measures or they made a decision on such a request (*unofficial translation*) (para. 59-60).

The CJEU in the said case found that Article 35 of Regulation (EC) No 1215/2012 must be interpreted as meaning that the court of a Member State to which a request for provisional measures, including protection, within the meaning of this provision has been made, is not required to declare that it lacks jurisdiction when a court of another Member State having jurisdiction to hear a case on the substance, has already ruled on a request in a case between the same parties on the same subject and on the same grounds (*unofficial translations*) (para. 61).

In the present case the Polish court would have jurisdiction to hear the application for provisional measures which has been already dismissed by the German court. The mere fact that the court in Germany dismissed the application does not mean that the courts in Poland lack jurisdiction to hear such application.

Note. I would be also relevant to discuss the opposing situation when the court in one Member States apply provisional measures and after the application for provisional measures is submitted to the court in another Member State. The Brussels I Regulation (recast) does not regulate the coordination of application of provisional measures in different countries. It may be important to discuss the proportionality and scope of provisional measures in such cases.

5. Assume that, after the decision in the court of Germany was rendered, Auditor applied to the court to issue the certificate of enforceability to enforce the judgment in Poland. Info applied to the court and demanded not to issue the certificate.

a. Does Info have a right to ask the court not to issue the certificate because the court allegedly lacked jurisdiction to hear the dispute?

Auditur as an interested party in the dispute has the right to ask the court to issue a certificate of enforcement under Article 53 of the Brussels I Regulation (recast). A certificate is necessary for the purpose of invoking recognition and seeking enforcement in another Member State. Pursuant to Article 37(1) of the Brussels I Regulation (recast) a party who wishes to invoke in a Member State a judgment given in another Member State shall produce: (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (b) the certificate issued pursuant to Article 53. Article 41(2) of the Brussels I Regulation (recast) establishes that for the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with: (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and (b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

Recital 32 of the Brussels I Regulation (recast) establishes that in order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary, accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service.

According to Article 53 of the Brussels I Regulation (recast), the court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I.

The Brussels I Regulation (recast) does no establish specific rules how the certificate should be issued and what circumstances, legal matters should be assessed when the court deals with this question.

The question whether the court issuing a certificate has authority to re-assess the jurisdiction of the dispute was analysed in the *Salvoni* case.

The court found in the *Salvoni* case that "Article 53 of Regulation No 1215/2012 must be interpreted as precluding the court of the Member State of origin, which has been requested to issue the certificate referred to in that article concerning a judgment which has acquired the force of *res judicata* issued against a consumer, from examining of its own motion, in a case such as that in the main proceedings, whether that judgment was given in compliance with the rules on jurisdiction laid down by that regulation" (CJEU, 4 September 2019, C-347/18, para. 39).

Also, the CJEU found in the said case that "Article 53 of Regulation No 1215/2012, read in conjunction with Article 47 of the Charter, must be interpreted as precluding the court of origin which has been requested to issue the certificate provided for in Article 53 of that regulation in respect of a judgment which has acquired the force of res judicata from being able to ascertain of its own motion whether there has been a breach of the rules set out in Chapter II, Section 4 of that regulation, so that it may inform the consumer of any breach that is established and enable him to assess, in full knowledge of the facts, the possibility of availing himself of the remedy provided for in Article 45 of that regulation" (CJEU, 4 September 2019, C-347/18, para. 46).

In this case Info does not have a right to ask the court not to issue the certificate because the court allegedly lacked jurisdiction to hear the dispute since it is automatic procedure. Issuance of the certificate is an automatic procedure, and it would be incompatible with the aims of the Brussels I Regulation (recast) if the court re-assessed the question of jurisdiction when issuing the certificate. Thus, the court should only issue a certificate without reassessing the jurisdiction of the dispute.

b. Should the court examine whether the judgment may violate public policy out of duty (ex officio) before issuing the certificate of enforceability?

The question is whether the court should assess if judgment may violate public policy out of duty (ex officio) before issuing the certificate of enforceability. To deal with this question the relevant case law of the CJEU should be discussed. As the CJEU noted in the *Salvini* case, delivery of that certificate is almost automatic (CJEU, 4 September 2019, C-347/18, para. 38).

The question whether the judgment may violate public policy or other ground for non-recognition of a judgment shall be assessed only on the application of any interested party pursuant to Article 45 of the Brussels I Regulation (recast).

It should be emphasized that enforcement of judgments under the Brussels I Regulation (recast) is based on the principles of mutual trust and free movement of judgments (Recital 6, 23 of the Brussels I Regulation (recast)). All the procedures related to the enforcement of judgments should be limited what is established in the Brussels I Regulation (recast) and additional procedures (requirements) shall not be established.

The relevant case law of the CJEU suggests that the issuance of a certificate on enforceability is automatic procedure facilitating the enforcement of a judgment: "In that context, the function ascribed to the certificate is specifically to facilitate, in the first stage of the procedure, the adoption of the declaration of enforceability of the judgment given in the Member State of origin, making its delivery almost automatic, as is expressly stated in recital 17 in the preamble to Regulation No 44/2001" (Trade Agency Ltd, C-619/10, para. 41)

According to the CJEU in case H limited, in accordance with Article 45(1)(a) of Regulation No 1215/2012, read in conjunction with Article 46, on the application of any interested party, recognition of a judgment is to be refused if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed (C-568/20, para. 41). Thus, the grounds for non-recognition of a judgment may be raised only by the interested parties in the court of the other Member States.

In this case the court which received the request to issue the certificate has not right to assess the possible violation of public policy or any ground for non-recognition of the judgment as established in Article 45(1) of the Brussels I Regulation (recast). Since the procedure for the issuance of the certificate is automatic, it does not require to assess the possible enforcement questions of the judgment. Thus, the court in this case should not assess the possible violation of public policy or any other grounds for non-recognition of a judgment in another Member State.

Exercise: *Find the relevant forms for the enforcement of an authentic act, a court settlement or a judgment through the Brussels I (recast) procedure or through the European Enforcement Order procedure in the e-justice portal.*

Although the requirements for European enforcement are very similar, a distinction must be made, depending on the measure to be enforced. Therefore, several forms are accessible to the parties.
The European Enforcement Order Regulation provides for three different forms (judgment, court settlement, authentic instrument), which can be found here:
https://e-justice.europa.eu/content_european_enforcement_order_forms-270-en.do?clang=en.

The Brussels I Regulation (recast), provides only for two different forms (Judgement, authentic instruments and court settlements, which can be found here:

https://e-justice.europa.eu/content_judgments_in_civil_and_commercial_matters_forms-273-en.do?clang=en).

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