THE ENFORCEMENT OF FOREIGN JUDGEMENTS AND THE ADVANTAGES OF ARBITRATION

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1. *Enforcement following the introduction of Brussels 1 Recast*

The importance of money and time

One of the main reasons the exequatur was abolished is due to the money and time involved in this procedure. Although professor dr Xandra E Kramer may be right in her work asserting that the impact of exequatur in the cost is relatively low[1]; the reality is that the cost depends of each case and each country. As she says, the cost is low in most cases, but when it comes to United Kingdom and Ireland the cost is almost double than in the rest of the countries. According to the Cses, both United Kingdom and Ireland fees for exequatur proceedings are at the top of the list (3565 Euros). These fees come not only from court and legal fees buy also from other additional fees such as preparation of documentation, translation, submitting the application, serving the documents, success fees (UK being one of the countries more liberal in respect of them) and the like[2]. The biggest challenge for these two countries stems from the legal fees which are very high and this makes them quite expensive to transact exequatur procedures. With the Brussels Recast, the enforcement will be reduced from two to one single procedure, saving a considerable amount of money, especially in legal fees. This is relatively important in complex cases, where more money would be required to be invested. In my opinion, the abolition of exequatur is a huge advance for both United Kingdom and Ireland, since even the most straightforward case is quite expensive.

When it comes to protective measures, the importance of time is huge. To this respect, the Brussels 1 is useless so to speak.[3] This regulation makes possible for the debtor to hide his assets in cause of a freezing order because the "request" for this measure takes place after the notification of the exequatur to the other party. The situation under the Brussels Recast is much more protective[4] to the claimant and the enforcement procedure in general since the protective measures happen not after but "before" the defendant knows about the future enforcement. The reason is that it is possible to request protective measures before presenting the Brussels 1 Certificate to de defendant[5]. From my point of view, it is obviously and improvement for United Kingdom and Ireland, since from now on, part of the judgement can be assured or enforced beforehand.

In relation to the delays the exequatur may cause, the problem is smaller since both Ireland and United Kingdom are "speed countries", as it were. The average time to transact the exequatur is one month but here the time spend is less than that (5 days for United Kingdom)[6]. The problem is not in the exequatur itself, but on the "waiting time" needed to enforce it because of appeals (order 42A for Ireland says that enforcement will not take place until appeals expire[7]). With the new regulation, it seems that less time will be required, but this is

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[1] Prof dr. Xandra E. Kramer *Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area*, pp.17

[2] CSES: Data Collection and Impact Analysis –Table 3.3: Estimated Cost of Exequatur Proceedings– 2009 (Euro), pp. 42-43

[3] Art 47.2 and 47.3 Brussels 1 Regulation

[4] Art 43.3 Brussels 1 Recast

[5] Dorothee Schramm *Enforcement and the abolition of the exequatur under the 2012 Brussels 1 Regulation*, pp. 158

[6] CSES: Data Collection and Impact Analysis – Table 3.3: Estimated Cost of Exequatur Proceedings– 2009 (Euro), pp. 36,47

[7] Order 42A, rule 15

not completely clear. Although art 48 says that the court "shall decide on the application for refusal of enforcement without delay"[8], some delay could be caused because the refusal of enforcement will be governed by the law of the member state addressed. Each country has both different deadlines for appealing and duration of appeals, and this can create the same kind of delays again under the recast[9]. In fact, United Kingdom and Ireland will for sure encounter more troubles under the recast since there may be not 2, but 3 levels of appeal.

The Brussels 1 seems to be a slower system because of the exequatur and the requirement of both the Brussels 1 Certificate and the translations. But the truth is that this system may be faster in some situations, because "not always" these documents are required, it is up to the court to request them or not[10]. With the new Brussels Recast, although the procedure will be faster in most cases, the reality is that in terms of "time" it is still uncertain. The main reasons are two of them: The Certificate and the translations. From January onwards, both the Brussels 1 Certificate and translations will be compulsory. It will be practically impossible to enforce a judgement until the defendant receives these documents.

National law problem

Many people would argue that the Brussels Recast will create problems when enforcing foreign judgements, saying that "National laws are very different among states" and "its adoption to the enforcing state with an equivalent effect"[11] will be almost impossible. The flaws present in this art 54.1 are; in my opinion, reinforced with the possibility given to any party to challenge this adoption[12]. This, together with a much more detailed Brussels 1 Certificate (leading them how to proceed), makes UK and Ireland courts more capable of interpreting "correctly" the law of the court of origin. Despite thinking that these countries will not have trouble enforcing the judgements under the new regulation, in some situations (especially at the beginning of 2015) the enforcing courts will find problems adapting themselves to a new system.

Grounds for refusal of enforcement

As can be interpreted from recital 18 of the Brussels Recast, the inferior position of employees has led the Commission to extend this ground also to them and at the same time, delete this ground available for the employers[13]. Although the proposal to abolish any kind of review is ideal in terms of mutual trust and a more easily enforcement, enlarging its scope will not be problematic (it will be equally successful). The reason behind is the small percentage of occasions people use this ground to refuse enforcement[14], and in words of the Brussels 1 Commission Report: "its relevance is limited because the findings of fact of the court of origin are binding on the reviewing court"[15].

The public policy ground will not be a matter to be worried about from 2015 onwards, not even with the enlargement of the grounds for the procedural part of it. With reference to the procedural ground in the Brussels Recast, it may seem obvious that the possibility of

[8] Art 48 Brussels 1 Recast

[9] Marta Requejo Isidro *Recognition and Enforcement in the new Brussels I Regulation: The abolition of exequatur,* pp.8

[10] Art 55.1 and 55.2 Brussels 1 Regulation

[11] Art 54.1 and Recital 28 Brussels 1 Recast

[12] Art 54.2 Brussels 1 Recast

[13] Art 45.1(e)(1) Brussels 1 Recast

[14] 2009 Brussels 1 Commission Report, pp.4

[15] 2009 Brussels 1 Commission Report, pp.4 and Art 45.2 Brussels 1 Recast

enforcement is bigger because the defendant can invoke not only the grounds mentioned in art 34 of Brussels 1, but also other grounds under national law[16]. In my opinion, there are not more possibilities of refusing enforcement because of a higher number of possible grounds. The reason is because, as Dorothee Schramm says; "procedural public policy is frequently invoked, but rarely accepted"[17]. Under this new regime; the courts are entitled to refuse enforcement only if the violated principle of national public policy has sufficient weigh under European standards. With the European limits of art 6.1 of ECHR, it seems really difficult to enforce a judgement such as that in Krombach case[18]. In relation to the substantive public policy, I would argue that it is a ground almost impossible to be used to refuse enforcement and I will explain why. The similarity among member states in commercial matters and the impossibility of reviewing the substance (as I mentioned in the grounds for revision of jurisdiction) of the judgement, makes very difficult to trigger this ground[19].

One of the grounds most often used is lack of due service. With the new regulation, the percentage of success granting it will be very low too. The defendant is still incapable of refusing enforcement in cases of force majeure and other situations that made him impossible to contest the claim. This, together with the previous limitation now mentioned in art 45.1(b) of Brussels Recast[20], makes me believe that the near future for United Kingdom and Ireland defendants (trying to invoke this ground) will be tough.

The last and also one of the grounds most criticized is the incompatibility of the foreign judgement with other judgements. The art 34.3 and 34.4 remains exactly the same in the Recast, and this will be not without consequences. As Burkhard Hess says, this criticism stems from the broad scope that allows a domestic judge have priority[21]. As a result, it will be quite difficult to enforce "any" judgement in United Kingdom and Ireland, even if it was rendered before. Another consequence will be making those courts able of enforcing unfair judgments. The reason is that under the recast it is still possible to enforce a judgement obtained as a result of a violation of the lis pendens rule[22]. Not only it is enforceable, but also it has preference, that is the most shocking part.

1.1 Enforcement at common law

We have already seen how easy it is to enforce a European Union judgement. We turn now to the difficult position of a non-EU judgement and its enforcement at common law. I clarify that United Kingdom is in a better position than Ireland because at least they possess bilateral treaties. Under the Administration of Justice Act 1920, judgements obtained in the superior courts in many parts of her Majesty´s Dominions outside the United Kingdom may be registered by a similar procedure to European Union judgements and applies to

[16] Art 41(2) and Recital 30 Brussels 1 Recast
[17] Dorothee Schramm *Enforcement and the abolition of the exequatur under the 2012 Brussels 1 Regulation*, pp.161
[18] Krombach v Bamberski case, C-7/98
[19] Article 52 Brussels 1 Recast
[20] Art 45.1(b) Brussels 1 Recast: "unless the defendant failed to commence proceedings to challenge…"
[21] Burkhard Hess *Heidelberg Report*, pp. 146,147
[22] Dorothee Schramm *Enforcement and the abolition of the exequatur under the 2012 Brussels 1 Regulation*, pp. 166

Commonwealth countries. The foreign Judgements Act 1933 allows the judgement of higher courts in the countries with which the United Kingdom has entered into bilateral treaties to be enforced by registration. The judgement will be set aside if the court is satisfied with one of the grounds mentioned in S.4. United Kingdom can also enforce judgements of foreign countries with which have no bilateral treaties (such as EEUU), but it is necessary to commence fresh proceedings at common law.

Common law rules are much more restrictive than that of the Brussels Regulation rules, making enforcement a hard task. This difficult situation for United Kingdom is present in Ireland in every case since this country has no bilateral treaties. The bad news both for Ireland and (in some situations) for United Kingdom is that they have to commence proceedings from scratch, but the good news is that it is possible to use the summary summons procedure, which is a fast track used in different instances when there is little factual dispute between the parties.

2. ***Arbitration advantages***

Although I agree with Lord Atkin when he said that "finality is a good thing, but justice is better"[23]; the reality is that when parties chose arbitration, they have waived their right to appeal (this waiver makes arbitration an efficient dispute resolution). With regard to litigation, possible mistakes and the ability to request a second look is an important safeguard. These safeguards do not exist in arbitration because the lack of opportunity for multiple appeals is an attractive aspect. For business people there is great value in finishing a dispute and carry on with their business[24], finality is what people really want. This concept was confirmed by most arbitration regulations and the ECJ in Eco Swiss v Benetton case[25]. As I mentioned in paragraphs 1 and 3 of this work, countries usually allow two or three appeals in litigation, creating delays and wasting money. Arbitration eliminates this problem forbidding the right to appeal.

Litigation is neither private nor confidential. Proceedings and documents are open to the public and this is unappealing to parties who want to keep certain information away from the public[26]. Privacy and confidentiality (rooted in the international arbitration) are interrelated concepts and also two good reasons why people choose arbitration. I have to assert that confidentiality in arbitration is not absolute but even knowing that, it is highly desirable. "Choice of rules, choice of place and contractual provisions" plays an important role in determining the degree of confidentiality. Some rules (LCIA, UNCITRAL) allow parties to have broad protection, but others offer (ICC, ICDR) a lesser degree of confidentiality. The place of arbitration is also of great importance since countries differ on how much protection should be granted. England has an implied obligation of confidentiality, creating a general rule of confidentiality even when the arbitration agreement does not provide for it. EEUU is the other face of the coin in respect of protection, where there is no implied duty of confidentiality[27]. In these cases, parties need to take action if they want protection. Even though it seems the confidentiality is not always granted and it is very instable, I think that if parties are clever and

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[23] Lord Atkin *Ras Bihari v The king-Emporer case*

[24] Margaret L. Moses *The principles and practice of international commercial arbitration (second edition),* pp.4

[25] *Eco Swiss v Benetton* case

[26] Joshua Chong *"Confidentiality in arbitration: Fundamental virtue or mere illusion?"*

[27] Margaret L. Moses *The principles and practice of international commercial arbitration (second edition),* pp.200,201

choose very protective rules such as LCIA and England as a place of arbitration plus some other contractual provisions; the confidentiality is almost 100 percent; making arbitration much more attractive.

The possibility of determining both the physical arbitrator and the procedure, makes it possible to have a neutral tribunal and a neutral forum. If we look at litigation, it is obvious that the judge is likely to have the same nationality as one of the parties. In this way, the judge shares an important characteristic (the nationality) which can be seen by the other party as disadvantageous to him. In arbitration, as Scott Dohaney says, "the arbitrator might be inclined towards the position of a party who shares with him the same language, culture and general value system"[28]. For this reason, the arbitration rules permit the parts to appoint the arbitrator they like and also require that the nationality of the arbitrator should be taken into consideration during the appointment stage[29]. The opportunity to include a "nationality clause" [30](in exceptional circumstances) for arbitrators has been diminished since Jivraj v Hashwani case was decided[31]. As a result of this decision, the possibility of unfair situations relating to the "shared" nationality between party and arbitrator, is reduced considerably. The obligation to be both impartial (in the sense of not favouring one party over the other) and independent (not having financial interest in the case or its outcome) are general conditions to arbitration, and also terms related to the concept of neutrality.
These three obligations are contained in most if not all arbitration rules. In order to be completely impartial and independent, arbitrators should disclose and investigate[32] any possible conflict of interest. To this end, the red/orange list, the IBA guidelines and the IBA rules of ethics play an important role. I clearly doubt that similar kind of rules exist in litigation, but in my opinion they are a fundamental support for the neutrality of the tribunal. The neutrality of the forum is the second part of this advantage. The problem in litigation of having to defend a case through a foreign court system (which may be unknown to the other party), using unfamiliar laws and procedures; is not present in arbitration. The reason is because most arbitration rules allow the parties to select the rules and procedures more convenient to them[33]. In this way, both parties are able to avoid the system of the other (as opposed to litigation).

The main reason people choose arbitration is the enforceability of the New York Convention. The likelihood of enforcement is high because so many countries have adopted international conventions that are pro-enforcement; providing very narrow grounds for refusing to enforce. Although it seems that the "obligation" to render an arbitral award is considered in moral terms, the truth is that there are certain institutions that impose this obligation in their rules[34]. If we look at litigation, the grounds for refusal of enforcement or Brussels 1 and International treaties are not as narrow as the grounds mentioned in art V of the New York Convention[35]. From my point of view, there is a reason why this article V results so appealing (apart from its narrowness):"The possibility to enforce a vacated award".

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[28] M. Scott Donahey *The independence and neutrality of arbitrators Journal of international arbitration,* (1992)
[29] Art 6.1 LCIA, Art 9(3) ICC, Art 20(b) WIPO
[30] Art 6.1 LCIA, Art 9(3) ICC, Art 20(b) WIPO
[31] Kim Barton *Recent decisions: Nationality requirements for arbitrators, the effect of Jivraj v Hashwani*
[32] Margaret L. Moses *The principles and practice of international commercial arbitration,* pp. 136-146
[33] Art 21.1 ICC
[34] Art 32.2 LCIA, Art 41 ICC
[35] Art V(1) and V(2) New York Convention

The possible loophole that permits a local court to vacate an award on grounds outside article V is given no effect; allowing other courts to enforce it. Courts have discretion to determine whether they will or will not enforce an award vacated in another jurisdiction[36]. This is accompanied by article VII, which allows to take advantage of any treaties or laws more favourable to enforcement[37]. A party belonging to both the New York Convention and the European Convention is always going to choose arbitration because he can enforce the award very easily: "They do not have the grounds for refusal of the New York Convention".
It is also possible to use national laws that are more favourable to enforcement, making it possible to enforce a vacated award unless the basis for vacating the award was one of the specific grounds listed in its law. A good example of this is France[38].

Another important aspect of arbitration that enables an easy enforcement of arbitral awards is that it is enforceable despite being an error of fact or law. This makes arbitration very appealing not only because the enforcement aspect, but also because of the cost and time saved; two aspects to which I turn now.
The last two advantages are cost and time. I leave this to the end because I do not consider them as important as the others outlined above and also because of the change in the mentality of some people that no longer consider them as advantages. These two concepts are interrelated and in my opinion, are "still" two reasons to choose arbitration. Although it is true that disputes are becoming more complex and parties tend (believe it or not) to choose lengthier procedures; to my mind, the impossibility to appeal makes the process cheaper and shorter at the same time. Cheaper because as we all know, the most part of the expenses come from the lawyers and as a result, the shorter the process the cheaper the lawyer. Shorter because the informality and the flexibility allows a simpler procedure.

[36] Art V(1)(e) loophole
[37] Art VII loophole
[38] Art 1520, 1525 French Code of Civil Procedure