



Appendix 10

**The recognition and Enforcement of Decisions regarding
Maintenance Obligations between Member States.**

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The subject to be dealt with in this paper concerns the determination as to when a judgment of a foreign court, more specifically a court of a Member State, which established a maintenance obligation, will be given effect in Malta. The focus therefore will be on situations where the parties or other relevant issues to a particular lawsuit involving a maintenance obligation are connected with other EU Member States apart from Malta.

In terms of a green paper that concerns maintenance obligations, presented by the Commission on the 15th of April 2004, it was reported that according to Community Statistics collected in 1999, about 6 million citizens of Union Member States resided in another Member State. This gives an idea of the potential cases of judgments having to be enforced in a different state than the one which delivered the maintenance judgment. Large numbers of people are concerned and the difficulties met by some of them can be extremely costly both materially and psychologically. Apart from this, sums to be paid out by States to make up for the default of certain debtors are considerable.

We are here faced with a PROBLEM of laying down criteria as to when judgments of EU Member States should be recognized. Certain differences between national rules governing recognition of judgments hamper the sound operation of the internal market and therefore provisions to unify the rules of conflict of jurisdiction and to simplify formalities with a view to rapid and simple recognition and enforcement of judgments are essential.

The EU approach: foreign judgments should be recognized provided they are granted by the courts of an internationally recognized country, even if the judgment debtor is domiciled in a third state

The Community has as its OBJECTIVE the development and maintenance of an area of freedom, security and justice in which the free movement of persons is ensured and consequently to ensure the free movement of judgments and for the purposes of this paper, judgments establishing matrimonial obligations. This objective is to be achieved by adopting measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market which measures are embodied in a Community legal instrument which is binding and directly applicable - the Brussels I Regulation. Council Regulation (EC) No. 44/2001 of the 22nd of December 2000 deals with the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial

Matters. All member states are bound by these regulations except for Denmark who did not participate in the adoption of this Regulation and is not bound by it or subject to its application.

By Malta's accession to the EU this Regulation enacted by the Union (like all other Regulations) is directly effective in Maltese Law without the requirement of any special procedure for ratification. Traditional provisions are now to be set aside and courts are to apply these Regulations were applicable.

Council Regulation 44/2001 has as its aim the mutual trust in the administration of justice in the Community justifying judgments in a Member State being recognized automatically without the need for any procedure except in cases of dispute.

Procedure for Recognition/Enforcement – a two stage process

- (1) First stage: satisfaction of the basic conditions for recognition/enforcement.
- (2) Second stage: dealing with any defence by reason of which the foreign judgment should nevertheless not be recognized/enforced.

The First Stage:

The first stage concerns the satisfaction of the basic conditions required by the Regulation namely that:

- (a) the judgment must have been given by a court of a member state;
- (b) the judgment must fall within the scope of the Brussels regime:

Article 1 states the following:

“The Regulation shall apply to civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters”;

whilst **Article 5(2)** makes the Regulation specifically applicable to “matters relating to maintenance”.

When Council Regulation (EC) No 2201/2003 came into force on the 27th of November 2003 which Regulation concerned the jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, it was specifically provided that:

“Maintenance obligations are excluded from the scope of this Regulation as these are already covered by the Council Regulation No. 44/2001”

- (c) the judgment sought to be enforced is to fall within the definition of the term “judgment” given by **Article 32** which article defines the term 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 the determination of costs or expenses by an officer of the court”.

Once the above mentioned conditions are satisfied, the Brussels I Regulation simply provides in **Article 33** that, “A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required”. This means therefore that there is no requirement that the person seeking to rely on the foreign judgment should establish that the original court was a court of competent jurisdiction. To obtain recognition the party relying on the foreign judgment need do no more than produce a copy of the judgment.

It is to be noted that although there can be no enforcement without recognition there can be a request only for recognition. A case in point is that where a judgment granted by a foreign court declaring that a party is not entitled to financial relief is used simply to oppose proceedings for financial relief being pursued in Malta.

When it comes to the enforcement of the foreign judgment, there is no requirement for the judgment to be final and conclusive or for a fixed sum. The foreign judgment must however be enforceable in the state where judgment was delivered which fact can be ascertained from the Certificate mentioned later on in this paper. The court in which recognition is sought may nevertheless stay proceedings if an ordinary appeal against the judgment has been lodged .

The procedure for enforcement itself is simple and established by the Regulations themselves therefore harmonizing the said procedure:

- interested party is to file an application
- application is to be submitted to the Court or competent authority as indicated in the list in Annex II to the Regulation (**Article 39(1)**). In **Malta’s** case the competent authority to which the application herein referred to may be submitted is the Court Registrar on transmission by the Minister for Justice.

In terms of **Articles 39(2)**, the local jurisdiction determined by reference to:

- the place of domicile of the party against whom enforcement is sought; or,
- the place of enforcement.

The procedure for making the application above mentioned is governed by the law of the Member State in which enforcement is sought (**Article 40(1)**). Applicant must give an address for service of process within the area of jurisdiction of the court applied to (**Article 40(2)**) and if the law of the Member State in which enforcement is sought does not provide for the furnishing of such address, then the applicant shall appoint a representative *ad litem*.

- A number of documents hereunder listed are to be attached to the application:
 - A copy of the judgment which satisfies the conditions necessary to establish its authenticity (**Article 53(1)**)
 - A certificate issued by the court or competent authority of a Member State where the judgment was given at the request of any interested party using the standard form in Annex V to the Regulations (**Article 54**). In cases where this is not produced, the court or competent authority may:
 - specify a time for its production; or,
 - accept an equivalent document; or,
 - if it considers that it has sufficient information before it, dispense with its production.

Court may ask for a translation of the documents which translation is to be certified by a person qualified to do so in one of the member states.

Once the above formalities are completed the judgment shall be declared enforceable immediately (**Article 41**) and any defences against enforcement are not to be entertained at this stage. Party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application and the Court itself cannot of its own motion raise any of the grounds for non-enforcement provided for by the Regulation.

In terms of Article 42 of the Regulation, the decision on the application is to be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which

enforcement is sought and is also to be served on the party against whom enforcement is sought, in this case accompanied by a copy of the judgment if not already served on that party.

Only one case has been decided in **Malta** wherein a judgment concerning a maintenance obligation was sought to be recognized and enforced in Malta and was in fact declared to be enforceable – the case was in the names of *Elwira Maria Opatecka vs Andrew Francis Ciantar* (Application No: 303/2005) which was decided on the 30th June 2005 by the First Hall Civil Court and confirmed on appeal in front of the Court of Appeal on the 27th of January 2006. This case dealt with a request for enforcement in Malta of a judgment delivered in Varsavja, Republic of Poland, on the 22nd of October 2004, which judgment granted to the applicant Opatecka arrears of maintenance for a specific time period ending on the day that the parties signed a contract of separation in Malta.

One must necessarily comment, first of all, about the manner in which these proceedings were carried out and this since the said proceedings did not follow the procedure laid down by the Regulation. As explained above, the procedure for recognition/enforcement should have commenced in front of the Court Registrar whereas in this case the application was filed by the maintenance creditor Opatecka directly in front of the First Hall Civil Court bypassing the stage required by the Regulation of submitting the relative application in front of the Court Registrar. On the other hand, the procedure for the recognition and enforcement itself laid down by the Regulation was in fact followed by the First Hall Civil Court. The judgment delivered explains in detail the procedure leading to a declaration of enforceability in terms of these Regulations.

In front of the First Hall Civil Court the defendant put forward a defence against a declaration of enforceability stating that the Polish judgment goes against another judgment given in Malta and this since the deed of separation was being considered by the defendant as a judgment. The deed of separation was signed in October of the year 2003 and therefore prior to the granting of the Polish judgment and the defendant stated that in virtue of this deed of separation the wife had renounced to her right of maintenance and that the deed itself was in full and final settlement of any pretensions that the parties had against each other. Defendant therefore submitted that the judgment granted by the Polish Court was in conflict with the said deed of separation which was being considered as a judgment. In terms of the Regulation, this defence should not have been entertained and yet the First Hall Civil Court did examine the submissions put forward by the defendant although, as we shall see in more detail further on, such defence was not upheld.

The First Hall Civil Court moved on to ascertain that a copy of the relative judgment and the certificate as required by the Regulation were in fact annexed to the application filed in front of it and proceeded with granting a declaration of enforceability. In terms of **Article 42** of the Regulation, the Court ordered service of the judgment to the parties and also ordered for Costs to be paid by the defendant.

The Second Stage:

This is where the defences to the recognition and enforcement of a foreign judgment come into play. Although the creditor's rights are regarded as predominant by the Regulation, the scales are not to be tilted too much in favour of the creditor and the rights of the defendant should also be respected.

This balance is ensured by granting a right of appeal (**Article 43**) to the defendant from a decision enforcing a foreign judgment. This right applies both to the applicant and the party against whom enforcement is being sought and the Regulation provides that in both cases, under no circumstances may the foreign judgment be reviewed as to its substance. The appeal is to be lodged with the court indicated in the list in Annex III to the Regulation and in **Malta** the appeal is to be filed in front of the First Hall Civil Court. This appeal is to be dealt with in accordance with the rules governing procedures in contradictory matters. As a general rule an appeal against a declaration of enforceability is to be filed within one month from date of service thereof. However, where the party against whom enforcement is sought is domiciled in a different Member State from the one where the declaration was given, the time limit here is extended to two months from date of service, either on him in person or at his residence. In no case is an extension of time to be granted simply on account of distance.

Grounds for Appeal:

In terms of **Article 45** of the Regulation, an appeal from a decision enforcing a foreign judgment is to be based on one or more of the grounds laid down by **Articles 34** and **35** which are the following:

A limited review of jurisdiction – Article 35

As a general rule it is for the original court to ensure that it had jurisdiction and the Court where enforcement is sought is not entitled to question whether the original court was justified in exercising jurisdiction. The reasoning behind this is that if defendant had a defence against the original court exercising jurisdiction such defence should have been raised at the original proceedings and the defendant cannot afford to ignore the

foreign proceedings with the hope that he can rely on the lack of jurisdiction as a basis to oppose enforcement. The aim behind this reasoning is to draw the defendant into the original proceedings so that any jurisdictional problems can be resolved as early as possible. If therefore one Member State exercises jurisdiction, then the judgment granted on the merits is enforceable throughout the member states.

Article 35 provides an exception to this general rule however this exception has not been made applicable to cases of judgments concerning maintenance obligations and this since this ground of appeal has been made applicable only to specific cases indicated in the Regulation and judgments concerning maintenance obligations are not included.

Public Policy – Article 34(1)

Within the context of the Brussels Regime the concept of public policy is given a restricted interpretation and is to be invoked only in exceptional cases. The *Green Paper in matters of Maintenance Obligations* above quoted refers to a report on a study done for the European Commission based on national reports which shows that the concept of public policy is applied in only a handful of cases. These cases usually envisage circumstances where the recognition of the foreign judgment would constitute a breach of a fundamental principle or of a rule of law regarded essential in the legal order where recognition is sought such as in the case where the law of the state of origin fails to prevent a manifest breach of the defendant's right to a fair trial under article 6 of the European Convention on Human Rights.

The Regulation expressly provides that the test of public policy may not be applied to the rules relative to jurisdiction (**Article 35 (3)**).

Natural Justice – Article 34(2)

This ground for appeal can be invoked where the judgment sought to be enforced “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 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”. The aim behind this ground for appeal is to avoid abuses of procedure. The points to highlight here are the following:

- 1) This defence is available only if the judgment was given in default of appearance so that if defendant took part in proceedings on the merits, if the defendant played any parting in proceedings, then the defence cannot be relied upon. Simply asking for a postponement or

appearing to contest jurisdiction is considered as an appearance for the purposes of this article;

- 2) This ground is based on a question of fact as to whether the defendant had enough time to arrange for his defence or not. The defendant can resist recognition/enforcement if there was not enough time between service and the delivery of the judgment and therefore if process of service fails to give the defendant a reasonable opportunity to prepare his defence;
- 3) It is up to court asked to recognize/enforce a particular judgment to decide whether service was made in sufficient time and effected in an appropriate way and this in the light of all the circumstances;
- 4) It is sufficient if the document required for service enables the defendant to assert his rights before an enforceable judgment is given;
- 5) Defence is lost if after judgment has been delivered, defendant fails to take an opportunity to challenge the judgment in the country of origin and the idea behind this proviso is that if the defendant can appeal on grounds of a procedural irregularity then that opportunity is to be taken and tackled in the country of origin. If this opportunity is in fact taken and has not been not successful, then the defence is not available anyway. On the other hand, if no opportunity for such a challenge existed in the Member State of origin, then the defence is to be applied in favour of non recognition/non enforcement.

Irreconcilable Judgments – Article 34(2) & (3)

The jurisdiction provisions in Chapter II of the Regulation have as their aim the reduction of conflicting judgments, however there's a limit to what can be achieved. Even if the Regulation is in fact applied correctly by all Member States, there still exists a possibility of conflicting judgments:

- 1) The Regulation cannot prevent parallel litigation involving the same parties and issues from taking place. Article 34(2) provides that recognition/enforcement will not be granted if judgment sought to be recognized/enforced is irreconcilable with a judgment given in a dispute between the same parties in the State where recognition/enforcement is being sought. Such judgments must entail consequences that are mutually exclusive. An example of this is when there is one judgment of another member state ordering payment of maintenance whilst the marriage between same parties has been annulled in the Member State where the recognition/enforcement is being sought;

- 2) In the case of two foreign judgments when the one being sought to be recognized/enforced is irreconcilable with an earlier judgment given in a member state or non member state involving the same cause of action, the same parties. It is essential for the earlier judgment to fulfill the conditions for recognition under the law of the Member State in question for this ground for appeal to be applicable.

Possibility of a Second Right of Appeal:

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV (**Article 44**) and in Malta's case a second right of appeal exists and is to be filed before the Court of Appeal.

I have mentioned earlier that for recognition a particular judgment need not be final and conclusive and it is in fact so, however at appeal stage both in front of the First Hall Civil Court and in front of the Court of Appeal, the Court may choose to stay proceedings if:

- an appeal is pending in the original court; or,
- time for such appeal has not yet lapsed.

The Court may also make enforcement conditional on the provision of such security as it shall determine (**Article 46 (3)**). However such imposition cannot be made on the ground that the debtor is a foreign national or that he is not domiciled or resident in the state in which enforcement is sought.

Going back to the Maltese judgment in the names above mentioned, *Opatecka vs Ciantar*, the first Appeal was filed in front of the Court of Appeal and the defences put forward which were decided upon were the following:

- the argument that the Polish judgment went against another judgment already given in Malta; and,
- the allegation that the Polish judgment was delivered in breach of the principles of natural justice since the decision granted was not motivated.

First Defence

The Court of Appeal referred to the reasoning given by the First Hall Civil Court whereby this first defence was not upheld. The First Hall Civil Court held that the deed of separation being invoked as constituting a judgment did not in fact constitute a 'judgment' in terms of Maltese Law and that it does not fall within the definition of the term 'judgment' given by the Regulations. The defendant held that the decree authorizing the separation should be considered as falling within the definition of the term

'judgment' however the First Hall Civil Court considered this decree as one which is not itself the means by which the parties separate and create obligations and therefore cannot be considered other than a simple authorization.

In terms of the above mentioned reasoning, the First Hall Civil Court declared the defendant's defence to be inadmissible and not applicable in terms of the defence granted by Article 34. The defence granted by the Regulation is in fact limited solely to judgments and the definition of the term 'judgment' given by the Regulation does not include public deeds. One would in fact have to give a very wide interpretation of this term to be able to incorporate public deeds within such definition. This was not the intention behind the Regulation and this is also demonstrated by the fact that the enforcement of public deeds are dealt with under a separate title, "Authentic Instruments", and therefore considered as distinct and not falling within the term "judgment".

The Court of Appeal further commented that since the defendant did not even file a copy of the decree authorizing the separation, the defence could not be entertained further and did not uphold this first defence put forward by the defendant.

Second Defence

The Court of appeal declared that this point should have been raised in front of the First Hall Civil Court and since it was not so raised, it could not be entertained at appeal stage and the Court of Appeal dismissed such defence without even put forward any further considerations in this respect.

With due respect this cannot be held to be correct in the light of the provision laid down in the Regulation in Article 41, whereby it is prohibited for the Court or competent authority in front of which an application for recognition/enforcement has been submitted to entertain any defences at this first stage. One has to keep in mind that in this case, the First Hall Civil Court was in fact acting as the authority entrusted with the task of deciding upon the creditor's application for recognition/enforcement and was therefore exercising the function of the Court Registrar as explained earlier on and in this capacity this Court was not empowered to deal with any defence brought forward by the defendant and therefore in this case it should have been the Court of Appeal to have the power to entertain all defences brought forward by the defendant.

In reality however, this second definition could not have been upheld in any case since the argument behind this defence does not fall within the parameters of any one of the defences granted by the Regulation.

Measures for Enforcement:

Until proceedings for recognition and enforcement are concluded only provisional protective measures may be taken and no measures for enforcement can be taken if the matter is still subject to the appeal filed in terms with the Regulation. However, once registered, a judgment of another member state may be enforced in Malta in the same way as any other judgment given by the Maltese Courts.

Legal Aid:

Person benefiting from legal aid in the foreign state, whether complete, partial or simply an exemption from costs) shall be entitled to the most favorable legal aid or the most extensive exemption from costs available in the Member State who is to enforce.

Costs:

No charge duty or fee calculated by reference to the value of the matter in issue may be levied.

Authentic instruments are also enforceable in terms of the Regulation. A document formally drawn up or registered as an authentic instrument which is enforceable in one Member State shall be declared enforceable even in the other Member States in accordance with the procedure discussed above although in this case the only ground for appeal applicable is that on a matter of public policy. The instrument must satisfy the conditions necessary to establish authenticity in the Member State of origin which state is to issue a certificate in terms of the standard form laid down in Annex VI to the Regulation.

Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall be regarded as authentic instruments for the purposes of the Regulation and are enforceable in the same manner above explained. Likewise *Court Settlements* are also enforceable in the same way as authentic instruments and in this case, the certificate to be issued is to conform with the standard form prescribed by Annex V to the Regulation

Proposal for a Council Regulation on Jurisdiction, applicable Law, Recognition and Enforcement of decisions and cooperation in matters relative to maintenance obligations

Examining this Proposal from the recognition and enforcement point of view one can highlight the following:

Objectives: To eliminate all obstacles which still today prevent the recovery of maintenance within the EU - to generalize and make automatic the provisional enforcement of all maintenance decisions

To abolish intermediate measure needed for recognition and enforcement

Maintenance creditors should be able to obtain easily and quickly and generally free of charge an enforcement order capable of circulation without obstacle

Enabling regular payment of the amounts due

Offering support and assistance to the creditor for each stage in the recovery of maintenance

Offering the possibility to obtain attachment on wages or on a bank account by:

triggering cooperation mechanisms

granting access to information making it possible to locate the debtor and to evaluate his assets

introducing legal provisions enabling direct deductions of maintenance from wages or bank accounts

strengthening the ranking of maintenance claims

All this is to be achieved having in mind full respect of the fundamental rights guaranteed by the EU and therefore a balance is to be struck between the creditor and debtor's rights.

Practical Terms:

Article 22 - lays down methods of service and includes service by electronic means such as fax or e-mail.

Article 25 - decision to be recognized and enforceable without the need of a declaration of enforceability and without any possibility of opposing its recognition.

- Article 28 - once again documents to be provided are: a copy of decision which satisfies conditions to establish its authenticity and an extract using the standard form provided by the Regulation (Annex I). However no translation is to be required.
- Article 33 - refusal or suspension of enforcement can be obtained upon a request to this effect by the debtor and on the grounds listed in the proposal:
- new circumstances
 - debtor applied for review of decision in country of origin
 - debt already satisfied
 - irreconcilable decisions
- This list here is exhaustive of the grounds on which the enforcement of a decision can be refused or suspended.
- Article 34 - at the request of the creditor the court of origin may give an order for monthly direct payment which is to be addressed to:
- the debtor's employer in another Member State;
 - to the Bank in another Member State in which the debtor has a Bank Account;
- this order is to be directly enforceable in the member state addressed in the same way as any other decision in terms of Article 25/26. This new provision is important on two counts:
- it offers certainty that this type of enforcement measure will be available everywhere throughout the EU
 - it offers a maintenance creditor the possibility of obtaining an order from the original court which will be enforceable in all the Member States
- Article 35 - provides for the temporary freezing of a bank account in virtue of:
- an order granted by the court seized as to the substance;
 - addressed to the bank in another member state in which the debtor has an account.
- Article 36 - maintenance claims are to be paid in preference to all the other debts of a debtor, including the expenses relating to the enforcement of maintenance decisions.

Article 39 - each member state is to set up a central authority, one or more, with the aim of assisting with the application of the Regulation. The functions of the central authority will be as follows:

- to communicate information on national laws and procedures;
- to take measures to improve the application of the Regulation; and,
- to strengthen co-operation.

The central authority is to be empowered to take steps, directly or through other public authorities or other bodies, to:

- collect and exchange information on the situation of the creditor and of the debtor procedures under way decisions taken
- provide information and assistance to creditor
- facilitate agreement between creditors and debtors through mediation or other means

Article 44 - Access to information to be provided by central authority is to facilitate the recovery of maintenance claims. The information provided is to achieve the following objectives:

- to locate the debtor
- to evaluate the debtor's assets
- to identify the debtor's employer
- to identify the bank accounts of the debtor

The information to be provided shall at least be that held by the administration and authorities including from the following areas: Taxes and duties; Social security; Population registers; Land Registers; Registration of motor vehicles; and Central Banks.

It is often very difficult to trace or retrace the maintenance debtor – member states must exchange info in order to achieve this objective.