

Enforcing Foreign Judgments – Principle Points from The Viewpoint of the Execution of the Right

Ejecución de sentencias extranjeras – aspectos principales desde el
punto de vista de la aplicación de los derechos

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**ENFORCING FOREIGN JUDGMENTS – PRINCIPLE
POINTS FROM THE VIEWPOINT OF THE
EXECUTION OF THE RIGHTS***

**EJECUCIÓN DE SENTENCIAS EXTRANJERAS -
ASPECTOS PRINCIPALES DESDE EL PUNTO DE VISTA
DE LA APLICACIÓN DE LOS DERECHOS**

**EXECUÇÃO DE SENTENÇAS ESTRANGEIRAS -
ASPECTOS PRINCIPAIS DO PONTO DE VISTA DA
APLICAÇÃO DOS DIREITOS**

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ABSTRACT

The aim of the paper is to address the nature and the importance of the activity resulting in the issuance of the formula of the coercive execution based on recognized foreign judgments. The function of the formula is to prevent infringement of parties' rights and obligations in the course of the execution process due to misunderstandings of the ruling in the foreign judgment by the enforcement authorities, etc. In virtue of this specifics, it is considered that the judge, granting recognition and adapting the formula of the resolution of the material dispute to the national legal system, is the most appropriate authority to order also the formula of the execution together with the recognition. Based on these considerations, conclusions are drawn about the types of litigation for recognition and enforcement, the legal construction of the recognition, the legal effects, the application of the new European Union regulation.

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KEYWORDS

Foreign judgments; recognition; enforcement; coercive execution; writ of execution.

RESUMEN

El objetivo del trabajo es abordar la naturaleza y la importancia de la actividad que resulta en la emisión de la fórmula de ejecución coactiva basada en el reconocimiento y ejecución de sentencias extranjeras. La función de la fórmula es evitar la violación de los derechos y obligaciones de las partes en el curso del proceso de ejecución debido a malentendidos en el fallo de la sentencia extranjera por las autoridades de ejecución, etc. En virtud de estas especificaciones, se considera que el juez que concede el reconocimiento y adapta la fórmula de la resolución del litigio material al ordenamiento jurídico nacional es la autoridad más apropiada para ordenar también la fórmula de la ejecución junto con el reconocimiento. Sobre la base de estas consideraciones, se extraen conclusiones acerca de los tipos de litigios para el reconocimiento y ejecución, la construcción jurídica del reconocimiento, los efectos jurídicos y la aplicación del nuevo reglamento de la Unión Europea.

PALABRAS CLAVE

Sentencias extranjeras; reconocimiento; ejecución; ejecución coactiva; mandamiento de ejecución.

RESUMO

O objetivo do artigo é abordar a natureza e a importância da atividade que resulta na emissão da fórmula de execução coercitiva baseada em julgamentos estrangeiros reconhecidos. A função da fórmula é impedir a violação dos direitos e obrigações das partes no decurso do processo de execução devido a mal-entendidos da decisão na sentença estrangeira pelas autoridades de execução etc. Em virtude desta especificidade, considera-se que o juiz que faz a concessão do reconhecimento e a adaptação da fórmula da resolução do litígio relevante ao ordenamento jurídico nacional é a autoridade mais adequada para ordenar também a fórmula da execução juntamente com o reconhecimento. Com base nestas considerações, são extraídas conclusões sobre os tipos de litígios de reconhecimento e execução, a construção jurídica do reconhecimento, os efeitos jurídicos e a aplicação do novo regulamento da União Europeia.

PALAVRAS-CHAVE

Júizos estrangeiros; reconhecimento; execução; execução coercitiva; mandado de execução.

INTRODUCTION

It might be stated as a common international standard that the authority of enforcement decides first of all if the preconditions under which the national jurisdiction might limit its sovereignty and accept as binding the foreign judgment are established. This is the primary and immanent task of the procedure for recognition and enforcement of foreign judgments. As a result, the formula of the resolution of the civil dispute on its merits becomes operative in law within the domain of the accepting sovereignty as it is fixed in the foreign judgment (the formula is recognized). From this point of view, it might be considered that irrespectively whether an application for recognition or for enforcement is lodged this activates a specific procedural tool for adjudication whether the public right of recognition exists or not. In the light of this, it might be further considered that the additional specific task of the authority granting enforcement should be to provide also for the formula of the execution. This formula is required since the execution pursued by the execution authorities has not to contradict or to deviate from the formula of the resolution of the dispute granted by the foreign court. The aim of the present paper is to analyze these characteristics of the enforcement of foreign judgments together with the conclusions stemming from the analysis in both national and international aspects.

1. The specific function of the writ of execution under the national law

1.1. Under the Bulgarian law, the first step towards the coercive execution of the civil rights, is the application for the order of execution. If execution is ordered, a writ of execution is handed over to the creditor. The application is considered to be the first step of the execution, since the writ is the sole act that empowers the execution officer to commence the process of the compulsory performance of the civil rights when they are not satisfied by a voluntary performance of the obligations. The writ itself is issued by the court and is based on the rulings in the judgment, or in the

final complex of judgments delivered in the course of the case through the different court instances.

1.2. With the application, the party requests from the court (i) to adjudicate whether the power of coercive execution is attached to the judgment (is coercive execution required and possible for the actual protection of the rights as they are declared in the judgment); and (ii) to issue the formula of the coercive execution in the form of a writ of execution, where it is stated what exactly is to be compulsory performed and in which substantial, personal and temporal parameters.

1.3. Bearing in mind the present development of the national Civil Procedure model, this activity seems to be to some extent formal and it is so in the sheer bulk of the cases. However, in respect to the International Civil Procedure, it might be contended that the process of issuing a writ of execution is one of the most important procedural elements of the authority of the national courts related to the recognition of foreign judgments in civil matters. This importance is a result of two tasks which are additional to the two main ones, as they are considered above. Even though the additional tasks are to some extent autonomous, they homogeneously blend their nuances with each other and with the main ones:

a) The first one is connected to the necessity the rulings of the foreign judgment to be converted into a working formula for the coercive execution. The conversion aims all of the ambiguities that might occur in the correct understanding of the recognized judgment to be avoided. This guarantees that the executable rulings of the judgment will be clear and hence will raise no controversies for the enforcement authorities (thus avoiding the jeopardy the parties' rights and obligations to be not performed correctly); and

b) The second one is connected to the duty of the judge to consider whether the material rights established in the judgment are executable under the national rules at all and, where necessary, to model, in the process of conversion, the rights and obligations

as established in the judgment, so that they can fit to the particular national means of execution¹.

1.4. The importance of this part of the proceedings of enforcement is closely connected with the procedural requirements of swiftness in administering justice and with the quality of the protection granted to the parties in the enforcement and execution. In this regard, on the one hand, the creditor has to enjoy the right of execution as soon as the judgment is recognized. On the other hand, it has however to be strictly observed that the national formula of coercive execution does not deviate from the formula of the resolution of the legal dispute given in the judgment. Namely these requirements presuppose that the procedure of ordering execution based on a foreign judgment is to be completed in the course of the proceedings of recognition and enforcement, as explicitly adopted after the reform of the Civil Procedure rules, not in separate proceedings as compared to the national judgments.

2. The National Reform of the Civil Procedure Rules

2.1. The joining of Bulgaria to the global market with its constant migration of people, goods, services and capitals (including the European Common Market with its freedoms of movement) urged inevitably a reform in the legislation concerned with the recognition and enforcement. It appeared that an optimal and based on the commonly accepted international standards for recognition (including the preconditions for recognition etc.²) procedure is extremely necessary for the adequate protection of the parties' rights, the proper functioning of the free market, and consequently for the attraction of investments³.

Therefore, with the reform of the Civil Procedure, a new rule (of Art. 405, section 4 of CPC) has been adopted in the new Code of Civil Procedure (published in the State Gazette # 59

1. Geimer, R. (2001). *Internationales Zivilprozeßrecht*. Verlag Dr. Otto Schmidt, 4., neubearbeitete u. erweiterte Auflage, Köln, 917 und 952-953. Compare also Jauerling, O. (1996). *Zwangsvollstreckungs- und Konkursrecht*. Verlag C. H. Beck, 20. völlig neubearbeitete Auflage des Friedrich Lent begründeten Werkes, München, 21.

2. See i.e. the projects for a convention and the reports of the Working Group on the Judgments Project (The Hague Conference on Private International Law). Retrieved from: <http://conflictflaws.net/News/2015/03/Proyecto-mundial-La-Haya.pdf>.

3. For exemption, despite the lack of explicit legislation envisaging this, in some cases judges ordered execution even together with the recognition of foreign arbitral awards.

of 20th of July 2007, in force from the 1st of May 2008, hereafter CPC). At present, the Code provides that the judge who renders the recognition shall also order the execution and shall correspondingly order a writ of execution to be issued⁴. There is no matter whether the judge renders the recognition as a court of first instance, or as a court of second instance that dismisses the judgment of the first instance (which has refused recognition) and orders it for the first time – the execution is always ordered together with the recognition.

2.2. For a comparison, in the general national model, the particular court of first instance, where the proceedings have been commenced, which court will keep the final archive file of the case, orders the execution and issues the respective writ of execution, when the final judgment returns to this court from the last instance. This court is chosen, since there is no certainty when the party will decide that coercive executions is needed. Solely in cases of preliminary executable judgments of the second instance, this is done by the same court that has rendered the judgment and declared it as preliminary executable (Art. 405, section 2 CPCP).

2.3. The reform of the Civil Procedure provided thus explicitly that the procedure for the issuing of the formula of coercive execution based on foreign judgments is an inherent part of the proceeding of recognition⁵. When compared to the classical one, a peculiarity in the national model is also the fact that the order of execution will not rely on already existing procedural effects of the judgment - neither *res iudicata* (there is no finality) is attached by the law to the judgment of recognition, nor the power the judgment to be executed is attached to the final complex of the foreign judgment and the judgment of recognition.

Therefore, the rule of Art. 405, section 4, second sentence of CPC explicitly envisages that the writ is not handed over to the creditor until the judgment of recognition becomes final (there

4. The wording of the norms is however rather vague and is not simple this conclusion to be reached without systematical and teleological approach. However, a detailed construing of those rules will be beyond the scope of the present paper.

5. Irrespectively whether in the form of writ of execution (as particularly chosen due to the long lasting national tradition) or as a separate ruling in the judgment, which primary and immanent aim is the rendering of recognition and enforcement, in other words the decision about the existence of the material right of recognition.

are no further regular possibilities the judgment to be appealed). This rule takes account of the fact that until the judgment is recognized with finality, there is no basis the state sanction to be attached to it (the foreign judgment to be sealed with the state imperium, which equals its authority to the authority of the national judgments and makes the judgment operative in law in the national legal system) and hence, from the viewpoint of the national sovereignty and the protection of the legal certainty, there is also no basis the power of execution to be attached.

2.4. In other words, any preliminary execution is excluded simply as a matter of protection of the sovereignty. From another viewpoint, to be allowed an execution of a judgment, which recognition is not certain and might later be dismissed in the course of a regular appeal, will impair the legal predictability and might severely infringe the party's rights in cases of reverse execution (i.e. the creditor has already moved the acquired assets out of the jurisdiction where execution occurred and final recognition was not granted)⁶. While adopting this construction, the legislator has also borne in mind that the power the judgment to be executed will be attached automatically by the law when the judgment of recognition becomes final. These effects will immediately stabilize the order for execution and there will be no further obstacles for the handing-over of the writ of execution to the creditor.

3. Reasoning of the Reform

3.1. A question appears inevitably why the general procedure under which an execution is ordered and a writ of execution is issued by the court of first instance is not followed instead of bothering with the sovereignty problem, with the particularly competent court in each hypothesis etc.

3.2. The decisive arguments for the new model to be preferred are derived from the fact that the process of the conversion of the foreign judgment into a national formula of execution presumes that the judge must, first of all, examine and establish in

6. Compare Linke, H. (2001). *Internationales Zivilprozeßrecht, Leitfragen für Verfahren mit Auslandsbezug*. Verlag Dr. Otto Schmidt, 3. völlig überarbeitete Auflage, Köln, 178-180; Chernev, S. (1999, № 6). The power of coercive execution after the amendments in CPC (State Gazette # 64, 1999). *Търговско право*, 20-30.

his mind the exact content and the exact parameters of the substantial rights as declared in the recognized judgment. And only once the national judge has done this, he will be in the proper position to re-formulate the rights and the obligations in a manner that is appropriate for the national execution machinery. This preliminary mental process, together with the correct written expression of its results in the following re-formulation, reveals specific complexity and practical problems, which are the sheer reasons related to the legislator's choice.

3.3. The latter might be stated, irrespectively of the fact that there are no special procedural rules and standards of the assessment and of the proof in the process of ordering execution, notwithstanding whether it is based on national or on foreign judgments, or respectively on other acts and instruments. In this regard, according to the provisions of Art. 406, section 1 CPC there is no difference between foreign and national judgments, since in both cases the party must ground that he/she presents to the court a dull forced title as envisaged by the national legal order (Art. 404 CPC), and that the said forced title certifies an unsatisfied material demand which maturity is not subject to any conditions and so it is due. Hence, in order to issue a writ of execution, the court will have first of all to consider the common national preconditions for ordering the execution under Art. 406, section 1 CPC. More precisely, the court has to be sure that (i) a national judgment or a dully recognised foreign judgment is presented and (ii) that the judgment declares a material right that is eligible for coercive execution under the national conditions.

3.4. The first precondition does not presuppose any practical difficulties considering that the foreign judgment is recognized in the same proceedings. The second precondition will however depend on the judge's consideration and estimation of the rulings of the judgments and the rights as they are declared therein. In this line of thoughts, the prescription that the formula of the execution is issued by the judge granting recognition aims to abolish all the possible controversies between the formula of the resolution of the civil dispute on its substance, as it is certified in the judgment, and the formula of the coercive execution, as it is certified in the writ of execution.

These controversies might occur mainly in the course of the consideration of the judgment by

different authorities and/or by different persons with different specific trainings, respectively specializations and competencies (i.e. a judge experienced in international matters and a judge nor experienced, or a consideration by a judge compared to the one by an execution officer, who does not have a training or practice in resolving legal disputes – i.e. execution officers do not pass an entry exam similar to one designed for new judges).

Such controversies will inevitably considerably imperil the rights and the obligations of the parties to the execution and sometimes to even third parties with legal spheres connected to the ones of the main parties (creditors, guarantors etc.). Therefore, it is vital that when ordering the execution, the content of the foreign judgment is re-formulated (when it is necessary) by the national judge in a manner that raises no ambiguities to what is actually ruled and ordered⁷. This will prevent the possible ambiguities and errors about the parameters of the execution in the work of the execution officer. The same is also sometimes needed even for the national judgments in cases of unprecise wording, non-systematic rulings (i.e. the operative parts of the judgment are to be traced from the act of the first-instance court through the acts of the second and the last instance, since different parts were subject of appeal, dismissed, upheld) and etc.

3.5. The sense this activity to be imposed on the recognizing court stems hence from the specific grounds that the particular regulation of the material rights and the terminology used might be completely unfamiliar compared with the national legal system. For exemption, specific foreign formulations and doctrines might be used or the foreign court might have applied substantial and procedural resolutions that are unfamiliar or unusual under the national law. In any case, the very process of bringing under the national standards a judgment written in a foreign

7. There is no doubt that the choice of issuing a writ of execution is a matter of form after all. The same result might be reached with the judgment for recognition, which might also order the formula of the execution. However, since the tradition of the writ of execution is preserved with respect to the national acts and the only task of the judgment is to order recognition (to render a decision upon the preconditions of the material right of execution and thus upon the right itself), the legislator has had no reason to abolish the writ of execution in international cases and thus decided to merge the two procedure – the litigation with the order of execution and issuance of a writ of execution.

language with the respective legal terminology presupposes possible misunderstandings and deviations from the original.

3.6. Moreover, the court might simply decide not to credit the translation of the judgment delivered by the interested party (the applicant), as well as his contentions about the subject-matter and the parameters of the rights and the obligations declared in the foreign judgment, or the other party might object to the translation and the contentions. Solely this situation has the potential to raise a difficult dispute about the translation and consequently about the exact content of the judgment.

3.7. Last but not least, there might even appear discrepancies between the substantial rights certified in the judgment and the national tools of coercive execution, which discrepancies might be an obstacle for the process of the execution at all (remedies that are not applied under the national law and/or cannot thus be forced with the tools of execution admissible by this law). In such cases, the judge will have to model on his discretion the rights, so that an effective and just execution will be possible (Art. 406, section 2 CPC). Most commonly, the judge will have to substitute the material demand with its equivalent under the national law, which equivalent is in compliance with the admissible tools of execution, since legal protection to the full possible extend cannot be denied to the creditor.

An example with a broad practical application is the recognition of judgments, where the final accounting of the interest, penalties, damages, cost and others is left to the execution authorities under the law of the court of origin. There is no doubt that such judgments are generally capable of recognition also in their parts in question. However, the national execution authorities do not enjoy the prerogative to account such demands (in accordance with Art. 426, section 1 CPC the execution officers follow strictly solely the writ of execution; and only the court that decides the case on its subject-matter is empowered to decide on all demands and their exact final amount of the sums, with only some minor exemptions). Therefore, the court of recognition will have to adjust the recognized judgment to the national tools of execution by defining the exact payments due and calculating their final amount based on the amount of the principal or the instalment etc.,

and also based on the time period elapsed and sometimes based on the applicable foreign law with all the problems stemming from this. The judge will determine these amounts in the writ of execution correspondingly.

3.8. Having all of this in mind, it might be with no doubt contended that it is most rational and appropriate the judge, who has already assimilated the content of the foreign judgment in the course of the assessment of its possibility of recognition (this assessment might be a very complex process too bearing in mind even only the application of foreign language in its strictly specific legal aspect, the possible standard in judgment writing and reporting etc.) to order also the execution and to issue the writ of execution.

4. Advantages of the Reform

4.1. The above conclusion takes full account both of the specific tasks of the said procedure and of the fact that the assimilation of the foreign judgment by the judge and its re-formulation in the national terms and terminology is practically one vital and important part of the work of the recognizing judge. He has to do that in order to understand the ruling in the judgment and to assess them from the viewpoint, i.e. the admissibility of the litigation (who has the legitimate interest of applying for recognition) or the pre-conditions for a successful recognition.

He has also to provide for a strict replica of the formula of the resolution of the civil dispute on its merits in its judgments, which formula is to be transformed in the national legal language and specific terms, if the latter is necessary. This is required since any controversies what exactly the foreign court ruled on and ordered and consequently what exactly is recognized should be avoided (from all the possible *ratione personae*, *materiae* and *temporae* view points). These controversies might appear if different authorities have to decide lately what exactly is recognized as a content of the judgment.

Therefore, if applying the new model of the proceedings, the results of the mental prefatory work of the judge for rendering recognition will be used directly and at first hand by ordering the execution. This will guarantee the avoidance of any discrepancies, compared to the situation

where another judge will have to decide upon the possibilities of the coercive execution, or even compared to the situation where the same judge will have to decide this from the distance of the time.

4.2. Moreover, the construction adopted by the legislator gives certain advantages to the debtor too. With no doubt, he/she has to enjoy the right to contest the converted formula of the execution, as it will be anchored in the writ of execution, as well as to contest the national preconditions for ordering execution. The application of this right might also cause the proving of the exact parameters of the rights and obligations as they are certified in the recognized judgment. This process might require expert evidence about the exact ruling of the foreign material law, the strict meaning of the terminology used etc., depending on the particular proceedings and judgments. All of these possible disputes will be decided together with the disputes about the recognition and enforcement themselves in the appropriate form of the two- or three-instances process. In the same time, the model of joined contentions against the formula of the execution and of an appeal against the judgment of recognition will preserve all the guarantees for the lack of controversies between the formula and the recognized judgment.

4.3. Additionally, the construction adopted has the advantage that it saves both resources of the court and of the parties and accelerates the ordering of the execution simultaneously. In the course of the recognition, the judge will acquire all the required familiarity with the foreign judgment as well as all the specific information, he might need to order the execution and will render a formula of the execution that is fully reconcilable with the recognized judgment. It is absolutely needless and expendable the one most important and considerable part of the same activity to be done by a second judge, which would have been the practical result if the execution is to be ordered by the court, where the proceedings of recognition have been commenced and where the final judgments returns.

4.4. The latter would also put the creditor in the possibility to be involved in a second procedure that will consume time and expenditures (especially if the debtor contests the formula issued), having already finished the recognition. It should also not be forgotten that it is vital for the creditor to obtain a swift recognition and execution, since he has already

finished proceedings, usually with an international element, on the subject-matter and has faced all the difficulties and costs of such a litigation.

5. Formulation of the Application

Anyhow, since the national codification of the rules of International Civil Procedure envisages explicitly both a litigation for recognition and a litigation for enforcement (Art. 18-19 of CIPL), the statement of claim has to be formulated either as an application for a recognition, or for an enforcement. The sole difference will be that in the second application there should be no need for a formal request for the ordering of the execution and handing-over of the writ of execution – it is implied in the request for enforcement. In the same time however, the codification of the Civil Procedure rules requires an explicit application for ordering the execution, including cases of recognition (Art. 405, section 1 CPC). This contradiction is to be abolished in the hypothesis of recognition/enforcement.

6. Appeals

6.1. Since the procedure for the order of execution is joined to the procedure for recognition/enforcement, if the judgment for enforcement is appealed, the order for execution will have to be appealed in the same proceedings. In these proceedings, it will be thus considered both the preconditions for recognition and the grounds for ordering the execution, as well as the admissibility of both applications. There are no practical obstacles for this, by virtue of the fact that the judge of appeal will have to follow an activity that is to some extent equal to the activity of the judge of first instance: to assess the parameters of the civil rights and obligations when assessing the grounds for recognitions. The judge will hence also have to assimilate rationally the content of the foreign judgment in his psychic in order to be able to decide about the disputes involving the order for execution. Only if the order for execution is appealed as inadmissible or/and on its specific merits and the recognition itself is not appealed, the independent general procedure for appealing orders of execution will be applied (Art. 407, section 1 CPC).

6.2. The latter will not be the rule in the hypothesis of Art. 406, section 2 CPC, under which

the execution is ordered by modeling the substantive rights and ordering of substitutional execution. In this case, the appeal of the order has mandatorily to follow the procedure for the appeal of the recognition, notwithstanding that the recognition itself might not be appealed. The practical difference is that in the hypothesis of appeal under Art. 407, section 1 CPC, the parties will not be summoned to appear personally and no hearing will be held. Both parties might solely rely on written submissions. In the hypothesis of appeal under Art. 406, section 2 CPC the parties will always be summoned for oral hearing of the case. The judge is empowered however to decide that he needs to hear the parties also in an appeal under Art. 407, section 1 CPC, depending on the complexity of the particular dispute.

7. Handing-over of the Writ of Execution

As already mentioned, the order for execution will not be considered final, including if issued by the second instance, until the very dispute for the recognition is not decided with finality, and/or the dispute about the formula of the execution is also not concluded. Accordingly, the writ of execution will not be handed over to the creditor and the further compulsory performance of the rights cannot be started. It might be therefore stated that the recognition of the foreign judgment is a specific procedural condition for the entering into force of the order for execution: until the state sanction is granted to the foreign judgment with finality, the coercive execution is without stable material basis, since the recognition might be refused yet. Therefore, any preliminary coercive execution ordered as a preliminary measure prior to the finality of the judgment for recognition is not admissible. In this line of thoughts, it might be stated that the appeal of the recognition will inevitably imply a revision against the issued formula of execution. The judge of appeal will also have to consider it and change or adjust it on its motion, if it appears necessary, in order any possible controversies to be avoided.

8. Conclusions About the Model of the Procedure of Recognition and Enforcement

8.1. The reform in the CPC have brought about one additional interesting observation concerning the nature of the two types of

action: the one for recognition and the one for (recognition and) enforcement of foreign judgments, as they are defined in Art. 118-119 of the Code on International Private Law (published in the State Gazette # 42 of 17th of May 2005, in force from the 21st of May 2008), hereafter CIPL). It appears that there are no theoretical and practical reasons for differentiation of these two types of civil litigations.

In this respect, it should be first of all borne in mind that the two types of actions (litigation) have the same subject-matter, since the preconditions are usually identical both in the hypothesis of recognition and in the hypothesis of enforcement (explicitly Art. 117 CIPL) and in both cases a transformed formula of the resolution of the civil dispute on its subject-matter is required. More specifically, since there are no different specific preconditions for admitting the enforcement (see also Art. 120 CIPL), from a purely legal point of view, it might be stated that the judge decides, both in the two types of proceedings, upon the existence or the non-existence of the right of recognition that is based on the preconditions for recognition⁸.

The right is of public nature due to the public importance it has, which importance is inevitably connected to the protection of the national sovereignty. The question whether an act of foreign sovereignty (foreign jurisdiction) is to be accepted by the national one and thus the national powers the case to be considered and decided on its subject-matter to be limited⁹ simply cannot be left to the methods of the civil law regulation based on the parties' equality and on the autonomy to contract (the principle of the free disposition of the parties)¹⁰.

8.2. In this regard, when the right of recognition is ascertained by the court of recognition in the specific route (tool) of the particular type of civil litigation, the enforcement of this right has as a result that the state grants its

8. See also Schütze, R. (1960). *Die Anerkennung und Vollstreckung ausländischer Zivilurteile in der Bundesrepublik Deutschland als verfahrensrechtliches Problem. Doktorarbeit, unveröffentlicht*, 9-11.

9. Therefore, the phenomenon is also a conflict of sovereignties, in particular: state jurisdictions.

10. Bonchovski. P. (2005, No 3). *The Subject of the Procedure for Recognition and Enforcement of Foreign Judgment. Правна Мисъл, Sofia, Bulgarian Academy of Sciences*, 34-45.

sanction to the foreign judgment¹¹ thus making it operative in law within the national sovereignty. There is no other possible legal construction of making the judgment operative in law having in mind the present paradigm of the effects of the sovereignties within their domains.

From other viewpoint, the recognizing state limits its sovereignty with the recognition and/or enforcement, since all the national authorities and all the persons and legal entities within this sovereignty will be under the duty to accept and apply the complex of the foreign judgment (that gives the formula of the resolution of the civil law dispute) and the judgment of recognition (that grants the state sanction to the formula), as a national judgment on the subject-matter of the civil dispute.

8.3. Accordingly, it might with no doubt be concluded that there is no principle difference between the action for recognition and the action for enforcement. The definition by the CPIL of a separate action for enforcement that has not been abolished with the reform in the Civil Procedure, irrespectively of the explicit regulation of the beginning of the execution (ordering the writ of execution to be issued) by the recognizing court, might therefore be based on the broader scope of the activity of the judge in this action, namely the simultaneous granting of the formula of the execution in the same proceedings¹².

8.4. Notwithstanding the latter, the present situation is ambiguous and controversial, if considered *lege artis*, since the two types of actions will be differentiated only on the bases whether the recognition is grounded on a pure declaratory judgment or on a judgment that is capable of coercive relief and a formula of execution might be accordingly needed. The right of application for a writ of execution stems however directly from the provisions of Art. 405, section 4 CPL, and the national power of coercive

relief is attached automatically by the provisions of Art. 404, p. 2-3 CPC as a direct result of the attachment of the national sanction to a foreign judgment for coercive relief (it is attached by the law as a consequence of the recognition, not by some type of explicit decision of the judge).

8.5. In contrast, by the application of the first Law on Civil Procedure Rules (from 1892 until 1952) it was clear that the order a writ of execution to be issued is the only difference between the procedure for recognition of a judgment capable of coercive relief and the procedure for recognition of a judgment for mere declaration of rights, which do not need any further measures for coercive execution. The only discussion has been solely on the point whether the proceedings for enforcement were also able to have as a result *res iudicata* encompassing the public right of recognition. This was due to the fact that the enforcement procedure was in the form of a procedure for granting an order for payment (based on the German and Austrian *Mahnverfahren*) not in the form of civil litigation commenced with a statement of claim. Later on (in 1930), the procedure was reshaped as classical civil litigation, which sealed that *res iudicata* occurs as a result of the enforcement. The form of the recognition was a litigation based in a statement of claim.

8.6. As a further comparison, there might additionally be traced a discussion, also based on the fact that according to the German rules of Civil Procedure, there are two separate procedures: (i) for recognition (*die Anerkennung ausländischer Urteile*) and (ii) for enforcement (*die Vollstreckung ausländischer Urteile*). It is considered however that, due to the explicit rules in this respect, the second procedure has as its specific task namely the attachment of the German power of coercive execution to the foreign judgment¹³. In the light of this, some authors consider that the second procedure presupposes as a preliminary question an obligatory recognition in the course of the first procedure¹⁴. This would mean that the question about the recognition cannot be raised in the second procedure any longer and the judge should only check the preconditions

11. Compare Sier, K. (2002). *Das Internationale Privatrecht der Schweiz*. Schulthess Juristische Medien AG, Zürich-Basel-Genf, 678-679; Nagel, H. und Gottwald, P. (2002). *Internationales Zivilprozeßrecht*. Aschendorff Rechtsverlag, 5., neubearbeitete Auflage, Münster, 61. Cappelletti, M., Perillo, J. (1965). *Civil Procedure in Italy*. Martins Nijhoff, The Hague, 367; Barnett, P. (2001). *Res iudicata, Estoppel, and Foreign Judgments*. Oxford University Press, Oxford, 260-261.

12. Irrespectively whether in the form of issuing a writ of execution or of granting a specific dispositive in the judgment.

13. Zöller, R./Bearbeiter. (1999). *Zivilprozeßordnung*. Verlag Dr. Otto Schmidt, 21. Auflage, Köln, 958 und 1759.

14. Jauerling, O. *Op. cit.*, S. 20.

for the issuance of the writ of execution, because the other hypothesis will imperil the recognition and the legal predictability. Other authors consider however that the recognition could also be rendered in the second procedure, which differentiates from the first one only by the authority of the judge to issue a writ of execution altogether with the recognition¹⁵.

9. Considerations from the Viewpoint of the Protection of the National Sovereignty

9.1. My observation is that the ambiguous resolution under the national law is due to the mechanical adoption of legal models and doctrines, which adoption does not take into account the fact that under the national law there is no requirement for a special act that attaches the power of coercive execution to the recognized judgment. Having taken account of this and bearing in mind the same subject-matter of the two types of litigation – adjudication about the right of the national sanction to be granted to the foreign judgment (the right of recognition that reveals precisely the same preconditions in a case of recognition and in a case of enforcement), there is however no certainty about the role of the second procedure and its relations to the first one. The only sure fact is that the second procedure has as a result the order a writ of execution to be issued, which result is additional to the judgment of recognition.

9.2. In this line of thoughts, it should also be stressed out the fact (as already mentioned) that the act of recognition assigns the state sanction to the foreign judgment, which sanction makes this judgment operative in law within the accepting sovereignty. Since this judgment becomes operative as equal to a national judgment, the required legal effects are attached automatically by the national rules of Civil Procedure. It is only a pure technical matter whether solely a declaration in a state judicial act is sufficient for the further effective protection of the rights certified in the judgment, which means that the attachment by the law of the effect of the *res iudicata* is sufficient and no power of coercive execution is required

and hence attached; or there is also a need of a coercive execution in order the rights of the claimant (creditor) to be fully satisfied.

9.3. In the second hypothesis both *res iudicata* and the power of coercive execution are attached by the law, not by the judge. The judge will just have to check the content of the judgment to be sure that coercive execution is needed under the national rules, and if so, he will declare this in the writ of execution in order to exclude any legal ambiguities. Therefore, in this very respect, the activity of the judge is the same as concerned with a national judgment: he/she states that the rights are due and unsatisfied, which means that the power of coercive execution has been attached by the law, and he/she declares further the parameters of the execution (from other viewpoint – the parameters of the power of execution attached to the judgment due to the state sanction) as the formula of the execution, which is obligatory for the execution authorities.

9.4. From a third point of view, it should also not be forgotten that *res iudicata* and the power of coercive execution are actually the technical aspects of the state sanction that operates in the field of the civil law and procedure, if the sanction is considered as a promise that the state will protect the civil rights compulsorily with its machinery, when so required¹⁶. Exactly these effects make the sanction existent and operative once the civil dispute is resolved on its subject-matter within the national sovereignty either by the national courts directly, or by the tool of the recognition. This is the sheer reason why the coming into being of these effects cannot be dependent on a decision of a judge in this respect. Hence they are attached automatically by the law (as a result of the judgment given), in order the next steps of the fulfillment of the state promise to be ensured: a cancellation of any further attempts the civil law dispute to be reconsidered by the courts (the *non bis in idem* rule) and a fulfillment of the rights with coercion, if the debtor does not perform voluntarily.

9.5. All these considerations are not affected by the theories of the recognition involving the application of the foreign *res iudicata*, since solely the national law can define the forced

15. Walter, G. (1974). *Vollstreckungsrecht*. Walter de Gruyter & Co, 2. Auflage, Berlin, 43-44; Zöller, R./Bearbeiter, *Op. cit.*, 1763.

16. Compare Bower, S, Turner, A. & Handley, K. (1996). *The Doctrine of Res Judicata*. Butterworths & Co (Publishers), 3rd Ed., London-Edinburgh-Dublin, 9-16

legal titles which can operate in the national legal system¹⁷ (types of judgments, notary acts and administrative acts etc.) thus predefining the attachment of the national power of coercive execution to these forced legal titles¹⁸(Art. 404 CPC). Under the national law, it might also be stated that solely the national *res iudicata* operates, since there are no rules that exclude its application and there are no rules that either impliedly or explicitly allow the operation of the foreign one.

To the contrary, the rules of Art. 1 CPC and of Art. 29 CPIL explicitly envisage that solely the national Civil Procedure is applicable within the national sovereignty, and with no doubt this encompasses the legal effects of the resolution of the civil dispute on its subject-matter. The application of foreign civil procedure rules is thus explicitly provided, where appropriate and rational, i.e. the power of foreign written documents as evidences (Art. 178, sec. 1 CPC), or the admissibility of oral evidenced based upon foreign adjectival rules (Art. 30, sec. 2 CPIL), and might be existent, only if such an explicit prescription is available in the national law. By comparison, there are no rules empowering the courts to examine and apply the personal, temporal or material scope of the foreign *res iudicata*, when seized of with the *non bis in idem* rule.

The operation of the national *res iudicata* is also clear in cases, where the debtor raises as a defense the argument that the right was satisfied after the rendering of the foreign judgment – the resolution of this civil material dispute will be a result of the national civil procedure rules, including the operation of the national legal effects (Art. 298-299 CPC). Moreover, a national rule of *res iudicata* provides for (i) that such a defense is not precluded and might be raised (irrespectively of the possible scope of operation of the foreign *res iudicata* in origin – my note); and that this defense is precluded in a subsequent national litigation on the subject-matter of the civil dispute, if not raised before the rendering of the judgment of recognition (Art. 121, sec. 2-3 CPIL).

9.6. In this regard, if we consider the effects of the judgment in the light of the state sanction and

17. Excluding the application of the European Civil Procedure with respect to the European Enforcement Titles.

18. Compare Zöller, R./Bearbeiter, *Op. cit.*, 958; 43-44; 20.

sovereignty any further, it might be concluded that the effects of the judgment are the actual functional connection between the parties (individuals, legal persons and entities) and the state imperium, since exactly through those relations the state keeps its promise to protect the material rights compulsorily, after the final judgment puts the litigation to its conclusion and its end.

If this connection is lost within the scope of the domain of the sovereignty (subjective, territorial, temporal), the sovereignty itself is lost – it is substituted by the foreign one¹⁹. Therefore, in the present paradigm of protection of the national sovereignty, no state should afford other legal order to provide for when a national court-of-law is empowered to consider and decide a case and when the court is not empowered to this by the application of the *non bis in idem* principle; or when and in which parameters a coercive execution might be exercised.

Such a legislative decision will require explicit changes at the national constitutional level²⁰. Additionally, such changes will bring into being immense practical problems²¹, since the foreign effect might have different scopes and subject, which parameters are often argued and discussed

19. This is the reason why the recognition itself is needed, unless there is some type of hierarchy between the sovereignties (compare Rosenberg, L. und Schwab, K. (1974). *Zivilprozeßrecht. C. H. Beck Verlag, 11. Auflage, München, 849; Zöller, R./Bearbeiter, Op. cit., S. 907.*): the foreign judgment cannot simply become automatically operative in law within the national sovereignty, since the state has to sanction the foreign formula of the resolution of the civil dispute, only after it is completely sure that it might fit the national legal system and the requirements of the protection of sovereignty. Automatic operation is nowadays possible in cases of a transfer of sovereignty, i.e. the judgments of Court of Justice of the European Union are automatically operative in all the Member States with no need of recognition. As a comparison, the judgments of the different states of the United States of America are subject to recognition in the other states, since there is no transfer of sovereignty between the states (for "the full faith and credit clause" see Richmann, W. M. and Reynolds W. L. (1993). *Understanding Conflict of Laws. Matthew Bender & Co., INC, 2nd ed., New York, 315-316*). Similar is the situation between the Member States (see Barnett, P. *Op. cit.*, p. 266), therefore the different instruments of the EU with direct effect about the recognition and enforcement are needed.

20. Compare for the problems with the acceptance in the Member States even of the judgments of the Court of Justice of the European Union: see for France: Raoul Georges Nicolo [1990] *Counseil d'Etat* 1 CMLR 1973; for Germany: *Internationale, Re Wunsche Handelsgesellschaft* [1982] *German Federal Constitutional Court* CMLR rev. 225. For Italy: *Frontini -v- the European Union Treaty* [1994] 3 CMLR 57; for England and Walsh: *sec 2, subsec. 1 & 4 of the European Communities Act 1972; McCarty's -v- Smith* [1979] AER 325; *Factortame Ltd -v- Secretary of State for Transport* [1990] 2 AC 85.

even in the home jurisdiction and i.e. will have to be proved and adjudicated by a judge not trained in the respective legal system²².

10. General Conclusions

10.1. In accordance with the above, it might be stated that the first step of the execution of the civil rights in the hypotheses of recognition of foreign judgments (the request to the court to issue the formula of the execution thus empowering the execution officers to start the execution) is in close functional relation to the proceedings of recognition. It is however not an immanent feature, since some recognized judgment does not involve rights that need coercive execution for their fulfillment.

Also, sometimes the party might simply does not wish to seek execution at this moment, but only the advantages of *res iudicata* are sought, i.e. the party seeks to cancel the expiry of the time limitation period on the cause of action in the recognizing sovereignty. In the light of the above, it might hence to be suggested, that solely

the establishment of a procedure of recognition is needed in the legislation, together with a possibility the claimant to join to it a request for ordering the execution.

10.2. Additionally, in cases where no such request has been joined to the recognition proceedings initially, there should exist no obstacle an application to be filed separately later on. This will abolish the necessity of one purely formal procedure for enforcement, since the state sanction is already granted with finality by the recognition. Working exemption will be cases where only a recognition is sought initially in virtue of the fact that the material rights are conditional and thus not due (a future condition has to happen for the maturity of the demand, or the maturity depends on the performance of counter obligation). In such cases the party might prefer firstly to recognize the judgment and to wait until the right becomes unconditional and due.

Conclusions with respect to the Brussels-Lugano Regime

1. It might also be considered that the national rules are in full unison with the developments in the enforcement of Member States judgments within the EU. This is highly important since the instruments of the EU provide for the model of enforcement but leave the procedure rules generally to the national law. In this respect, the general model has been changed by the EU law with the adoption of Regulation (EU) 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The Regulation provides for a model under which the execution of the judgment might start directly with no need of prior enforcement.

2. It is to be stressed in this respect, that although abolishing the declaration of enforcement, the new Regulation does not establish European Enforcement Title with respect to the types of judgment at issue (as the Regulations providing for autonomous procedures on the subject-matter of the legal controversy do, having as results the certification of the judgments rendered in these proceedings as European Enforcement Titles: European Enforcement Orders in uncontested claims, in small claims, on payment orders etc.²³). The judgment enforced

21. See Zöller, R./Bearbeiter, *Op. cit.*, S. 960 u Schack, H. (2002). *Internationales Zivilverfahrensrecht*. Verlag C. H. Beck, 3, neu bearbeitete u. erweiterte Auflage, München, 344-347.; Matscher, F. (1963 Heft 9/10 und 21/12). *Die Anerkennung und Vollstreckung gerichtlicher Entscheidungen im Verhältnis zwischen Österreich und Großbritannien*. Juristische Blätter, Wien. See also Richmann, W. and Reynolds, W. *Op. cit.*, pp. 313-322.

22. *These are amongst the reasons for the modern theory that the national res iudicata models the recognized foreign one. According to it, the different national courts-of-law should apply the domestic scope of this legal effect, if it differentiates from the foreign one in order to avoid unjust consequences. However, if the domestic legal effect is always the decisive one, the idea that the operation of the foreign one is recognized appears questionable: why this mental construction is to be applied, and why the court will have to research and estimate the foreign effect, if in any possible case of controversy, the national procedure will produce the final rules that are to be applied. Hence this theory rather confirms that the national legal effect is attached to the recognized judgment, than to produce a valid argument for the application of the foreign effect. Especially in the light of the observation that unless the judge is explicitly empowered by the constitutional order to apply the foreign legal effect, he has no other choice than to apply the national one. All these conclusions are based on an analysis of the national legislation: Bonchovski, P. (2008, book 1). *The Legal Effects of the Decision of Recognition and Enforcement of Foreign Judgments in the Light of the Requirements of the Protection of the National Sovereignty*. Юридически съвм, CIBI, Sofia. There is no attempt a global theory about the legal effects in the recognition to be developed, since the particular model of recognition will depend on the strict national understandings of *res iudicata*, on application of the doctrines by the respective national courts etc. (compare, i.e. the French to the United Kingdom systems of recognition).*

under the new Regulation are not a result of autonomous (under the EU law) but of national proceedings on the subject-matter of the claim.

Therefore, the authority addressed is not bound by the certificate but has the power to examine it, i.e. whether the judgment is within the scope of the Regulation at all²⁴. The authority has also to check the legitimate interest of the applicant for enforcement and the formal compatibility of the documents submitted. For these purposes, the authority has also the power to examine the certificate, i.e. for discrepancies with the judgment, and hence the judgment itself. The formulation of Art. 42, sec. 4 of the Regulation is intended to encompass all possible hypotheses where discrepancies between the certificate, the judgment and the application for enforcement occur. Therefore, the judge will need also a translation of the judgment, for example to be sure that the party lodging the application enjoy the right of coercive execution. These activities reveal thus no principle difference form the old regime under the Brussels I Regulation.

3. With the new Regulation however, the special procedure for the declaration of the enforcement that presupposes that the act of the declaration should be entered into force in order the coercive execution to be effectively commenced (p. 26 of the Preamble of the Regulation) is abolished. So, both the enforcement and the execution are to be started in proceedings where the conditions for the recognition under the Regulation and for the execution under the national law are to be considered by the judge, who orders enforcement, simultaneously. The judge will order coercive execution if there are no obstacles connected with some of the two types of pre-conditions (p. 29-30 of the Preamble to the Regulation and compare Art. 41, section 1-2 of the Regulation). Once establishing this, there are no obstacles the coercive execution to be performed (unless the judge decides to stay it), notwithstanding the fact that the judgment is not recognised with finality yet (Art. 44 of the Regulation)²⁵.

23. See for them the 'Heidelberg' Report (Study)LS/C4/2005/03). Retrieved from: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. §. 63. „2. New Instruments in European Procedural Law”, p. 67, and §. 10., §. 28., §. 62; and C-195/08, C-211/10.

24. C-29/76, C-143/78 and C-120/79, C-172/91, C-514/10.

4. Recognition however cannot be refused, if solely the national types of pre-conditions are not satisfied, which means that the court should grant at least the recognition, although no coercive execution might be ordered yet (see p. 30 of the Preamble to the Regulation)²⁶. The Regulation provides also for the authority of the judge of recognition to model the civil rights and obligations, if necessary for the proper and dull execution (Art. 54 of the Regulation).

5. In this respect, the Regulation explicitly differentiates between the procedures for enforcement and execution, which are subject to the national rules, and the pre-conditions for ordering execution, which are also subject to the national rules according to the Regulation (in other words, it is declared that the national power of coercive execution of the state of recognition applies – Art. 41, section 1-2 of the Regulation and see for explanation p. 30 of the Preamble of the Regulation).

6. The Regulation also provides that in cases, where the effects of the judgment under the law of its origin encompasses also third parties (third parties joined to the proceedings; Streitverkündung) these effects will be accepted by the recognizing state (see Art. 65, section 1-2 of the Regulation). *Per argumentum a contrario*, it might therefore be established as clear that the Regulation considers no obstacles that the national effects of the recognizing state might be decisive.

25. This might be defined as the spirit of the reform in the regime and of the Regulation. The requirement this type of enforcement to be based also on a check of the national conditions of the power of execution are natural with respect to the protection of the national sovereignty and parties' rights and also based on the explicit rules of the Regulation itself according to the rules cited hereabove.

26. Therefore, this activity cannot be entrusted to authorities that lack jurisdictional powers, i.e. bailiffs (also from constitutional point of view). The same from the fact that if the debtor does not object to the enforcement within the time period specified by the national law, the judgment will be deemed recognised with finality (see Art. 622a, sec. 6 CPC and p. 30 of the Preamble of the Regulation).

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