



**Universität
Zürich** UZH

International Civil Procedure Law

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2nd Part

Slides III (Recognition and Enforcement)

Prof. Dr. Felix Dasser

felix.dasser@homburger.ch

Recognition and enforcement in general

Not a matter of course, but increasingly so

Basics

- Not self-evident: "foreign judges"!
- Not always, but more and more often (*favor recognitionis*)
 - comity
 - increasing need of the parties
 - (once again) trust in the equivalence of judicial systems
- Important: R & E only leads to *extension* of effect → never goes further than the initial judgement!
(DFT 134 [2008] III 467 cons. 3.3)

«Controlled transfer of effects» or full recognition?

«Recognition pursuant to art. 25 et seqq. PILA has the effect of extending the legal effect of the foreign judgment to the territory of Switzerland ([...]). However, this is subject to the restriction that the recognised judgment does not have any different, substantially more far-reaching effects than a corresponding domestic judgment (so-called controlled transfer of effects [«*kontrollierte Wirkungsübernahme*»]; [...]).»

DFT 130 [2004] III 336, cons. 2.5

«47 In that context [*mutual trust in the administration of justice in the European Union*], [...] recognition must 'have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given'. Therefore, a foreign judgment which has been recognised pursuant to Article 33 of Regulation No 44/2001 must in principle have the same effects in the State in which recognition is sought as it does in the State of origin (...). [...]

52 In any event, [...] while recognition must have the effect, in principle, of conferring on foreign judgments the authority and effectiveness accorded to them in the Member State in which they were given, this is not the case when that judgment is being enforced on the ground that, during that stage, there is no reason for granting to a judgment rights which it does not have in the Member State of origin or effects that a similar judgment given directly in the Member State addressed would not have »

CJEU C-567/21, 8 June 2023, *BNP Paribas SA v TR*, para. 47

Recognition or enforcement?

- Recognition is a prerequisite for enforcement
- Certain judgements only need recognition
- Incidental or independent recognition:
 - Incidental recognition: art. 33 para. 3 LugC
 - Independent recognition: art. 33 para. 2 LugC

Declaration of enforceability (exequatur)

- Incidental "declaration of enforceability" (in the context of enforcement proceedings)
 - Money claims: art. 81 DPBA
 - Other claims: art. 335 et seqq. CCP
- Independent declaration of enforceability proceedings (exequatur proceedings)
 - Money claims: art. 28|29 PILA / art. 335 et seqq., especially art. 338, CCP by analogy
 - Other claims: art. 28|29 PILA / art. 335 et seqq., especially art. 338, CCP by analogy

Legal sources

- Lugano Convention for judgments from other Lugano States
- Various multilateral state treaties, e.g.
 - Hague Conventions re Maintenance Obligations (1973, SR 0.211.213.02), Divorces and Legal Separations (1970, SR 0.211.213.3), Parental Responsibility and protection of Children (1996, SR 0.211.231.011), Protection of Adults (2000, SR 0.211.232.1)
 - Hague Choice of Court Convention 2005 (EU, Mexico, Montenegro, Moldova, Singapore, Ukraine, UK, soon Switzerland)
 - Hague Judgments Convention 2019 (EU, Ukraine, Uruguay)
 - New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, SR 0.277.12 (NYC)
- Various bilateral treaties
 - Principality of Liechtenstein
 - Various Lugano-States: Belgium, Germany, Austria, Sweden, Slovakia, Spain, Czech Republic
 - Regarding maintenance obligations: USA, various Canadian provinces
- Art. 25 et seqq. PILA

R & E under the LugC: scope of application

- *Territorial scope*: Decisions from a contracting state
 - The facts do not have to be international
 - The jurisdiction of the trial courts does not have to be based on the Lugano Convention
- *Subject-matter scope*: Decision on a civil or commercial case (art. 1 LugC)
- *Personal scope*: Nationality / residence of the parties: irrelevant
- *Temporal scope*: art. 63 LugC

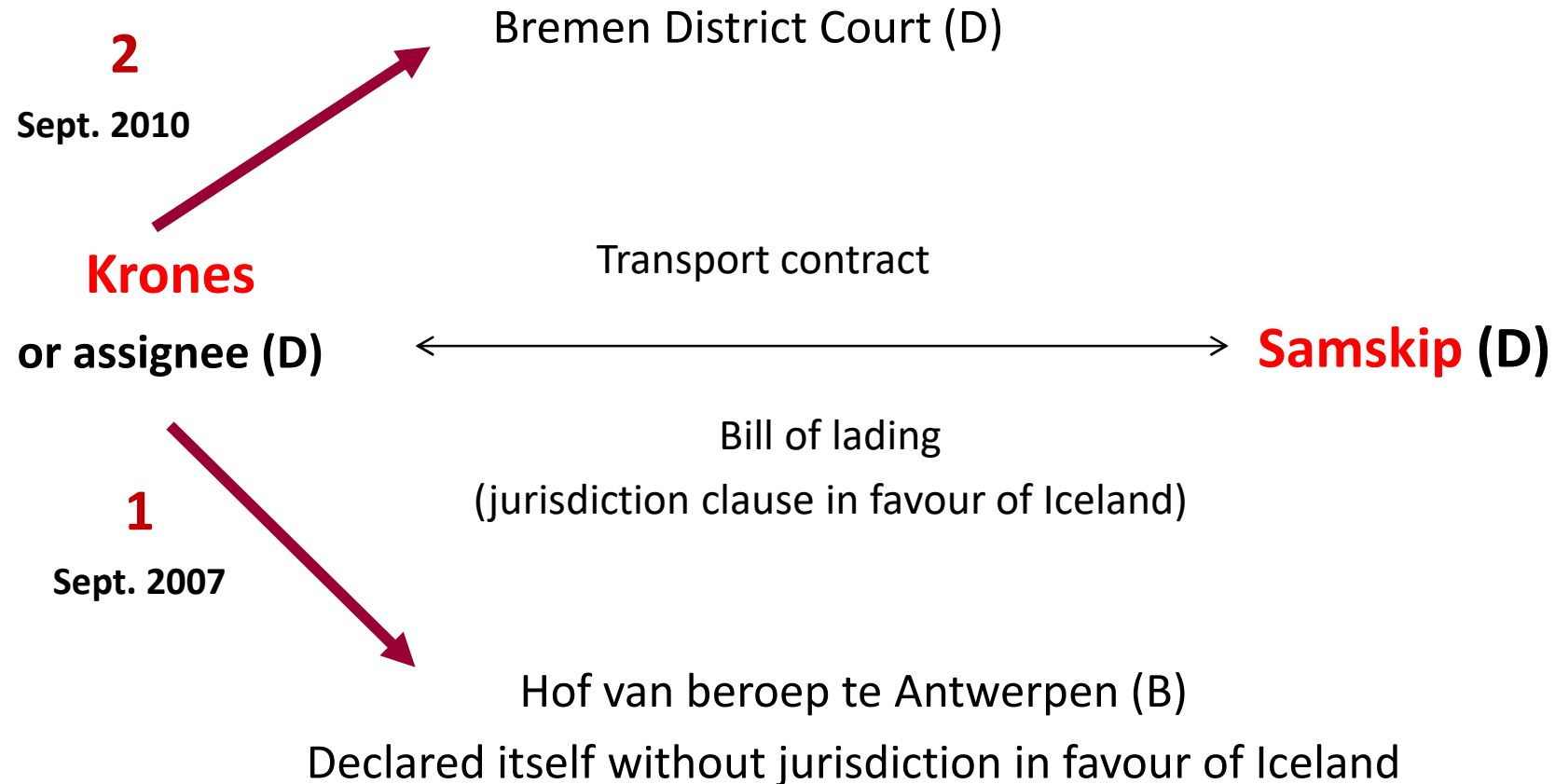
Requirements

- «Judgement» (in the sense of art. 32 LugC) of another Lugano State
- Enforceability of the decision in the state of origin (art. 38 para. 1 LugC)
 - Formal legal force is not required (art. 37, 46 LugC)
- *Not:* Jurisdiction in the state of origin (art. 35 para. 3 LugC)
 - Exceptions: art. 35 para. 1, 2 LugC (Special legal areas with an increased need for protection / exclusive competences)
- No further grounds for refusal (art. 34 LugC)
- No subsidiary enforcement according to PILA (warranty principle)

«Judgement» (Art. 32 LugC)

- Autonomous interpretation
 - «It follows from the foregoing that in order to be a ‘judgement’ for the purposes of the Convention the decision must emanate from the judicial body of a Contracting State deciding on its own authority on the issues between the parties.»
(CJEU 2.6.1994, Rs. C-414/92, *Solo Kleinmotoren / Boch*, N 17)
- Settlements in court: generally regulated in art. 58 Lugano Convention; no decision within the meaning of art. 32 Lugano Convention; demarcation partly difficult
- Provisional measures (if rendered in adversarial proceedings)

Decision on (lack of) jurisdiction



CJEU C-456/11 Gothaer et al. / Samskip

CJEU 15.11.2012, Rs. C-456/11, Gothaer et al. / Samskip:

«1. Art. 32 [...] must be interpreted as meaning that it also covers a judgment by which the court of a Member State declines jurisdiction on the basis of a jurisdiction clause, irrespective of how that judgment is categorised under the law of another Member State.

2. Art. 32 and 33 [...] must be interpreted as meaning that the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause.»

Ex-parte Decisions

A decision is not enforceable if the opposing party has not had the opportunity to be heard beforehand

(CJEU 21.5.1980, Rs. 125/79, *Denilauler / Couchet Frères*; Federal Tribunal 4P.331/2005; partly different DFT 129 III 626)

→ no judgment within the meaning of art. 32 Lugano Convention, not just a lack of the right to be heard pursuant to art. 34 no. 2 Lugano Convention.

→ To be taken into account already before the first instance

(for the example of the Italian «*decreto ingiuntivo*»: DFT 139 III 232; Federal Tribunal 5A_711/2018, 9.1.2019, cons. 6.3.1)

Reasons for refusal (Art. 34 LugC) (1/2)

- Obvious contradiction with Swiss public policy (No. 1)
- No timely service of documents (No. 2)
 - Insofar as there is no submission to jurisdiction
 - Service in such a way as to enable the defendant to arrange for his defense
 - Does not have to be «proper», i.e. formally correct (unlike under the PILA and the old LugC!)
 - Service of «the document which instituted the proceedings» (or equivalent)
 - CJEU C-343/22, 30 March 2023: functional unity between two proceedings suffices
 - See also reservation by Switzerland pursuant to Protocol No. 1, Art. III

Reasons for refusal (Art. 34 LugC) (2/2)

- Incompatibility with a domestic judgment (No. 3)
- Incompatibility with a previous foreign judgment eligible for recognition (No. 4)
 - Also applies in favour of third country judgments
 - Also applies between contradictory precautionary measures (CJEU 6.6.2002, Rs. C-80/00, *Italian Leather / WECO Polstermöbel*)

The High Court in London divorced a wealthy Russian couple. As part of the settlement of the financial consequences of the divorce, the court made a “Financial Remedy Order” whereby the husband and four of his trust companies (in Cyprus, Panama and Liechtenstein) were ordered jointly and severally to pay GBP 350 million.

The wife applied in Zurich for a declaration of enforceability against the husband and the Panamanian trust company A. A claimed that they had only been involved in the proceedings by means of a joinder order and that this had only been served on the husband's solicitors as a "procedural piercing of the corporate veil". Therefore, there was no proper summons.

(Zurich Court of Appeal, RV200001, 3.3.2020)

Exceptional review of jurisdiction of the court in the state of origin (art. 35 LugC)

- Review of the jurisdiction of the court in the state of origin is in principle not allowed (art. 35 para. 3 LugC) → ≠ art. 25 lit. a PILA!
 - Jurisdiction of the court in the state of origin is not part of the test of public policy according to art. 35 para. 3 LugC
 - «not even in case of blatant violations» (Federal Tribunal 4A_305/2009, 5.10.2009, cons. 3.1)
- Review exceptionally allowed in the case of:
 - Insurance and consumer matters (art. 8 et seqq. LugC) (Protection of the weaker party)
 - From the wording, both parties can refer to this rule
 - Cases of art. 22 LugC

Procedure

- Two possible recognition or enforceability declaration procedures:
 - Independent recognition or declaration of enforceability proceedings (art. 33 para. 2 in conjunction with art. 38 et seqq. and art. 53 et seqq. LugC)
 - Incidental recognition or declaration of enforceability (art. 33 para. 3 LugC; art. 80 et seq. DPBA)

Recognition procedure

- Principle of automatic recognition
(*ipso iure*; art. 33 para. 1 LugC)
- **Incidental** recognition (as preliminary issue; art. 33 para. 3 LugC)
No *res judicata* effect, as only in the reasons for the decision
- **Independent** recognition procedure (art. 33 Para. 2 LugC):
 - Sufficient interest in legal protection (≠ special interest in declaratory judgment)
 - Declarative, legal effect
 - Only application for positive determination possible
 - Reference to procedure pursuant to art. 38 et seqq. and art. 53 et seqq. LugC

Independent declaration of enforceability (*Exequatur*, art. 38 et seqq. LugC)

- The Lugano Convention only regulates the exequatur procedure (declaration of enforceability), not the actual enforcement, which must take place according to national law
 - See also Zurich Court of Appeal 2.4.2014, RV140001
- Consequence of the *exequatur*: Equality of the foreign judgment with a domestic judgment
- On application of an interested party together with Form V (art. 38 para. 1, 53/54, Annex V LugC)
- No hearing of the enforcement opponent in the first instance (art. 41 LugC)
- No review of art. 34 and 35 LugC in first instance; only review of whether there is an enforceable title within the meaning of art. 32 LugC and whether the formalities pursuant to art. 53 et seqq. LugC have been fulfilled (art. 41 LugC)
 - See generally Federal Tribunal 4A_547/2022, 16 January 2024

- **Substantive jurisdiction** at the enforcement court (art. 39 para. 1 in conjunction with Annex II Lugano Convention), namely for monetary and monetary benefits → art. 338 para. 1 CCP
- **Local jurisdiction** at the place of enforcement *or* at the domicile of the defendant (art. 39 para. 2 LugC; ≠ art. 339 CCP)
- **Appeal** → right to be heard of the defendant (art. 43 para. 1 LugC; art. 327a CCP)
 - Deadline for appeal:
 - 1 month for debtors domiciled in the state of enforcement (or a third state, see Zurich Court of Appeal 10.12.2019, RV170014)
2 months for debtors domiciled in another Lugano state (art. 43 para. 5 LugC)
 - 10 days for creditors (art. 321 para. 2 CCP)
 - Possibility of suspension until formal legal effect abroad (art. 46 para. 1 LugC; DFT 137 III 261)

Incidental declaration of enforceability (art. 80 et seq. DPBA)

- Art. 38 LugC: enforcement requires a declaration of enforceability
 - Preliminary recognition pursuant to art. 33 Lugano Convention is not sufficient at first sight
 - Some legal commentators: Lugano Convention is a closed system → no enforcement without independent enforceability declaration
- Today, however, it is recognised that recognition or enforcement without an independent declaration of enforceability within the framework of the definitive setting aside of opposition is to be carried out on a preliminary basis (art. 81 para. 3 DPBA)

(DFT 143 III 404 cons. 5.2.1; Federal Tribunal 5A_899/2020, 15.11.2021, cons. 2.2.2)

Protective measures (Art. 47 LugC)

- Art. 47 para. 1 LugC: possibility to request protective measures even without a declaration of enforceability if the judgement is to be recognised under the Lugano Convention.
No entitlement, however.
 - National law may provide for additional requirements.
- Art. 47 para. 2 LugC: a declaration of enforceability in the first instance entitles to (typically simultaneous) protective measures.
 - National law *must not* provide for additional requirements.

- Implementation in Switzerland:
 - «Lugano Arrest», art. 271 para. 1 no. 6 DPBA (Money claims with a title for definitive setting aside of opposition)
 - Requires simultaneous application for exequatur under art. 271 para. 3 DPBA, but such simultaneous application does not have to be explicit; it is (now) assumed
(Federal Tribunal 5A_428/2022, 18.1.2023)
 - Arrest on assets throughout CH
(art. 271 para. 1, 1. sentence *in fine*)
 - Jurisdiction at the place of debt collection or enforcement
 - Measure according to art. 340 CCP (for other benefits)

- (i) A court in Jordan ordered the Austrian resident J to pay USD 10m to Bank H.
- (ii) Bank H lodged a claim for enforcement in the English High Court. The High Court ordered J to pay based on the Jordanian judgments and issued a certificate pursuant to art. 53 Brussels Ia Regulation (= art. 54 LugC).
- (iii) Bank H seized the Austrian Courts for enforcement of the High Court decision.
- (iv) The Austrian Supreme Court tended to assume that the High Court decision was not enforceable under the Brussels Ia Regulation (exclusion of «double *exequatur*») and referred the issue to the CJEU.

(CJEU C-568/20, 7.4. 2022, J v. H Limited)

- (i) In 2002, an oil tanker sunk off the Spanish coast.
- (ii) In criminal proceedings in Spain against the captain of the tanker, the English insurance company London P&I Club was, amongst others, sued for damages. The insurer remained in default.
- (iii) In 2013 the insurer commenced arbitration proceedings against Spain for a declaration of non-liability. Spain remained in default.
- (iv) The arbitral tribunal found for the insurer. The English High Court rendered a judgment in terms of the award (Section 66(2) Arbitration Act 1996)
- (v) In 2017, the Spanish court found the insurer liable and ordered payment.
- (vi) Spain applied for recognition of the payment order by the English courts. The insurer argued that recognition should be refused based on art. 34(3) and (1) Brussels Reg. (= LugC)

(CJEU C-700/20, 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited v. Kingdom of Spain*)

Good luck in the exam and in practice!

Felix Dasser