

## **CNUE-CONFERENCE, BRUSSELS, 15<sup>TH</sup> OCTOBER 2010**

### **Picture 2**

In the draft for a Regulation on succession, the Brussels I-Regulation has been used as a model for the rules about Recognition and Enforcement.

In the proposal of the Presidency of the EU-Council these rules are in Articles 29 to 33-14.

### **Picture 3**

The main rule is in Article 29. There it is stated that a decision in a succession matter given in a Member State shall be recognized in all the other Member States.

According to my personal opinion as a practitioner, I think that this rule is the most important of all in the EU-Regulation on succession, because the tremendous practical problems with the current situation, where decisions in successions matters are not recognized in other Member States although a lot of persons residing in the EU have assets in other countries than where they have their habitual residence or citizenship.

Recognition has two effects, both a positive authority that constitutes a valid determination of the rights and obligations of parties, and a negative authority (*res judicata*) that prohibits a court in another Member State to retake a litigation in a matter that has already been decided by a court in a Member State.

There are two possibilities of recognition, first as the principal issue of itself and second as an incidental issue in a dispute, which primarily is about another question. Regularly when enforcement is the principle issue, recognition is an incidental prerequisite.

## Picture 4

In Article 30 are stated the only four grounds on which a court in another Member State can refuse recognition.

### 1. **Public policy (order public)**

The first ground of non-recognition is if the decision is manifestly (I repeat that word) **MANIFESTLY** contrary to public policy in the Member State in which recognition is sought.

Note that the legal cooperation between the Member States of the EU is founded on generally accepted rules of human rights and on mutual respect for each other's legal institutions. That means that the margin for refusing a decision in another Member State on the ground of public policy is very slim. That is also underlined with the word "manifestly" in the Regulation text.

Note that a decision on public policy in one Member State does not mean that the question is res judicata in another Member State as each Recognizing State shall review if the primary decision is contrary to its own public policy.

### 2. **If the defendant did not appear in the court where the principal decision was taken, and he was not properly served the document which started the proceedings.**

I guess that this will very rarely be the case if the service has happened in a Member State, but it could be more applicable if the defendant has been served in a State outside the EU. However one expects that the Decision court has closely examined if the service of documents have been made properly.

Note that also decisions in default of appearance can be recognized, however than it is of vital importance that the serving of the documents has been made in a legal proper way. As you know we have a EU-Regulation on serving legal documents since year 2007.

### **3. Irreconcilable decision in the Recognition State**

Here are considered decisions in the Recognition State both before and after the decision that the applicant wants to have recognized.

Actually this shall normally not happen as we have a rule of lis pendens in the Succession Regulation.

### **4. Irreconcilable with an earlier decision in another Member State or in a Third State.**

Here are only considered other decisions made before the decision that wants to be recognized.

## **Picture 5**

In Article 31 is stated that “Under no circumstances may a decision given in a Member State be reviewed as to its substance”.

That is the very core of recognition.

The Recognition Court may not review the Decision Court’s choice of applicable law, and can not change the decision even if the Decision Court obviously has made a wrong legal application of a law foreign to the Decision State.

## **Picture 6**

### **Article 33. Enforceability**

Decisions in succession matters given in a member State shall be enforceable in all the other Member States, if the decision is enforceable in the Decision State.

However there must be an enforcement decision by a court in the Enforcement State.

Therefore there is a special procedure stipulated in Articles 33-1 to 33-14.

Note that the procedure in the Succession Regulation does not regulate the actual enforcement measures. Those will follow the Enforcement States national law.

## **Picture 7**

### **Article 33-2. Application documents.**

The application for enforcement must of course be accompanied by an authentic copy of the original decision, which the applicant wants to have enforced.

Moreover the application must also be accompanied with a certificate issued by the Decision court using a special form set out in an Annex to the Succession Regulation. In this Certificate shall be stated inter alia the date of service of the document instituting the proceedings in the Decision court, the text of conclusion of the original decision and information that the decision is enforceable in the Decision State.

When necessary the certificate shall be translated by a qualified person to a language that the Enforcement court can accept.

The whole decision must not be translated at this stage of the proceedings, but might be required by the Enforcement court, if the defendant makes an appeal against the declaration of enforcement.

## **Picture 8**

### **Article 33-4. Declaration of enforceability.**

In Article 33-4 is stated that the Enforcement court shall issue a Declaration of enforceability of the original Decision immediately after it has got a complete and correct application. The court shall not review, if there are any grounds of non-recognition before the issuing the Declaration.

Even more surprising is that the court shall at this stage not even submit the application to the defendant and thus not hear the defendant before issuing a Declaration.

In a case of incidental Recognition, when the principal issue is something else than Enforcement, the court must of course hear the defendant and review the grounds of non-recognition before deciding on incidental Recognition.

However the defendant must be served the Declaration and after that he has a possibility to appeal, and, which is important, there may not be any actual measures of enforcement other than protective during the time of appeal against the Declaration. I will soon come back to that.

## **Picture 9**

### **Article 33-5. Serving of the Declaration.**

After the Declaration of enforceability has been issued by the Enforcement court, the Declaration shall be served on the defendant.

The serving of the Declaration follows the rules of serving in the Enforcement State.

## **Picture 10**

### **Article 33-6. Time of appeal.**

The main rule is that an appeal against the Declaration of enforceability must be lodged within 30 days of service to the defendant.

There is an exception rule of extended time of appeal of 45 days if the defendant has his habitual residence in another Member State than the Enforcement State, for instance in the Decision State. This rule is one of the few differences to the Brussels I-Regulation. In the latter Regulation it is two months instead of 45 days.

Nothing specific is said in the Regulation about the situation where the Defendant has his habitual residence in a Third State, that is in a State outside of the EU.

## **Picture 11**

### **Article 33-8. Revocation of Declaration of enforceability.**

After an appeal the court has 90 days to review the Declaration of enforceability.

A revocation of the Declaration can only be given on the grounds of non-recognition in Article 30.

It is important to notice that the Enforcement court also under the proceedings of appeal have no right to review the original Decision as to substance.

## **Picture 12**

### **Article 33-10, Protective measures.**

An applicant can ask the Enforcement court for a decision on protective measures, even before he has got a Declaration of enforceability.

Such an application is handled in accordance with the national law in the Enforcement State for protective measures.

## **Picture 13**

### **Article 33-10.**

No measures of enforcement other than protective measures may be taken during the time of appeal (normally 30 days, in some cases 45 days) and during the time until an appeal has been determined (90 days).

This is a very important not to say necessary rule, as a Declaration of enforceability in accordance with Article 33-4 shall be given without that the case has been submitted to the defendant, and thus without that he has got a chance to make any objections and claim any rules of non-recognition.