

## **National Report Malta**

### **Introductory Note**

Malta became a full member of the European Union on the 1<sup>st</sup> May 2004. Malta was not a signatory to the 1968 Brussels Convention or to the 1988 Lugano Convention prior to such date. In addition it is worthy of note that Malta only had reciprocity arrangements with the United Kingdom for the mutual recognition and enforcement of judgements.

Since May 2004, very few cases have come before the Maltese Courts which have a bearing on EC Regulation 44/2001. In some cases which touch on the Regulation, no decision has been granted by the Courts which is final.

The only decision which is final concerns an application by a Polish national against her Maltese husband in order to enforce a decision granted by the Courts of Warsaw whereby the defendant was ordered to pay his wife maintenance. ( Elwira Maria Opatocka vs Andrew Francis Ciantar, decided by the Court of Appeal on the 27<sup>th</sup> January 2006.) There are two cases currently pending before the Court of Appeal from decisions of the Court of First Instance concerning the enforcement of foreign judgments emanating from a Court of a Member State. To date the appeal proceedings are still pending. In the case of GIE Pari Mutuel Urbain (PMU) vs Zeturf Limited, the Court is still hearing submissions on the appeal submitted by Zeturf Limited whereas in another case, Elf Aquitaine vs Andre Guelfi, the Court of Appeal has stayed the appeal proceedings pending the outcome of proceedings before the Cour de Cassation in France. Both cases cited here refer to applications by the judgment creditors in France who have applied to have the respective decisions of the French Courts recognised and enforced in Malta and which have been accepted by the Court of First Instance.

## Questionnaire No. 1 : Collection of Statistical Data

1. Evaluation of the number of decisions concerning Regulation 44/01 EC proportional to decisions in civil and commercial matters in all.

The only decision to date is the above cited case *Opatecka vs Ciantar*. The application was submitted on the 30<sup>th</sup> March 2005 and a decision of the 1<sup>st</sup> Hall Civil Court was delivered on the 30<sup>th</sup> June 2005. An appeal was filed by the defendant and judgment of the Court of Appeal delivered on the 27<sup>th</sup> January 2006. The case was the first to come before the Maltese Courts and was dealt with like any other ordinary case in the sense that the Court of First Instance served the application to the defendant and granted him twenty days to respond to the application, just as would happen in any ordinary domestic procedure in contrast with the *ex parte* process which is outlined in the Reg. 44/2001. At the same time the proceedings were dealt with swiftly which is a positive aspect considering that litigation in Malta can be somewhat time consuming.

2. Evaluation of the approximate number of judgments where the Courts and tribunals of the Member States concerned retained jurisdiction on the basis of the rules of Regulation 44/2001/EC in 2003/2004 and evaluation of the provisions mostly relied on for that purpose.

No such cases. Malta became a member on the 1<sup>st</sup> May 2004.

3. Evaluation of the approximate number of applications for a declaration of enforceability on the basis of Regulation 44/2001/EC in 2003 / 2004.

No such cases.

4. Evaluation of the approximate number of declarations of enforceability granted on the basis of Regulation 44/2001/EC in 2003/2004.

No such cases.

5. Evaluation of the approximate number of declarations of enforceability which have been refused already in the first instance in 2003/2004, including the principal grounds for refusal; further evaluation of the number or proportion of cases, where a subsequent improvement of the application has been asked for.

No such cases.

6. Evaluation of the approximate number of revocations of decisions containing a declaration of enforceability after an appeal in 2003/2004, including the principal grounds of revocation.

No such cases.

7. Evaluation of the average amount of time required/accrued for obtaining a decision containing a declaration of enforceability.

As stated earlier, the case of *Opatecka vs Ciantar* was dealt with before the Court of First Instance and the Court of Appeal over a time span of ten months. The procedure before the Court of First Instance lasted three months and took so long due to the fact that the Court dealt with the matter as a trial rather than an *in camera* procedure as contemplated in the Regulation. In the cases of *PMU* and *Elf Aquitaine* cited in the introductory note, the applications were dealt with *in camera* within days. The appeal proceedings which ensued have been appointed for hearing expeditiously compared to normal appeal proceedings of domestic litigation and although still pending, clearly appear to be dealt with in an expeditious manner.

8. Compilation of a list of the provisions of Regulation 44/2001/EC that are most frequently applied by the Courts and tribunals in the member states concerned.

Given the small number of cases under review, it is not possible to highlight which provisions of the Regulation in particular are most frequently applied. However references to article 32 dealing with the

definition of “judgment” and articles 41, 53 and 54 appear to be constant from the limited number of cases under review.

## **Questionnaire No. 2 : Collection of Empirical Data**

2.1 Are there conditions and enforcement of judgments, authentic instruments and court settlements which are beyond those permitted under Regulation 44/2001.

Yes. The Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) provides clear provisions on the Recognition and Enforcement of Foreign Judgments. These provisions apply in those instances concerning judgments emanating from a Court of a State which is not a member of the European Union. In addition there are specific provisions regulating the enforcement of money judgments which emanate from a Court in the United Kingdom, in the British Judgments (Reciprocal Enforcement) Act ( Chapter 52 of the Laws of Malta) and finally there are also The Maintenance Orders (Reciprocal Enforcement) Act 1974 ( Chapter 242 of the Laws of Malta)

2.2 Are there local focal points i.e. do cross border litigations accumulate in border regions ?

None.

2.3 From which State of Origin do titles that shall be recognized or executed in your State come from ?

It is not easy to pin point any particular State. Generally however there is a trend that judgments would come from those countries with whom Malta has strong links due to trade or immigration. Thus most cases involve judgments delivered by the Courts of the United Kingdom, Germany, France, Italy, Australia, Canada and the United States of America.

2.4 Can the handling of the standard form concerning Article 54 be regarded as satisfactory or do similar problems arise as regarding the standard forms concerning Regulation 1348/2000 EC ?

The experience to date has been satisfactory in the sense that no difficulties have been experienced due to the type of certificate envisaged in article 54.

2.5 Do Courts make use of the possibility provided for in Article 55 to dispense with the certificate's production.

No cases as of yet.

2.6 Do any language problems arise regarding recognition and enforcement – especially regarding the handling of the standard form concerning Article 54.

Generally translations are provided in the case of languages not commonly spoken in Malta. Otherwise documents in English would tend to be accepted readily.

2.7 Is the production of translations required (Article 55 [2] Regulation 44/01 EC) ?

Yes, although invariably the parties would anticipate this and provide translations together with the original in the foreign language. The translation of the whole document would normally be required. Costs do not lead to less efficiency.

2.8 Which costs result from recognition of judgments, authentic instruments and court settlement ?

The Court Registrar is the officer responsible for the taxation of the Court costs including the fees due to the Advocate handling the case. In such instances the costs are those in line with cases which lead to declaratory relief and as such costs and fees are not assessed on an *ad valorem* basis irrespective of the value of the claim involved. The Court would invariably decide in its decision who out of the parties is to bear costs and generally speaking the party cast would be condemned to pay all costs, in which case the winning party would be entitled to recover costs. The

process for the assessment of costs takes its normal course and cannot be seen as a delaying factor for the execution of the judgment. Costs can be recovered through executive measures contemplated in our law together with the claim on the merits.

2.9 Does the requirement to serve the party against whom enforcement is sought with the declaration of enforceability, which is provided for in article 42 – or the practice of judicial authorities regarding the dispatch of communications in general – impair the efficiency of enforcement – in particular its surprise effect ? Does this virtually obstruct the possibilities of Article 47 ?

No. In practice, the experience is such that a party has a right to secure his claim as a precautionary measure pending the outcome of the process leading to the declaration of enforceability. The service of process on the person against whom enforcement is sought would in such cases come at a stage where assets may already be frozen as a result of the precautionary measures taken out at the early stage when the application for a declaration of enforcement is filed in Court.

Service of all court documents is carried out by the Court personnel. Thus in the case of an application for the declaration of enforcement of a judgment, this would be filed in the Court Registry and the documents would be assigned to a Judge for determination *ex parte* as contemplated in the Regulation. Once a decision is arrived at, the court file is sent back to the Registrar and the Creditor would follow proceedings by arranging for service of documents to be carried out by the Court Bailiffs thereafter. Similarly if security measures are taken out, these are in majority of cases such as warrant of seizure, warrant of description or warrant of garnishee, issued *ex parte* and once decreed by the Judge, the Court Bailiffs are entrusted with the formal service and execution of the Court Order. The debtor would in both instances therefore become aware of the proceedings against him upon service and execution of the court documents.

2.10 Is there any experience with the granting of legal aid according to Article 50 of the Regulation ?

No.

2.11 Is there any experience with the declaration of enforceability of authentic instruments (Article 57), court settlements (Article 58) and appealable judgments (Art 37) ?

The only experience so far arose in the case of *Elf Aquitaine vs Andre Guelfi* in the context of art. 37 of the Regulation. The First Court declared a judgment of the *Cour d'Appel de Paris* enforceable but on appeal the Appellate Court ordered a stay of proceedings on the basis of article 37. The reason for the stay was the fact that the defendant entered an appeal before the *Cour de Cassation* which was still pending and in its view such appeal constituted an ordinary appeal within the meaning of article 37. In addition as the applicant had issued precautionary measures in order to secure in Malta the claim the Court was of the view that the applicant would suffer no prejudice if proceedings were to be stayed.

2.12 Do problems arise regarding the references to national procedural laws that are included in Annex 1 to IV of the Regulation ?

No.

2.13 Do problems arise regarding the application of the standard forms (certificates) that are included in Annex V and VI of the Regulation ?

No.

2.14 Do judges have easy access to a version of the printed form concerning Article 54 of the Regulation (Annex V) in their own language, so that a translation of the contemplated form is dispensable ?

The rule in Maltese procedure is that all documents and proceedings are to be made in the Maltese Language.

In Malta most people are fluent in English and Italian whilst others have a working knowledge of French. As such and in practice it is quite common for the lawyers' involved to agree on a version which is understandable even though not in the Maltese language. A certificate which is produced in either of these three languages is likely to be accepted by the Court without insisting on having a translation in Maltese. In the alternative however a translation in English of an original

document drafted in another official language of the EU in a non English language would suffice.

2.15 Are there any possibilities to improve the implementation of the Regulation within the EU ? How could guidelines for an improved coordination and cooperation ( at a judicial and administrative level) look like ?

From the limited experience gained so far, there are no specific areas or issues which cry out for any particular improvement. We should state that when Malta acceded to the EU Treaty, a number of lectures and seminars were organised for the benefit of Judges and the legal community generally and which were intended to inform Judges and Lawyers alike with the main legal features of the Regulation, particularly from the point of view of case handling and management by the Court. We can say with satisfaction that so far the cases before our Courts have been dealt with efficiently and generally in keeping with the spirit of the Regulation.

In addition we feel that enhancing the judicial network between the national Judges and Lawyers Associations in terms of both formation and exchanges of national experiences is beneficial for a better implementation and interpretation of the Regulation.

2.16 How much time does it take until the first enforcement measure ( at least seizure of assets) is carried out – i.e. not only until the judgment – after an application for a declaration of enforceability has been submitted ? How much time does it take usually after a judgment has been given in a Member State to collect all documents which are necessary to pursue the application for a declaration of enforceability in another Member State ?

In those cases where seizure of assets occurs as a precautionary security measure, pending the filing and determination of an application of enforcement, seizure occurs very quickly as this involves an *ex parte* procedure and Judges deal with such application in camera. In practice such seizures are decreed within twenty four hours and execution follows thereafter by the Court Bailiffs within a few days. In the case of executive seizure, this would normally take somewhat longer for the obvious reason that invariably parties await the assessment of costs by

the Court Registrar in order to claim costs together with the amount of the claim. It is not uncommon however for a party to limit his claim to the amount due in terms of the judgment and reserve his position as to costs, particularly in urgent cases where seizure of assets is urgent.

We have had no experience which enables us to assess the time for the collection of documents in Malta in cases where a Maltese judgment needs to be enforced in another Member State.

2.17 Is there any experience with actions raising a substantive objection to the judgment claim ?

One of the arguments raised by the defendants in the PMY case is precisely concerned with the nature of the claim as determined by the French Court i.e. whether it is fiscal, administrative or civil and commercial. This in itself is a substantive objection to the judgment claim.

### **Questionnaire No. 3 : Legal Problem Analysis**

#### 1. General Themes

1.1 Are there any problems in the judicial practice with the autonomous interpretation of “civil and commercial matters” (Article 1 (1) practiced by the European Court of Justice ?

No problems have been encountered yet in the limited cases that have arisen in Malta.

1.2 Do public authorities use the Regulation to assert claims against private persons ?

If “public authorities” is meant as a reference to government agencies, there have been no such cases.

1.3 How is the delineation of the scope of application of the Regulation and other instruments concerning the judicial co operation in civil matters ?

To the best of our knowledge, no cases have arisen which enable us to comment on the delineation between Regulation 44/2001 and Regulations 2201/03 and 1348/2000.

1.4 Is the application of Article 4 of Regulation 1438/71/EC practical for the implementation of Article 1 (2) lit.c) ?

We have not traced any regulation with cited reference number 1438/71.

1.5 Should the scope of application be extended, especially to incorporate arbitration and mediation proceedings ?

No. The scope of application of the Regulation should not be extended to incorporate arbitration and mediation proceedings. These kinds of dispute resolution processes are inherently different from litigation both in terms of law and in terms of their conceptual and practical realities.

In the field of arbitration, an EU initiative for the recognition and enforcement of arbitral awards delivered in EU Member States can never be as effective as the 1958 New York Convention. This Convention has been rightly hailed as the single most successful instrument in transnational commercial law and it provides certain and predictable architecture for the recognition and enforcement of arbitral awards across the globe.

With respect to mediation, the move towards fostering so called alternative dispute resolution processes within the traditional civil justice machine including the recognition thereof should not be addressed at Community level. Mediation and similar processes reflect the socio-legal, ethic and economic realities of the particular communities and what is deemed acceptable and indeed desirable in certain parts of the European Union is not necessarily so in other parts. In addition mediation is essentially a voluntary process and it ends in a non binding resolution of the underlying dispute unless settlement is formalised in contract. It

should never lose this inherent characteristic by being incorporated in a system devised for court judgments.

1.6 How do the guarantees for the rights of defence provided by the Regulation work concerning jurisdiction on the one hand and recognition and enforcement on the other hand ?

As stated earlier the only experience so far is in the field of recognition and enforcement and in all cases the rights of defence appear to have been adequately safeguarded. In all cases moreover the right of appeal has been resorted to by the defendants. As such the scope behind the Regulation appears to have been attained without encroaching on the defendant's right to have a fair hearing.

1.7 Are the rules of Articles 32 –58 of Regulation 44/01 EC compatible with national procedural rules ? What is still left to be ruled by the member States ? Do special rules exist or do the general rules have to be used ?

The Code of Organization and Civil Procedure was amended in 2004 in order to ensure that where regulations of the European Union provide, with regard to matters concerning enforcement of foreign judgments, in any manner which is different in the Code, the said regulations shall prevail. Accordingly this state of affairs provides that in cases involving the recognition and enforcement of judgments emanating from Courts of a Member State, this procedure is regulated under the Regulation 44/2001.

The procedure under the procedural rules where judgments outside the EU are involved are somewhat different. Generally the defendant is afforded an opportunity to contest the application before the Court of First Instance. In addition the Court conducts its enquiry on the following grounds :-

- (i) if the judgment sought to be enforced may be set aside on any of the grounds which would ordinarily lead to a retrial under domestic rules;
- (ii) in the case of a judgment by default, if the parties were not contumacious according to foreign law;

- (iii) if the judgment contains any disposition contrary to public policy or to the internal public law of Malta.
- (iv) If the judgment is final and conclusive ( *res judicata* )

A right of appeal exists without any limitation as to the grounds of appeal.

1.8 Is the meaning of these conventions in relation between the member States reduced by the application of Regulation 44/01 EC ?

No evidence or experience of such reduction has been witnessed so far in our experience.

## **2. Provisions of Regulation 44/01 EC dealing with Jurisdiction**

### 2.1 General Issues

2.1.1. Does the Regulation guarantee, according to its overall objectives, predictability of judicial decisions and legal certainty ?

It is difficult to state in categoric terms that the Regulation guarantees legal certainty as ultimately much depends on the judicial application and interpretation given by National Courts. Similarly predictability of judicial decisions cannot be foreseen in all cases.

2.1.2. Do the provisions on jurisdiction deal satisfactorily with the relevant issues, in particular : Do the courts of the member states comply with the obligation as laid down in the ECJ that exclusively deal with the issues identified by Article 5 constitute a ground of jurisdiction ?

As stated there have been no reported cases whereby Maltese Courts have had to decide on jurisdictional issues contemplated in art. 5.

2.1.3. Is the catalogue of fact-specific grounds of jurisdiction sufficient ?

An area which in our view may need to be addressed concern actions against ships or other things ( *actions in rem* ). In the case of Malta for instance, the Arrest Convention has not been adhered to and there is considerable debate ( although no case has as yet come before the Courts) whether the Regulation applies where an arrest of a ship domiciled in a EU member state arises.

2.1.4. Does Article 4 (2) cause a discrimination in fact of third party states ?

Although we have no practical experience of such discrimination, our feeling is that the Regulation is clearly aimed at regulating proceedings commenced against persons who are domiciled within the European Union and as such it “discriminates” in favour of such EU domiciliaries.

2.1.5. How are Articles 25 and 26 applied in practice ? In particular : How does the examination “ex officio” work ? Does such examination include grounds of jurisdiction not mentioned in Article 25? Do the Courts examine ex officio if there is a valid choice of forum clause derogating the jurisdiction seized with the matter by reviewing the entire document of the agreement or do they demand a declaration of plaintiff that there is no derogation ?

Whilst the matter has not yet arisen before our Courts in the context of the Regulation, in practice one would presume that the Court will in open Court declare that it is raising the issue ex officio and would accordingly afford the plaintiff the opportunity to address the issue and make any appropriate submissions before a decision is taken. The Court would be open to hear evidence as well. This is the normal procedure which is followed in the context of similar situations where the Court reviews the issue of jurisdiction ex officio in the context of domestic litigation.

2.1.6. Is the examination of the issue of jurisdiction expensive and time consuming? Are the same fees for the court and the attorneys to be paid as under the main proceedings? How long does it usually take to obtain a final decision on jurisdiction ? Are there any complaints that Courts do not decide the issue of jurisdiction separately, but only in

connection with the main proceedings ? In reverse, are there complaints that a separate decision on jurisdiction results in an unbearable delay of the decision in the main proceedings ?

Under Maltese Law of procedure, the Court can decide to deal with the issue of jurisdiction either by delivering a separate and preliminary judgment or alternatively together with the main judgment on the merits. The tendency is to go for the first option. Depending on the issues involved and whether evidence is required even in connection with the jurisdictional issue involved, a decision on jurisdiction may take anything between six months to two years. This depends on the Judge involved as it is no secret that some Judges work more efficiently than others, other judges have more cases than others etc. As for the expenses, if the Court decided that it has jurisdiction and continues to hear the case, very often costs for the particular judgment would be borne by the defendant who may have raised the plea of lack of jurisdiction and here costs would be minimal as the case will continue being heard on the merits and ultimately costs on the final judgment are assessed on the basis of the value of the claim. If on the other hand the Court decides it has no jurisdiction and hence the case stops here, the Court Registrar will have to assess costs in a final manner based on the value of the claim because effectively the claim of the plaintiff will be rejected and the defendant declared to be non suited. In such instances the costs may be considerably higher based on the value of the claim rather than on the basis where the Court decides to exercise jurisdiction.

## 2.2. Questions regarding the various grounds of jurisdiction

### 2.2.1. How is the reference in Articles 2 and 59 applied ? How is the term “domicile” defined ? Are there any cases where the courts held that defendant had several domiciles ?

There are no precedents concerning the interpretation of “domicile” within the context of Regulation 44/2001. However the issue of “domicile” has often arose in the context of jurisdictional issues under the rules of the Code of Organization and Civil Procedure precisely because “domicile” is one of the grounds which enable a Maltese Court to exercise its ordinary jurisdiction.

The local courts have come out with conflicting interpretations of “domicile” due to the fact that in some instances the Court have applied the British notion i.e. residence coupled with an intention to reside in a particular jurisdiction permanently. At the same time the Code of Organization was originally promulgated in the Italian Language ( Italian was the official language of the Courts ) and hence the term used in the Italian text of the law was “domicilio” which in Italian means “residence”. When the Code was translated in Maltese and English, the term used was domicile and confusion arose due to the equiparation of the term to the English notion of domicile.

One cannot therefore exclude that the interpretation of “domicile” will continue to be somewhat problematic given that according to art. 59 of the Regulation a Maltese Court will have to apply its internal law.

2.2.2. Does Article 60 with its alternative connecting factors appear feasible ?

The alternative connecting factors which are contemplated in art. 60 appear feasible and wide ranging.

2.2.3. How does Article 5 No 1 work ? In particular : Art. 5. No 1 lit. b) 1<sup>st</sup> indent leaves open the place of fulfillment if goods are handed over to a carrier under CIF or FOB. Is the place of delivery the place where the goods are handed over to the carrier or is the place of delivery to the addressee at the latter’s place ? In that respect are there any difficulties known in Court practice or contract drafting ?

No cases have come to the Courts as yet but the difficulty which is highlighted in the question raises a potential difficulty of interpretation.

2.2.4. Do Courts have difficulties to determine the place where a service was provided or should have been provided ?

No cases involving the place where a service has been provided have to come before the Courts.

2.2.5. Under Article 5 No. 1 lit a.) how is the place of performance

determined in light of the jurisprudence of the ECJ ?

No cases as yet.

2.2.6. Under Article 5 No.1 lit. b.) how is the term “provision of services” defined and how are services localised ?

No cases as yet.

2.2.7. How is the scope of Article 5 No. 1 lit. C) determined ?

No cases as yet.

2.2.8. How is the line drawn between Article 5 No. 1 and Article 5 No. 3 ?

No cases as yet.

2.2.9. Does it provoke any problems that the ECJ does not accept annex grounds of jurisdiction ? In particular : Do the Courts of the Member States manage to draw a line between contractual and matters of offence in a way other than their own law ?

No cases as yet.

2.2.10. What falls within the scope of the term “matters relating to tort” under article 5 No. 3 ?

No cases as yet.

2.2.11. Taking into consideration the case law of the ECJ, how is the jurisdiction determined under Art. 5 No. 3 in particular in the case of distance and multistate offences? Is the ratio of the decision of the ECJ in “Shevill” workable ?

No cases as yet.

2.2.12. Functioning and practical relevance of Art. 6 No. 1 and No. 2 Regulation 44/01EC : Are there any doubts as to the compatibility of Article 6 No. 1 Regulation 44/01 EC with art.6 European Convention on Human Rights ?

No cases as yet.

2.2.13. How broad is the scope of the grounds of jurisdiction for consumer issues ?

No cases as yet.

2.2.14. Determination of defendant's quality, of a consumer in the sense of Art. 15 (1) ( in the light of case law of the ECJ)?

No cases as yet.

2.2.15. How is the concept of an activity "directed to one or several Member States" under Art. 15 (1) lit. c) applied in practice ? How is the provision construed in case of internet business ?

No cases as yet.

2.2.16. Taking into consideration the case law of the ECJ, how is the term of "establishment" in the sense of Art. 15 (2) interpreted ?

No cases as yet.

2.2.17. How do the provisions on individual contracts of employment (Art. 18-21) apply and how do they interrelate with the respective choice of law rules ( in particular Art. 6 Rome Convention) ?

No cases as yet.

2.2.18. How is the term "rights in rem" in the sense of art. 22 construed ?

No cases as yet.

2.2.19. Determination of the national practice in respect to the exclusive grounds of jurisdiction under art. 22 no. 2, in particular : In which types of cases is the provision most frequently applied in practice ?

No cases as yet.

2.2.20. Are there any positive or negative conflicts of competence ?

No cases as yet.

2.2.21. To what extent does the provision comply with the ECJ's decision on the freedom of establishment ?

No cases as yet.

2.2.22. How do you draw the line between Art. 5 No 3 and Art. 22 No. 4 in respect to litigation on patents ? How do the national courts deal in infringement proceedings with the argument of patent invalidity ?

No cases as yet.

2.2.23. Are any of the exclusive grounds of jurisdiction in the catalogue of Art. 22 too broad or too narrow ?

No cases as yet.

2.2.24. What is the relation between the respective national remedies against enforcement and the freedom of judgments ? In particular : What remedy does the obligor rely on if he argues that the claim has changed since the judgment or the title to enforce rendered outside courts does not base on a respective payment on the claim ?

This question is not clear to us. However if our understanding is correct, if a defendant wishes to argue that circumstances have changed since the judgment in the Court of origin has been granted, the remedy which would probably be open to him is limited to an action for a declaration that changes have occurred which have a material bearing on the enforcement of the judgment. Alternatively and once the creditor attempts to issue executive measures in execution of the judgment which is declared enforceable, there is a remedy under our Code of Procedure whereby the executive act can be challenged. Otherwise the grounds for a retrial would not be available as this is only available for cases which have been tried and decided in Malta.

## 2.2.25. Questions relating to the applicability of Article 23.

In particular :

### 2.2.25.1 Implementation in practice of the decisions of the ECJ by the courts of the Member States.

No cases have yet emerged.

### 2.2.25.2. Except for the issue of formal requirements, are conclusion and validity of choice of forum agreements determined according to the *lex causae* or the *lex fori* ?

*Lex causae*.

### 2.2.25.3. Are choice of forum clauses in standard form contracts subjected to judicial control ?

Not particularly unless a party in a dispute raises the point specifically and which would thus require the Court to investigate. However it is rare that the issue arises in Maltese Courts.

Indirectly, however, a Court would normally exercise judicial control when a plea of lack of jurisdiction is raised by a defendant. The Court have developed a trend over the years that despite the intention of the parties in favour of a foreign jurisdiction, the Court will still retain the discretion to exercise its residual jurisdiction if in its view there are sufficient grounds to exercise such jurisdiction. Typical cases where the Courts decide to exercise such jurisdiction arise where the evidence is more readily available in Malta or where it clearly appears that the chosen jurisdiction has no particular connection or affinity with the dispute and/or the parties.

This position of course arises in cases not involving the application of the Regulation. With the Regulation, one now expects the Maltese Courts to modify its approach and refrain from exercise its discretion.

2.2.25.4. National practice in determining “usages” of international trade or commerce in the sense of art. 23 (1) lit.c

No experience or precedents as yet.

2.2.25.5. Applicability of Article 23 vis-à-vis third states ?

No experience or precedents as yet.

2.2.25.6. How does Article 26 function in particular in comparison with Art. 19 of Regulation 1348/2000 EC ?

No experience of this scenario has been encountered before our Courts which enables us to comment in any way.

2.2.27. Effect and functioning of Art. 31

In particular

2.2.27.1. Term of “provisional measures”. According to the practice of the Courts of your member State, do measures resulting in the provisional fulfilment of the claim fall within the ambit of “provisional measures”.

The only experience we have had arose in the *Elf Aquitaine vs Guelfi* case where the Courts in Malta granted injunctive relief to Elf Aquitaine whereby Guelfi was restrained from disposing of his assets in Malta pending the outcome of the substantive proceedings in France. The case is still pending in the sense that Elf Aquitaine have since obtained judgment in France which is subject of an application before the Maltese Courts whereby enforcement of the judgment is being sought. The injunction is still in place pending the outcome of the enforcement proceedings in Malta.

2.2.27.2. Territorial connection with the State where the measure was rendered.

In provisional measures of a precautionary or security nature, the territorial connection would presumably be the only factor leading to the measure in itself. In other words the existence of an asset within the territory would make it attractive for a claimant to arrest or seize that asset within the territory otherwise there would be no other reason why that measure would be required within the particular territory.

2.2.27.3 Problems in applying autonomous provisions on jurisdiction in cross border transactions.

We are not sure what is required by this question. Can you please rephrase.

2.2.27.4. Relation between interim measures and main proceedings

As stated earlier, the Maltese Courts have issued interim measures in order to secure claims pending before the Courts of another Member State. The measure will remain in force until the main proceedings come to an end and if successful for the party issuing such measures, he would then be in a position to maintain such measures pending the outcome of the proceedings leading to recognition and enforcement in the jurisdiction where the measures were obtained.

2.2.27.5. Enforcement of provisional measures under National Law.

There is no experience in this field as yet. Clearly it is possible under Reg. 44/2001 to seek the enforcement of a provisional measure obtained in one Member State in another Member State. It is not contemplated in our law that a declaration of enforceability by the court of origin would in itself suffice for that same measure to be enforced in Malta. In fact in practice one is inclined to seek independent injunction or other precautionary relied in Malta as this is seen to be more direct and effective rather than have to obtain the enforceability of a foreign precautionary measure such as of a Mareva Injunction.

2.2.28. Is there any case law relying on Art. 24 Brussels I Convention (jurisdiction by appearance)?

No.

### 3. Lis Pendens and Similar Proceedings

3.1. How does Art. 27 work concerning the principle of *lis pendens*, particularly in the light of the case law of the ECJ and the Courts of the Member States.

No case law as yet.

3.2. Does the principle of *lis pendens* (“first seized”) cause an incentive to “race to the court room” in the judicial practice ?

No experience as yet.

3.3. Are there any frictions between Civil Law and Common Law systems caused by the different procedural cultures ?

As a Civil Law jurisdiction, the experience we have had with Common Law systems has seldom created “frictions.” This is also possibly due to the fact that in Malta some areas of law have a close affinity to English Law such as in Maritime Law, Company Law, Public Law etc. At the same time and in the procedural sphere, certain difficulties arise from time to time due to the way our Courts function rather than due to the procedural rules themselves.

3.4. How does Art. 28 work with actions that have close connections to each other ? Would a positive differentiation by hard criteria be useful ?

No experience as yet.

3.5. Within the Articles 27 to 30, how is it determined whether pending actions concern the same claim between the parties, particularly taking into consideration the case law of ECJ?

No experience as yet.

- 3.6. Do practical problems arise regarding the application of Art. 27 to 30 with actions of several parties ? If yes, please indicate which problems arise in your State.

No comment.

- 3.7. Is there a loss of efficiency because of the tactics of taking negative actions for a declaratory judgment at courts without jurisdiction (“torpedos”)? Please give a short description of these tactics.

No experience as yet.

- 3.8. Or could the client with an action taken quickly for a declaratory judgment turn away an oppressive action of a claimant in a foreign country ( for example in a country with extremely high costs ).

No experience as yet.

- 3.9. Are there any cases of actions concerning the infringement of a patent that were delayed by the objection of nullity of the patent ?

None that could be identified.

- 3.10. In the case of a European Patent : Can a consistent action of infringement be asserted in your country when the objection is raised that several elements of this European patent are infringed by a consistent strategy of marketing ?

Not clear what is meant by the question.

#### **4. The Recognition and Enforcement of Judgments, Authentic Instruments and Court Settlements According to Regulation 44/01 EC**

- 4.1 Questions regarding the free movement of judgments :

4.1.1. How does the procedure regarding the recognition and enforcement of judgements, authentic instruments and court settlement work ?

In essence a party wishing to enforce a judgement, authentic instrument or settlement will need to file an application before the Civil Court First Hall, whereby the demand for recognition and enforcement is put forward. The application is accompanied by the necessary documentation. The application is dealt with by the Civil Court in chambers and a decree is forthcoming generally within a few days. In the event that the application is acceded to, the applicant will then have to take steps to serve the application with the documents and the decree of the Court. This is done by a Court Bailiff.

If the debtor decides to appeal an application of appeal is submitted before the Court of Appeal within thirty days. The application is served on the creditor who has a right to reply to the appeal application. The case is then appointed for hearing before a decision is given.

4.1.2. Are the establishment of additional standard forms e.g for applications for a declaration of enforceability , desirable ?

Not really. The application as a form is quite flexible and generally our Code of Procedure has been simplified over the past years in an attempt to make procedure as simple and flexible as possible.

4.1.3. Did the term “judgment” in Article 32 lead to difficulties in your State ?

To date there has been no difficulty experienced in the limited number of cases which have arisen before the Maltese Courts.

4.1.4. Please describe the status of the accessibility by courts of electronic means.

There is no procedure whereby proceedings can be submitted in Court by means of electronic process. Proceedings can only commence by

filing pleadings and documents physically in the Registry of the Court.

- 4.1.5. Are the reasons for objection that are laid down in Articles 34 and 35 appropriate ? Is there a possibility to decrease the number of reasons for objection or is it – on the contrary – necessary to increase the number ?

Generally we find the reasons for objection in Articles 34 and 35 adequate. They are consistent with reasons which are contemplated in our Code of Organization and Civil Procedure in cases which do not involve judgments emanating from Courts of member States although it is pertinent to point out that in the latter case the Courts would be empowered to refuse recognition and enforcement if there are grounds which would otherwise give cause for a retrial. Moreover the Code of Organization and Civil Procedure refers to “public policy” as a ground for refusing recognition rather than “manifestly contrary to public policy...”

- 4.1.6. What is the criteria regarding the requirement of clarity and definiteness of foreign titles have to comply with according to Article 38 ?

It is not clear what is meant by this question. Generally a Court in Malta will need to be convinced that the judgment is clear and does not give rise to problems of interpretation. As for the criteria of definiteness, in contrast with the local Code of procedure, this is not a *sine qua non* requirement. In the cases which have so far come before the Courts, an appeal is still pending before the Cour de Cassation in France but nevertheless the Maltese Court is analysing the application for enforcement independently of the possible outcome on such appeal.

- 4.1.7. How often is the reservation of public policy (Art. 34 (1)) referred to and with which result ?

The issue has arisen in two out of the three cases mentioned earlier and both cases are pending before the Court of Appeal at the time of replying to this questionnaire.

4.1.8. Did the non recognition of judgments in your State ( in particular due to incompatibility with the public policy in the respective Member State) lead to amendments of laws ?

No.

4.1.9. What kind of interrelation exists between the rule of public policy and the general objection of abuse of the process of the court?

The point has not yet arisen in Malta.

4.1.10. How does Art. 49 work with regard to the enforcement of foreign decisions which are aimed at payment of an administrative fine to the creditor and what is the practical significance of this provision ?

It is arguable whether an administrative fine can be enforced. Under Maltese law an administrative fine, such as in case of a fine imposed by the Telecom Regulator on a provider, is described as an “administrative fine” but enforceable as a civil debt because it is not a penal or revenue sanction. Naturally what is relevant here is whether an administrative fine can be construed as a “civil or commercial” matter as envisaged in Art. 1 of the Regulation.

4.1.11. Is there any practical experience or is there a theoretical discussion among legal writers regarding the enforcement of titles which are aimed at the specific performance of an obligation or which are framed as a prohibitory injunction by means of penalties of contempt of court ?

No.

4.1.12. Does the inadmissibility of “anti suit injunctions” which has been stated by the ECJ have any consequences for the efficiency of legal protection ?

From a Maltese perspective anti suit injunctions were never sought before our Courts.

4.1.13. How does the practical implementation of appeals work in your State ( costs, duration, mandatory representation by lawyers) ?

The right of appeal is automatic once the case is determined by the Court of First Instance. In other words there is no system whereby one has to obtain leave to appeal before entering an appeal. Over the years the number of appeals pending before the Court of Appeal has increased considerably. This has been caused in part due to the fact that in most laws of a public or administrative nature, the law provides for a right of appeal on a point of law before the Court of Appeal. In most cases therefore the Court of Appeal is the recipient of various laws from decisions delivered by Boards of Appeal in fiscal, planning, communications and financial services legislation in addition to appeals entered from civil and commercial cases, constitutional cases as well as criminal cases heard by jury. A second chamber of the Court of Appeal has been set up some time ago in an effort to address the current backlog but in practice it takes on average around two years to be appointed for a first hearing. A decision can then be delivered within three to twelve months after final submissions are heard by the Court.

The costs are assessed by the Court Registrar in accordance with the official tariff of court costs. The costs on appeal are generally equivalent to those applicable to the proceedings before the Court of First Instance plus a third. In other words if the costs in first Instance amount to 100 Eur, the appeal costs are worked out at 130 Eur.

Parties have the right to plead personally or instruct and advocate. In general it is very rare that a party make pleadings personally.

## 4.2 Provisional Measures according to Art. 47

### 4.2.1 How does Article 47 work ?

As stated earlier, precautionary warrants which are issued in order to secure a claim can be obtained with relative ease on the basis of an ex parte application containing a sworn affidavit of the applicant creditor. The warrants are issued by the Court in chambers without a hearing and on the strength of the application and supporting documentation. Ultimately the warrant is issue on the responsibility of the applicant. It

is only in the case of a warrant of a prohibitory injunction that the Court sometimes appoints the application for hearing and gives the respondent the opportunity to be heard.

- 4.2.2. Do law enforcement authorities consider – within the scope of Art. 47 – the reasons to refuse recognition that are laid down in Articles 34 and 35 ?

Not really for the simple reason that the Court does not give the debtor the opportunity to be heard. Only in the case of the prohibitory injunction is it normal for the Court to request the defendant to be served and file a reply in which case the Court will have to decide on a prima facie level whether there is a basis for this protective measure to be issued.

- 4.2.3. If yes, on the basis of which factual criteria ?

As stated above.

- 4.2.4. Does the Judge who is competent for declarations of enforceability have competence for provisional measures (Art. 47) as well ?

In practice applications for a declaration of enforceability is like any other case of a civil or commercial nature assigned by the Registrar to the Judges according to a roster and depending on the number of new cases entered on a particular day.

In contrast another roster applies for the issue of protective warrants and usually there is a Judge who according to a roster is assigned such procedures over a period of two weeks. Thus while in theory the Judge who is competent to deal with an application for a declaration of enforceability is also competent to issue a provisional measure, it cannot be stated that both proceedings will necessarily be dealt with by one and the same Judge. More often than not this is not the case and when it does happen it is merely a coincidence.

- 4.3. Cross – Border Enforcement of Court Settlements and Notarial Deeds

- 4.3.1 How do Articles 57 and 58 work ?

We have no experience as yet in Malta.

In particular :

4.3.1.1. Is there any experience regarding the interpretation of the term “authentic instrument” in art. 57?

No experience.

4.3.1.2. Is there any experience regarding the interpretation of the term “settlement approved by a Court” in Art. 58? Did the wrong English version (“court approved” instead of “conclus devant de juge”) lead to difficulties?

No experience.

4.3.1.3. Are the standardised forms sufficient?

No comment.

4.3.1.4. To which extent are articles 34 and 35 applied.

No experience.

4.3.2. Please describe the practical significance of Article 57 and 58.

No experience.

4.3.2.1. Did the situation occur that declarations of enforceability against the debtor have been applied in several States at the same time?

We are aware that in the Andre Guelfi case mentioned earlier, enforcement is being sought in Malta and is also underway in several other states, both within the EU and outside the EU.

4.3.2.2. For creditors’ lawyers : Was it possible to achieve a higher efficiency of legal protection by means of this ?

In the particular case cited above, the amount of claim is considerable and accordingly concurrent enforcement in more than

one jurisdiction was in a way dictated by the amount of the claim and the fact that various assets were situated in various different jurisdictions. It is really a necessity dictated by the particular circumstances of the particular case.

- 4.3.2.3. For debtor's lawyers : Did oppressive situations arise out of this ? Did this lead in particular to the result that excessive enforcement measures have been carried out ?

No experience of oppression or of excessive enforcement has materialised to date.

- 4.3.3. Specific problems regarding court settlements, enforceable instruments and provisionally enforceable judgments.

No experience as yet.

- 4.3.3.1. Are there any known cases, where a court of a higher instance has reversed a foreign judgment after enforcement measures had been carried out ? How can enforcement measures be set-aside in such a situation ?

The case has not arisen as yet and as stated previously there are two such cases pending before the Court of Appeal where enforcement measures have been issued pending the outcome of the application for a declaration of enforceability. If the Court of Appeal were to reverse the earlier order of enforcement, then automatically the legal effect of those precautionary or protective measures would cease. The debtor would be in a position to request the removal or lifting of such measures and the Court would oblige without much difficulty.

- 4.3.3.2. Are there – from the debtor's point of view – any problems with documents that are not valued ?

Though the issue has not arisen before the Courts, it is clear that a declaration of enforceability should not in principle enter into issues of amounts due because the merits cannot be reopened. At the same time and in a case where for instance a debtor has already satisfied part of the judgment debt or where there has been

enforcement on other assets in other jurisdictions, one cannot exclude the possibility of a Court qualifying the declaration that any enforcement should be limited to the amount actually due.

### Proposals for Improvements

As stated earlier, the debate in legal circles locally has centred on the possible impact which the Regulation may have on maritime litigation. Malta is a maritime jurisdiction and it is felt that some clarification is needed as the applicability or otherwise of the Regulation vis-à-vis ships. Under local Admiralty legislation, ships as objects can be sued in specific circumstances. A vessel as a defendant is not deemed to have a legal personality but merely *locus standi* to stand as a defendant in civil proceedings. The difficulty which arises is whether in a case where a vessel is registered in a country within the EU, an arrest of the vessel in Malta can be followed with an action in rem in Malta or alternatively whether the action would have to be filed in the Court where the vessel or its owner is domiciled. On a reading of the Regulation it would appear that the subjects of the Regulation were individual or juridical persons and as such vessel should not feature at all in the debate. At the same time some clarification on this point would be welcome rather than leave things to be interpreted by the Courts if and when the case arises.

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