RECOGNITION OF FOREIGN CIVIL JUDGMENTS: THE EFFECT OF RES JUDICATA PRINCIPLE

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Abstract: *The principle of res judicata is one of the most important grounds for refusing the recognition of foreign civil judgment. According to all national and international legal sources that introduce res judicata as an obstacle to recognition, the court should not give an effect to the foreign civil judgment if there is another civil judgment between the same parties, for the same object and the same cause.*

This paper focuses on the material and procedural application of the res judicata principle before the courts. The paper will examine the provisions contained in the Brussels I bis Regulation and the Law on Private International Law of the Republic of North Macedonia.

For the purposes of this paper, several methods will be applied: normative analysis method, comparison, analogy, and case law method.

Key words: *recognition, foreign civil judgments, res judicata, Brussels I bis Regulation*

ПРИЗНАВАНЕ НА ЧУЖДЕСТРАННИ СЪДЕБНИ РЕШЕНИЯ: ЕФЕКТЪТ ОТ ПРИНЦИПА НА СИЛАТА НА ПРИСЪДЕНО НЕЩО

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Резюме: *Принципът на силата на присъдено нещо е едно от най-важните основания за отказ за признаване на чуждестранно гражданско решение. Според всички национални и международни правни източници, които въвеждат силата на присъдено нещо като пречка за признаване, съдът не следва да придава действие на чуждестранното гражданско решение, ако има друго гражданско решение между същите страни за същото нещо и на същото основание.*

Този доклад се фокусира върху материалното и процесуално приложение на принципа на присъдено нещо пред съдилищата. Документът ще разгледа разпоредбите, съдържащи се в Регламент „Брюксел I bis" и Закона за международното частно право на Република Северна Македония. За целите на тази статия ще бъдат приложени няколко метода: метод на нормативен анализ, сравнение, аналогия и метод на съдебната практика.

Ключови думи: *признаване, чуждестранни граждански решения, присъдено нещо, Регламент „Брюксел I bis"*

INTRODUCTION

The term res judicata refers to the principle that an earlier and final adjudication by a court or arbitration is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds, and the same parties (the so-called » triple-identity" criteria). The res judicata principle has existed for many centuries and in different legal cultures, it was amongst the principles of the roman jurists, and it was also recognized in ancient Hindu texts.[1]

According to Von Moschzisker, the rule of res judicata is said not to have been definitely formulated until 1776. He states that primarily, the rule is one of public policy, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim "*Interest reipublicae ut sit finis litium," (It is in the public interest that there should be an end of litigation)* and the secondary or subordinate one in the form "*Nemo debet bis vexari pro una et eadem causa" (No one should be troubled twice by the same claim)*. The whole doctrine bears a close resemblance to the exceptio rei judicatae of the Roman law.[2]

The author Bain William is on the same line as Von Moschzisker. Namely, he claims that res judicata is grounded in the dual policies of protecting the defendant from harassment and the public from the multiplicity of litigation. The effect of the doctrine is a conclusive determination of all matters in issue or which should have been an issue.[3]

Dickson also builds on previous authors. According to him, the legal effect of the doctrine of merger and cause of action estoppels are commonly justified by reference to the same two principles of the rule of res judicata: that the public interest lies at the end of litigation (*interest reipublicae ut sit finis litium*) and that nobody should be troubled twice by one and the same cause (*nemo debet bis vexari pro una et eadem causa*). Further, Dickson points out that in *Wiltshire v Powell*, Arden LJ noted: "*Res judicata promotes the important public policy of finality in legal proceedings and thus legal certainty. In addition, a party has a right under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, to the proper enforcement of any judgment that he obtains: see Hornsby v Greece (1997) 24 EHRR 250."* [4]

Kirkutis and Višinskis emphasize that the principle of *res judicata* means that an adjudicated issue cannot be re-litigated. In their opinion, the effect of applying the principle of *res judicata* is manifested in two aspects: the negative and the positive.

[1] Barin Chaharbakhsh, V., Asgher Jafari, S. Kuala Lumpur, The Principle of Res Judicata In International Law. – Journal of Critical Review, 2020, p. 3598.
[2] Von Moschzisker, R., Res Judicata, New Haven, Yale Law Journal Company, Inc., 1929, p. 299.
[3] Bain A., William. Civil Procedure: Judgments: Exceptions to the Rule of Res Judicata. Michigan Law Review Online, 1953, p. 289.
[4] Dickson, A., The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process. Oxford, British Institute of International and Comparative Law, 2008, p. 19.

The negative effect of the principle of *res judicata* is that the parties cannot re-bring an identical action (*non bis in idem*), while the positive effect of the principle of *res judicata* is that the judgment can be used as a basis for a claim in another civil case, i.e., the judgment acquires a preliminary ruling and the findings of fact cannot be challenged by the parties in other cases.[5]

Bearing in mind the mentioned definitions and views, it can be concluded that the principle of res judicata is introduced as one of the basic grounds for refusing the recognition of foreign civil judgment, in national and international legal systems, for two raisons d'être: to protect the public and the private (individual) interests. In general, the recognition may be refused if the previously passed civil judgment or recognized foreign civil judgment refers to the same parties, for the same cause of action and relies on the same legal ground.

THE PRINCIPLE OF RES JUDICATA AS A GROUND FOR NON-RECOGNITION THE FOREIGN CIVIL JUDGMENT WITHIN THE EU LAW

The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention)[6], as the Brussels I Regulation[7] predecessor governed the recognition and enforcement of judgments in civil and commercial matters in the EU. Among other refusal grounds for recognition, the Article 27 para.3 and para.5 stipulate as follows:

"A judgment shall not be recognized:

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfills the conditions necessary for its recognition in the state addressed."

Paul Jenard in its Report emphasizes that "*the words 'res judicata' which appear in a number of conventions have expressly been omitted, since judgments given in interlocutory proceedings and ex parte may be recognized, and these do not always have the force of res judicata."*[8] Additionally, Jenard points out that "*it will immediately be noticed that two conditions which are frequently inserted in enforcement treaties are not referred to in the Convention: it is not necessary that the foreign judgment should have*

[5] Kirkutis M., Višinskis, V. Problems of Recognition of Foreign Judgments and res judicata in European Union. Riga, Socrates, 2021, p. 81.

[6] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Consolidated version CF 498Y0126(01), Official Journal L 299, 31/12/1972 P. 0032 – 0042

[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal L 12, 16.1.2001, p. 1–23*

[8] Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal of the European Communities, No C 59/1, p. 43.

become res judicata, and the jurisdiction of the court which gave the original judgment does not have to be verified by the court of the State in which the recognition is sought unless the matter in question falls within the scope of Sections 3, 4 or 5 of Title II."[9]

So, according to Brussels Convention, two situations were possible for refusal of recognition:

a) In the first situation, it was not necessary for the same cause of action to be involved, but it was sufficient if the judgment whose recognition was sought was irreconcilable with a judgment given between the same parties in the State in which recognition was sought. Thus, for example, a French court in which recognition of a Belgian judgment awarding damages for failure to perform a contract is sought will be able to refuse recognition if a French court has already given judgment in a dispute between the same parties declaring that the contract was invalid;[10]
b) The second situation, also constituted an important restriction on the effectiveness of judgments, requiring that recognition may be refused if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfills the conditions necessary for its recognition in the state addressed.

Peter Schlosser, in its Report, does not specifically refer to the provisions of paragraph 3 and paragraph 5 of Article 27. Instead, he emphasizes the following: "*the effects of a court decision are not altogether uniform under the legal systems obtaining in the Member States of the Community. A judgment delivered in one State as a decision on a procedural issue may, in another State, is treated as a decision on an issue of substance. The same type of judgment may be of varying scope and effect in different countries. In France, a judgment against the principal debtor is also effective against the surety, whereas in the Netherlands and Germany it is not."*[11]

Therefore, it can be concluded that, according to Schlosser, the issues related to the principle of res judicata should be examined by applying the national provisions of private international law, in addition to the application of the Convention. He considers that "*a certain lack of clarity in some of these provisions can be accepted since the European Court of Justice has jurisdiction to interpret them. However, Member States cannot be expected to accept a lack of clarity where this might give rise to diplomatic complications with non-contracting States. The new Article 27 (5) is designed to avoid such complications."*[12]

[9] Ibid., p. 44.
[10] Ibid., p. 45.
[11] Report on the Convention on the Association of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed at Luxembourg, 9 October 1978) by Professor Dr Peter Schlosser, Official Journal of the European Communities No C 59/71, p. 127.
[12] Ibid., p.130.

The Regulation Brussels I[13], as well as the Regulation Brussels I (bis)[14] contain the very same provisions as the Brussels Convention, regarding the principle of res judicata. Accordingly, Article 45 of the Brussels I (bis) Regulation provides that:

"1. On the application of any interested party, the recognition of a judgment shall be refused:

...

(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

...

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State addressed."

As Monique Hazelhorst explains, where the irreconcilability is between a judgment given in the Member State where enforcement is sought and one in another Member State, the judgment in the Member State of enforcement is prioritized its existence precludes recognition or enforcement, even if it was delivered later. In these situations, the judgments do need to concern the same parties, though they need not be on the same cause of action. Where the irreconcilability is with a judgment delivered in another Member State or a third state, the judgments do need to concern the same cause of action. In these situations, priority is given to the earlier judgment.[15]

Geert Van Calster also agrees with the declared views. Specifically, he states that the first situation, which requires the same parties only, not the same cause of action, applies whether other judgments are issued sooner or later and the application of lis alibi pendens and related action ought greatly to reduce the number of irreconcilable judgments. On the other hand, the second situation which requires the same parties and the same cause of action applies when recognition may be refused if the proceedings which gave rise to the judgment whose recognition is sought have already resulted in a judgment that was given in a third State or another Member State and which would be entitled to recognition and enforcement under the law of the State in which recognition is sought.[16]

[13] Article 34: "A judgment shall not be recognized: 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfills the conditions necessary for its recognition in the Member State addressed."

[14] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments In Civil and Commercial Matters (Recast), Official Journal of the European Union L 351/1.

[15] Monique Hazelhorst Monique. Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial. The Hague, T.M.C. Asser Press, , 2017, p. 47.

[16] Geert Van Calster, European Private International Law. Oxford, Hart Publishing, 2013, p. 122.

THE PRINCIPLE OF RES JUDICATA IN THE EU CASE-LAW

The first mentions of res judicata in European Economic Community procedural law appear in Joined Cases 22 and 23/60, Raymond Elz v. High Authority of the E.C.S.C.[17], and Joined Cases 2 to 10/63, Società Industriale Acciaierie San Michele and Others v. High Authority of the E.C.S.C.[18], while the first judgment to explicitly link res judicata to legal certainty in EU law was in Case 126/97, Eco Swiss, although the first legal argument linking the two in ECJ case law was made by the Commission, in Case 106/77, Simmenthal.[19]

In **Raymond Elz v. High Authority of the European Coal and Steel Community**, the Court of Justice of the European Communities emphasizes that "*it is first necessary to consider whether this application has not been brought in spite of the force of res judicata of Case 34/59, which concerned the same parties and was settled by the judgment of the Court (Second Chamber) of 4 April 1960"* (p. 188). The Court founds in this case, that "*the force of res judicata is, therefore, no bar to the admissibility of this application."* The Court decided in the same manner in **Società Industriale Acciaierie San Michele and Others v. High Authority of the European Coal and Steel Community**, regarding the admissibility of the application: "*no decision having the force of res judicata has therefore been taken by the Court on the subject matter of the present proceedings."*

In **Case 145/86 Horst Ludwig Martin Hoffmann v Adelheid Krieg[20]**, the Court examined the conditions determined by Article 27 (3) of the Brussels Convention:

"To ascertain whether the two judgments are irreconcilable within the meaning of Article 27 (3), it should be examined whether they entail legal consequences that are mutually exclusive. It is apparent from the documents before the Court that, in the present case, the order for enforcement of the foreign maintenance order was issued at a time when the national decree of divorce had already been granted and had acquired the force of res judicata, and that the main proceedings are concerned with the period following the divorce. That being so, the judgments at issue have legal consequences which are mutually exclusive. The foreign judgment, which necessarily presupposes the existence of the matrimonial relationship, would have to be enforced although that relationship has been dissolved by a judgment given in a dispute between the same parties in the State in which enforcement is sought. The answer to be given to the third question submitted by the national court is therefore ***that a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable within the meaning of Article 27 (3) of the Convention with a national judgment pronouncing the divorce of the spouses"*** (para. 22–25).

[17] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61960CJ0022
[18] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61963CJ0002
[19] Turmo, A., National Res Judicata in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law, Common Market Law Review, 2021, 58 (2), p. 361.
[20] https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:61986CJ0145

In **Case – 351/96 Drouot assurances SA v. Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne**[21], the Court, examining the admissibility of the application, from the aspect of the same parties element, had stated as follows: "*It is certainly true that, as regards the subject matter of two disputes, there may be such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of res judicata as against the other. That would be the case, inter alia, where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings. In such a situation, insurer and insured must be considered to be one and the same party for the purposes of the application of Article 21 of the Convention"(para. 19).*

The Court in **Case C – 234/04 Rosmarie Kapferer v Schlank & Schick GmbH**[22] explicitly emphasizes the importance of the principle of res judicata in the context of the Brussels I Regulation: "*in that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of the time limits provided for in that connection can no longer be called into question (Case C-224/01 Köbler [2003] ECR I-10239, paragraph 38). Therefore, Community law does not require a national court to display domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 46 and 47)"* (para. 20 and 21).

THE PRINCIPLE OF RES JUDICATA AS A GROUND FOR NON-RECOGNITION OF THE FOREIGN CIVIL JUDGMENT WITHIN THE NORTH MACEDONIAN LAW

To prevent the existence of parallel decisions in the same legal system, the condition of res judicata is foreseen as an obstacle to the recognition of foreign civil judgments in North Macedonian law.[23] Article 162 of the North Macedonian Private International Law Act provides follow:

"(1) A foreign judicial decision shall not be recognized if on the same mater the court or another authority of the Republic of North Macedonia has rendered a final decision or if another foreign judicial decision has been recognized in the Republic of North Macedonia that was rendered for the same matter and between the same parties.

[21] https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61996CJ0351
[22] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2006%3A178
[23] Deskoski T., V. Dokovski. Private International Law. Skopje, Faculty of Law "Iustinianus Primus", 2021, p. 500.

(2) If a proceeding is pending before the court of the Republic of North Macedonia, initiated earlier, on the same matter and between the same parties, the court shall stay the recognition procedure of the foreign judicial decision until the final conclusion of those proceedings."

The condition of res judicata, or more precisely, the existence of the final decision on the same matter between the same parties, was also a part of the former North Macedonian PIL Acts, as an obstacle for foreign judgments recognition. Accordingly, in the North Macedonian legal system as well, a final judicial decision of a North Macedonian court, regardless of whether it was rendered or recognized, is an obstacle to the recognition of a foreign judicial decision on the same matter and between the same parties. According to the North Macedonian PIL Act, res judicata is a condition addressed ex – officio by the court. In this context, we consider that the party could also apply an objection to the res judicata condition and point out to the court the existence of a previously rendered or recognized judicial decision on the same matter and between the same parties. Without this intervention, we consider that the court might not even know about the existence of such a judicial decision. Also, in our point of view, the question of whether the principle of res judicata represents a procedural condition for foreign judgment recognition would be governed by the law of the state where the court is located (lex fori).

Finally, we would like to emphasize that from the available data on the electronic pages of the North Macedonian Basic courts, we were not able to find a judicial decision that does not allow the recognition of a foreign judgment decision, on the res judicata condition existence legal basis.

CONCLUSIONS

It is undisputable fact that the principle of res judicata is one of the essential characteristics of judicial institutions in the modern State as a sine qua non condition of the trust placed by parties in the authority of the courts.[24]

The concept of res judicata under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the ratio decidendi of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it. As observed (in paragraph 35), given that the common rules of jurisdiction applied by the courts of the Member States have their source in European Union law, more specifically in Regulation No. 44/2001, and given the requirement of uniform application referred to (in paragraph 39), the concept of res judicata under European Union law is relevant for determining the effects produced by a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause.[25] The CJEU's definition of res judicata has incorporated the so-called "positive effects" and gives

[24] Turmo, A. Opt. cit., p. 362.

[25] Case C – 456/11 ERGO Versicherung AG, Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts, Nürnberger Allgemeine Versicherungs-AG, Krones AG v Samskip GmbH, para. 40.

res judicata a scope which at first seems quite clear.[26] However, neither legislation nor EU jurisprudence introduced a uniform definition of the res judicata principle, as a ground for refusing the foreign judgment recognition. So, in the future, the specific scope of the res judicata principle must be defined at the European Union level.

Under North Macedonian law, the principle of res judicata, as an obstacle for foreign judgment recognition is introduced more broadly, comparing to the European Union law.

Common to both legislations is that the principle of res judicata is retained as an essential condition in the procedure for recognition of foreign judgment, which has a particularly positive impact on greater legal certainty in both legal systems.

[26] Torralba-Mendiola, E. and Rodríguez-Pineau, E., Two's Company, Three's a Crowd: Jurisdiction, Recognition and *Res Judicata* in the European Union. – Journal of Private International Law, Vol. 10, No. 3, p. 422.