Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 7 April 2016 [1]

Case C-70/15

Emmanuel Lebek
(Request for a preliminary ruling

from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Article 34(2) — Possibility of commencing proceedings to challenge a judgment — Regulation (EC) No 1393/2007 — Article 19 — Relief from the effects of expiry of the period within which an appeal may be brought)

I – Introduction

1. This is already the Court's second opportunity this year to explore the objections which a defendant may raise under Regulation (EC) No 44/2001 [2] to an application for the declaration of enforceability of a court decision. Whereas the public policy objection pursuant to Article 34(1) of that regulation lies at the heart of the *Meroni* case, [3] the present case concerns Article 34(2), which is even more important in terms of legal practice. This provision sets out the conditions under which deficiencies in the service of a document instituting proceedings may prevent the subsequent recognition and declaration of enforceability of a judgment in another Member State.

2. The basic concept of Article 34(2) of Regulation No 44/2001 dates back to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the 'Brussels Convention'), [4] but its regulatory content has changed considerably since the Brussels Convention. That is because under the Brussels Convention deficient service of a document instituting proceedings was still a fundamental argument against recognition of the subsequent judgment given by the court. By contrast, Regulation (EC) No 44/2001 is dressed in terms much more favourable to the applicant. It allows the obstacle to recognition to be removed even when it was not possible for the defendant to arrange for an effective defence in the State in which the judgment is given *before it was pronounced*, such as due to failure to be summoned in sufficient time, if the defendant could have challenged that judgement in the State in which it was given *after it was pronounced* but did not do so.

1 — Original language: German.

2 — Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1, in the version applicable in this case, as most recently amended by Regulation (EC) No 1103/2008 of the European Parliament and of the Council of 22 October 2008 (OJ 2008 L 304, p. 80)).

3 — See my Opinion in *Meroni* (C-559/14, EU:C:2016:120).

4 — See Article 27(2) of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968 (OJ 1978 L 304, p. 36).

3. The present case adds another dimension to the reasoning underlying recognition in default judgments insofar as in the case before the Court it was no longer possible to commence proceedings to challenge the judgment in the State in which it had been given because the permitted time limit had expired, but it was possible to consider bringing proceedings for relief from the effects of that expiry.

4. The central questions in the present case are whether Article 34(2) of Regulation No 44/2001 requires the defendant to try to win the national appeal in the State giving the judgment first by initiating relief proceedings in order to avoid a later declaration of enforceability in another Member State and what time limits might apply in this situation.

II – Legal framework

5. The EU legal framework for this case is provided by Regulation No 44/2001 and Regulation (EC) No 1393/2007. [5]

A – *Regulation No 44/2001*

6. Article 34(2) of Regulation No 44/2001 states that a judgment is not to be recognised where 'it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

7. The first sentence of Article 45(1) of Regulation No 44/2001 provides that 'the court with which an appeal is lodged under Article 43 ... shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35'.

B – *Regulation No 1393/2007*

8. Article 1 of Regulation No 1393/2007 ('Regulation on the service of documents') defines its own scope of application as follows:

'This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. …(2) This Regulation shall not apply where the address of the person to be served with the document is not known.

…'

9. Article 19(4) of the Regulation on the service of documents provides that:

'When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled:

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and

5 — Regulation of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ 2007 L 324, p. 79).

(b) the defendant has disclosed a prima facie defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Member State may make it known [to the European Commission in accordance with Article 23(1) of the Regulation on the service of documents] that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.'

III – Legal dispute in the main proceedings and questions referred for a preliminary ruling

10. On 8 April 2010, the Tribunal de Grande Instance de Paris (Regional Court, Paris) (France) ordered Mr D., who has been resident in the Republic of Poland since 1996, to make monthly maintenance payments to the applicant L. The defendant Mr D. had not appeared at the proceedings before the French court. The reason was that he had not been served with the document instituting the proceedings, because the applicant had given as the defendant's address for service an incorrect address in Paris at which Mr D. could not be served with documents.

11. It was not until July 2011 that Mr D. even became aware of the existence of the judgment when its declaration of enforceability was effected in the Republic of Poland and the Sąd Okręgowy w Jeleniej Górze (Regional Court, Jelenia Góra, Poland) served him with a copy of the application for a declaration of enforceability together with an attached copy of the judgment. Since according to the findings of the Polish court[6] the national time limit for bringing an appeal against the French judgment had already expired, however, the first application for a declaration of enforceability in Poland remained unsuccessful despite appeal by the applicant; the competent Polish court based its refusal of the application on Article 34(2) in conjunction with Article 45 of Regulation No 44/2001.

12. In May 2012, Mr D. was then served again with the judgment in question in compliance with the provisions of the Regulation on the service of documents and at the same time was notified that he would be able to apply, within two months of the date on which the judgment was served, for relief from the effects of failing to comply with the lapsed time limit for appeal. This notice regarding the legal remedies available for relief corresponds to the contents of Article 540 of the French Code de procédure civile (Code of Civil Procedure). However, Mr D. neither commenced relief proceedings in France nor lodged an appeal against the judgment in question.

13. On this basis, a second declaration for the enforceability of the judgment in the Republic of Poland was applied for. The applicant Mr L. argued that as a consequence of the renewed service together with the notice regarding the right to relief from the effects of the lapsed time limit for appeal it had become possible for the defendant to contest the judgment, but that he had not exercised that right. This argument was not shared by the Sąd Apelacyjny we Wrocławiu (Court of Appeal, Wrocław), however, which refused the application for a declaration of enforceability of the judgment by order of 27 May 2013. As the grounds for its decision the court stated that the mere entitlement to apply for an extension of the time for appeal was not the same as the possibility of commencing proceedings to challenge the judgment within the meaning of Article 34(2) of Regulation No 44/2001. The possibility of challenging the judgment at issue within the meaning of this provision in fact existed only where a defendant had been served with the judgment together with its grounds and notice of the available remedies within the ordinary time for bringing an appeal.

6 — Unfortunately, the details relating to permitted redress procedures and the reason for their expiry despite the previous failure to serve the judgment cannot be found in the request for a preliminary ruling (see p. 7, IV.1 therein).

14. The applicant has challenged this order by his appeal on a point of law filed before the national court. That court raises in particular the question of whether in the present case the possibility of relief from the effects of the lapsed time limit for appeal can even be presumed at all in view of the fact that the French Republic gave notice pursuant to Article 23(1) of the Regulation on the service of documents that such relief would not be entertained if application for it were filed more than one year following the date of the judgment, which was given in April 2010.

15. In those circumstances, the national court decided to stay proceedings and refer the following questions to the Court for preliminary ruling:

'(1) Must Article 34(2) of Regulation No 44/2001 be interpreted as meaning that the possibility of commencing proceedings to challenge a judgment laid down therein covers both the situation in which such a challenge can be brought within the time limit laid down in national law and the situation in which that time limit has already passed but it is possible to submit an application for relief from the effects of its passing and then — following the grant of such relief — actually to commence such proceedings?

(2) Must Article 19(4) of Regulation No 1393/2007 be interpreted as excluding the application of provisions of national law concerning the possibility of relief from the effects of the expiry of the time for appeal or as meaning that the defendant has the choice of availing himself of either the application for relief provided for in that provision or the relevant set of provisions under national law?'

IV – Assessment of the questions referred for a preliminary ruling

A – *The first question*

16. By its first question the national court essentially wishes to know whether Article 34(2) of Regulation No 44/2001 must be interpreted as precluding, following the passing of the national time limit for appeal in the State in which the judgment was given, a declaration of enforceability even when the defendant could avail himself once again of the possibility of commencing proceedings to challenge the judgment by means of proceedings to obtain relief from the effects of the lapsed time limit for appeal.

17. The written observations of the Member States that have taken part in these proceedings, and of the European Commission, argue in favour of a broad interpretation of Article 34(2) of Regulation No 44/2001 insofar as they address the first question referred for a preliminary ruling.

18. These maintain that if the option were available in the State of judgment of relief from the effects of the lapsed time limit for appeal the defendant would as a matter of course be under the obligation to take that route to try to win the right to appeal the judgment and then, having succeeded in obtaining such relief, to commence proceedings to challenge the judgment in the State in which it was given. Otherwise the defendant would have to face not being able to rely on Article 34(2) of Regulation No 44/2001 in proceedings for a declaration of enforceability in another Member State. This broad approach favouring recognition would also appear to be supported by various legal scholars and the case-law of the Member States.[7]

7 — See, for example, the Decision of the German Bundesgerichtshof (Federal Court of Justice) of 21 January 2010, No IX ZB 193/07, EuZW 2010, 478, paragraph 14 with further references.

19. However, this reading does not inevitably follow from the provision's wording, which refers to proceedings 'challenging the judgment'. Relief proceedings do not qualify as such proceedings in the strict sense. Rather, in circumstances in which relief proceedings may be contemplated it is no longer possible, as things stand, for the defendant to commence proceedings to challenge the actual judgment itself.

20. Nor do systematic arguments necessarily support the view that, in circumstances such as those in the main proceedings, the defendant should be forced to conduct relief proceedings and otherwise be refused the possibility of claiming the obstacle to recognition pursuant to Article 34(2) of Regulation No 44/2001.

21. In particular, it is not possible in this context to invoke Article 19(4) of the Regulation on the service of documents, which deals with relief from the effects of the lapsed time limit for appeal in the event that the defendant fails to enter an appearance in the case of the cross-border service of documents. This is because no solid conclusion can be drawn from this provision which would have a bearing on the relevance of relief proceedings under Article 34(2) of Regulation No 44/2001, which — unlike Article 26 of the same Regulation — does not include any inherent link to the Regulation on the service of documents.

22. First, the respective areas of application of the Regulation on the service of documents and Article 34(2) of Regulation No 44/2001 at issue here do not fully coincide, since Article 34 also relates to obstacles to recognition in judgments where service has not been made according to the Regulation on the service of documents. Second, Article 19(4) of the Regulation on the service of documents is not applicable to the present case if a reading that reflects real practice is adopted. This provision explicitly deals with cases in which 'a writ of summons ... has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation *and* [8] in which then ...] a judgment has been entered against a defendant'. This does not apply in the present case, since the writ of summons was sent to an address in Paris, with the result that there was not even any reason to effect cross-border service when commencing proceedings in France. Consequently, the first of the two accumulative conditions is missing which form the foundation for the relief provision of Article 19(4).

23. Even if Article 19(4) of the Regulation on the service of documents were applicable, however, it would still not be possible to infer from this provision an obligation to initiate relief proceedings. This is because the purpose of Article 19(4) is to protect the person to whom the service is addressed, giving him the opportunity under certain circumstances *of being able* to initiate relief proceedings *without, however, requiring him to do so*. It thus takes account of any interest the person to whom the service is addressed might have of his own accord in reviving the proceedings where the service was deficient and, if appropriate, try to have the action dismissed.[9] However, it cannot be concluded systematically from Article 19(4) of the Regulation on the service of documents that the defendant is subject to an obligation under Article 34(2) of Regulation No 44/2001 to initiate such relief proceedings or otherwise to accept the declaration of enforceability of the judgment.

24. As regards the question of whether the 'possibility of commencing proceedings to challenge the judgment' within the meaning of Article 34(2) of Regulation No 44/2001 also includes relief proceedings, it is instead the content and rationale of this provision that must be examined. In doing so it must be remembered that the objective pursued by Regulation No 44/2001 is to facilitate the quick and efficient declaration of the enforceability of court judgments while also preserving the right

8 — Emphasis added.

9 — Such interest may exist, for example, when in a third State or even in the State in which the judgment is given there is concern that there will be adverse consequences from proceedings wrongly conducted under the EU's Regulation on the service of documents, such as enforcement measures against the defendant, or when the defendant has an interest in a final decision on the dispute being reached quickly, perhaps because he considers his chances of success to be good, whereas any potentially impending new proceedings would be onerous for him.

of the defendant to a defence.[10] In contrast to the old rule of the Brussels Convention, its aim was principally to prevent the defendant from abusing, in proceedings for a declaration of enforceability, the failure to serve the document initiating proceedings, provided that he was able to defend himself, without more, against the judgment given in the State in the event that the time limit for appeal has not yet expired. However, the idea that the defendant should also be obliged to bring proceedings to obtain relief after the expiry of the time limit for appeal cannot be found either in the text of the provision or the recitals to the Regulation.

25. Rather, considerations from the perspective of a fair trial[11] would suggest that the wording of Article 34(2) of Regulation No 44/2001 should not be stretched too far and that relief proceedings should not be subsumed under the concept of 'proceedings to challenge' within the meaning of this provision. For if, after the expiry of the time limit for appeal, the defendant were obliged to initiate relief proceedings in the State in which the judgment is given and would otherwise risk a declaration of enforceability in another Member State, this would be contrary to the principle of equality of arms between plaintiff and defendant, which is an essential element in a fair trial[12] as understood in the Court's case-law.

26. This becomes clear if it is recalled that a defendant who commences proceedings to challenge a judgment in accordance with Article 34(2) of Regulation No 44/2001 *before the expiry of the time limit for appeal*, thereby creating the right to be heard in the State in which the judgment is given, finds himself essentially in the same situation as he would have been if he had been served with the document instituting proceedings in sufficient time to allow him to enter an appearance at the proceedings at the court of first instance: he might then incur court and legal costs in the State in which the judgment is given solely for conducting *a single* proceeding, and the substance of the dispute would be confined to the subject matter of the judgment to be enforced.

27. The situation is different where the defendant first becomes aware *after the expiry of the time limit for appeal* that a judgment has been given against him without his knowledge. Since it is no longer possible for him to lodge an appeal, without more, in order to contest the judgment in the State in which it was given, he must first explore the options for applying for relief and then initiate the relevant proceedings. Only after that would he be able, at a second stage, to lodge an appeal against the judgment, assuming he was successful with the application for relief. Unlike the situation described in point 26, the defendant would thus be encumbered with *two* proceedings (and their associated costs) whose subject-matter would exceed to a considerable extent the substance of the dispute in the judgment, given that the issue of reopening the case would also have to be appraised. Moreover, if consideration is also given to the fact that, in addition to the procedural and cost complications, practical problems could also arise, such as finding suitable lawyers and translation costs, it becomes clear that the defendant would be in a much worse position than the claimant if, in order to defend himself against the declaration of enforceability, he is encumbered with the burden of reopening the case. This applies particularly to defendants with little legal experience and few financial resources. Particularly in the case of relatively small claims it would have to be expected that such defendants, in view of the potential cost and procedural complications, might be inclined to accept the enforcement without defending themselves against it as a way of at least saving on additional legal and procedural costs, whose profitability in the case of cross-border cases is often difficult to estimate, particularly for the layman.

10 — On this, see judgment in *ASML* (C-283/05, EU:C:2006:787, paragraphs 20 and 24).

11 — On its relevance, see judgments in *Apostolides* (C-420/07, EU:C:2009:271, paragraph 73) and *ASML* (C-283/05, EU:C:2006:787, paragraph 27).

12 — Judgment in *Ordre des barreaux francophones et germanophones and Others* (C-305/05, EU:C:2007:383, paragraph 31) and Article 47(2) of the Charter of Fundamental Rights of the European Union.

28. In light of the foregoing, it must be presumed that postulating an obligation to conduct relief proceedings as part of Article 34(2) of Regulation No 44/2001 would seriously disrupt the equality of arms between the parties insofar as the defendant would face conducting an additional proceeding to defend his interests.

29. To this it must be added that in primary law anything done to facilitate a declaration of enforceability in cases in which the defendant was not granted the right to be heard before the judgment was given is on a collision course with the principle of a fair trial. It should be noted here as a general point that the provision of Article 34(2) of Regulation No 44/2001 is currently being examined by the European Court of Human Rights ('ECtHR'), whose Grand Chamber is expected to pronounce in the near future upon its compatibility with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') in the case *Avotiņš v. Latvia*. That case was also concerned with the impending declaration of enforceability of a decision given before the defendant had been heard and against which he had not filed an appeal. The Chamber's decision, taken by a slim majority in 2014,[13] ultimately found in this case that the legal framework of Article 34(2) of Regulation No 44/2001 and the declaration of enforceability were still consistent with Article 6 ECHR, but stressed that the defendant bringing the appeal was not without business experience. The ECtHR's reasoning here, which focuses strictly on the facts of the case, to declare that there has been no violation of Article 6 ECHR, suggests that its decision might have been different in the case of a defendant inexperienced in business.

30. Even though the factual situation presented to the ECtHR does not coincide in all points with the present case, its decision in *Avotiņš v. Latvia* must be regarded at least as a cautionary sign to proceed with a sense of proportion as regards the interpretation of the obstacles to recognition in Article 34(2) of Regulation No 44/2001 and not to lose sight of the legitimate concerns of the defendant, alongside the requirement to ensure the free movement of court decisions. This means that, beyond the mandatory regulatory content of the provision, the defendant should not be refused the possibility of claiming that there are obstacles to recognition.

31. Accordingly, there is no reason to expect a defendant who has not been summoned in sufficient time first of all to have to fight for leave to challenge a judgment after the time limits for appeal have expired by initiating relief proceedings and otherwise refuse him the possibility of claiming an obstacle to recognition. Rather, if the time limits for appeal have already expired when the defendant becomes aware of the decision affecting him it must be assumed within the meaning of the aforementioned provision that the defendant had no possibility of commencing proceedings to challenge the judgment.

32. Consequently, the answer to the first question referred for a preliminary ruling should be that Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that the possibility of commencing proceedings to challenge a judgment laid down therein merely covers the situation in which such a challenge can be brought within the time limit laid down in national law, but not the situation in which that time limit has already passed but it is possible to submit an application for relief from the effects of its passing and then — following the grant of such relief — actually to commence such proceedings.

13 — ECtHR, judgment in *Avotiņš v. Latvia* (CE:ECHR:2014:0225JUD001750207, in particular paragraph 51 et seq.); on this, see point 39 of my Opinion in *Meroni* (C-559/14, EU:C:2016:120).

B – *The second question*

33. By its second question the national court essentially wishes to know whether Article 19(4) of the Regulation on the service of documents must be interpreted as excluding the application of provisions of national law concerning the possibility of relief from the effects of the expiry of the time for appeal or as meaning that the defendant has the choice of availing himself of either the application for relief provided for in that provision or the relevant set of provisions under national law.

34. First of all, it must be remembered that the provision at issue in the Regulation on the service of documents, as explained above in point 22, does not appear to be applicable to the present case since there was no cross-border service of the document initiating the proceedings. The answer to the question referred for a preliminary ruling therefore applies only in the event that the Court should consider that Article 19(4) of the Regulation on the service of documents is applicable to the present case.

35. In that eventuality, it must be noted that Article 19 of the Regulation on the service of documents applies when the defendant has not entered an appearance where cross-border service has been made 'under this Regulation'. The first step required in Article 19(1) of the Regulation on the service of documents is that the judgment should not be given until it can be verified that the writ of summons was actually served on the defendant. Article 19(2) of the Regulation on the service of documents sets out exceptions to this principle to allow the continuation of the proceedings. Finally, Article 19(4) contains a provision to relieve the defendant from the effects of the expiry 'within a reasonable time after the defendant has knowledge of the judgment', namely to the benefit of a defendant who, through no fault of his own, had no knowledge of the writ of summons and did not defend himself for that reason but was still sentenced regardless. The third subparagraph of Article 19(4) of the Regulation on the service of documents allows Member States to provide for a cut-off period for the application for relief, but which shall in no case be less than 'one year following the date of the judgment'.

36. The French Republic has submitted a declaration on the one-year period and thus definitively settled the time limit for the application for relief *in the cases covered by Article 19(4) of the Regulation on the service of documents*. This rule leaves no room for coexistence with any provisions of national law diverging from it, such as Article 540 of the Code de procédure civile (French Code of civil procedure), which as regards the time limit for relief refers to the date on which the judgment was served and not, as in the case of the Regulation on the service of documents, to the 'date of the judgment'. I would agree with the Commission's view that in an individual case, the rules governing relief may turn out to be more unfavourable to the defendant under the Regulation on the service of documents than under national law. However, this is an inevitable consequence of the declaration on the one-year time limit submitted by the French Republic and must therefore be accepted as the arrangement wished for by this Member State.

37. Therefore, the answer to the second question referred for a preliminary ruling, to the extent that Article 19(4) is deemed relevant, should be that Article 19(4) of the Regulation on the service of documents should be interpreted as excluding the application of provisions of national law concerning the possibility of relief from the effects of the expiry of the time for appeal.

V – Conclusion

38. In the light of all the foregoing, I propose that the Court answer the questions referred as follows:

Article 34(2) of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that the possibility of commencing proceedings to challenge a judgment laid down therein merely covers the

situation in which such a challenge can be brought within the time limit laid down in national law, but not the situation in which that time limit has already passed but it is possible to submit an application for relief from the effects of its passing and then — following the grant of such relief — actually to commence such proceedings.

Article 19(4) of Regulation No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) is to be interpreted within the scope of application of that regulation as excluding the application of provisions of national law concerning the possibility of relief from the effects of the expiry of the period for appeal.