



CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL



Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

MODULE I

UNIT I

The European Judicial Area in Civil and Commercial Matters: Characteristic Features. The Principle of Mutual Recognition

DISTANCE-LEARNING COURSE
The Judicial Area in Civil and
Commercial Matters
2011 EDITION

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With the support of The European Union
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1.- EUROPEAN JUDICIAL AREA IN CIVIL AND COMMERCIAL MATTERS

1.1.- Concept, Background and Principal Accomplishments. The Stockholm Programme

In the 21st century the globalisation of social and economic relations, the huge development in the media, as well as the freedom of movement of people, goods, services and capital in the European Union has all lead to an increase in the movement of people and trade between companies within the European area. This is combined with marriages and common-law relationships between nationals of different States, as well as the consumption of goods and services produced in other countries, resulting in an increasing number of disputes in with an element affecting another EU Member State. The presence of a cross-border factor translates into greater complexity for the resolution of the dispute through the courts, with difficulties which affect access to justice and the proceedings themselves.

The national judicial systems cannot adequately resolve these disputes on their own, therefore community institutions have assumed the political objective of creating a European Judicial Area in which European citizens are guaranteed equal access to justice, in such a way that the borders of European countries are no longer an obstacle to the resolution of civil law matters or suits and enforcement of rulings in civil cases¹.

The construction process of the European Judicial Area began with the Treaty of Amsterdam (1997), and its fundamental milestones have been the Vienna Action Plan (1998), the Tampere European Council (1999), The Hague Programme (2004) and the recent Stockholm Programme (2010).

After the conclusions of the Tampere European Council, the second decisive step on this matter was taken at the so-called “Hague Programme”, which was approved by the European Council held in Brussels on 4 and 5 November 2005, with a term which ended in 2011. The last relevant step was taken in the Stockholm Programme², published in Official Journal no. C 155 of 4 May 2010; as well as the Action Plan applying the Stockholm Programme³, which provides a roadmap for the implementation of the political priorities set out in the Stockholm Programme for the area of justice, freedom and security between 2010 and 2014.

¹ As established in the Conclusions of the Tampere European Council (1999): “In a genuine European area of justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Judgements and decisions should be respected and enforced throughout the Union. Better compatibility and more convergence between the legal systems of Member States must be achieved.”

² See: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010XG0504\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010XG0504(01):EN:NOT)

³

See: http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/jl0036_en.htm



1.2.- The Treaty of Lisbon: Foundations for Civil Judicial Cooperation

The so-called “Treaty of Lisbon”⁴ was implemented through a series of modifications to two treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

This Treaty establishes that the Union will develop judicial cooperation in civil matters with cross-border effects, based on the principle of mutual recognition of judgements and decisions in extrajudicial cases. This cooperation may include the adoption of approximation measures of the legal and regulatory provisions of the Member States. It also adds that, to the previous ends and in particular when necessary for the smooth functioning of the domestic market, the European Parliament and the Council will adopt, in accordance with the ordinary legislative procedure, measures to guarantee:

- mutual recognition and enforcement between Member States of judgements and of decisions in extrajudicial cases;
- cross-border service of judicial and extrajudicial documents;
- the compatibility of the rules applicable in the Member States concerning conflict of laws and jurisdiction;
- cooperation in the taking of evidence;
- effective legal protection;
- the elimination of obstacles to the proper functioning of civil procedures, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States;
- the development of alternative methods of dispute resolution;
- support for the training of the judiciary and judicial staff.

However, the measures relative to family law with cross-border implications will be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament. The Council, acting on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament. National Parliaments will be informed of the proposal referred to in the second paragraph. In the event that a national Parliament makes known its objection within six months of the communication, the decision will not be adopted. In the absence of opposition, the Council may adopt the decision."

1.3.- General Principles

The strategy chosen for the construction of the European Judicial Area⁵ is not focused on the application of advanced political-legal integration techniques (based on the

⁴ See http://europa.eu/lisbon_treaty/full_text/index_en.htm

⁵ See Joaquín DELGADO MARTÍN, “Práctica de Tribunales. Revista de Derecho Procesal Civil y Mercantil”, 3rd year, number 28, June 2006, p 5 *et seq*



creation of EU institutions) but on the grounds of the functioning of the national legal systems, using measures:

- Primarily targeted at the recognition of the impact of judgements handed down by a court in a Member State on the rest of the European territory (principle of mutual recognition);
- And, secondly, targeted at improving access to justice and procedural applications in civil proceedings with is a cross-border element. Each of these strategic linchpins is examined below.

2.- EXTRATERRITORIAL EFFECTS OF JUDGEMENTS: THE PRINCIPLE OF MUTUAL RECOGNITION

Following the provisions of the Tampere European Council of October 1999, it can be asserted that the principle of mutual recognition has become the cornerstone of judicial cooperation in the European Union and the construction of the European Judicial Area, both in civil and criminal matters.

To this regard, the Stockholm Programme states that “the European Council considers that the process of abolishing all intermediate measures (the *exequatur*), should be continued during the period covered by the Stockholm Programme. At the same time, the abolition of the *exequatur* will also be accompanied by a series of safeguards, which may be measured in respect of procedural law as well as of conflict of law rules. Mutual recognition should, moreover, be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States’ legal systems, including public policy, and national traditions in this area.”

2.1.- Essential Characteristics of the Principle of Mutual Recognition

The characteristic features which, essentially, shape the principle of mutual recognition of judgements are as follows:

- Respect for the diversity of national legal systems;
- Mutual trust between judicial systems;
- Dynamic nature of the idea of mutual recognition: the need for additional measures to progress towards improved levels.

2.2.- Respect for Diversity

2.2.1.- Origin of mutual recognition: alternative to the harmonisation of legislation

To eliminate the obstacles to the common market, the TEEC previously opted for the harmonisation of legislation technique, although the difficulties found in its application determined a new strategy. Thus the principle of mutual recognition was born in the field of free circulation of goods, subsequently being extended to the free



circulation of services, as an alternative to the harmonisation of legislation and based on the great difficulties inherent in the harmonization process itself⁶.

When its application in the field of the European judicial area was proposed, it had the same goal: to dynamise the progress in the configuration of free circulation of judgements given the great difficulties inherent in the harmonisation of legislation. Thus, the development of the common judicial area took place with regards to the unique traits of the national legal systems.

In the European judicial area, the principle of mutual recognition means that the judgements delivered by the courts in a Member State will be valid in accordance with that laid down in its national legislation, and will be recognised and enforced in any other Member State without monitoring (or with very limited monitoring) by the courts in the Member State in which enforcement is sought⁷. Thus, the courts in the different EU Member States are called upon to assume a significant role in the process of construction of the European Judicial Area.

2.2.2.- Plurality of National Judicial Systems

Since its beginnings, the European Judicial Area has been built on foundations constituted by the national judicial powers, belonging to different sovereign States, each with its own characteristics. It is the judicial bodies in each State who are responsible for exercising the jurisdictional function in proceedings with any “foreign” element, applying their national legislation and/or that of Community Law itself⁸. As has been mentioned previously, the techniques used do not question the existence and functioning of national judicial systems⁹, instead instruments of recognition for the judgements handed down by the judicial bodies of other States (mutual recognition) and instruments of coordination of action between the judicial authorities of different countries are used.

Perhaps one of the principal reasons for the great relevance of the principle of mutual recognition in the creation of the European Judicial Area is, precisely, respect for the diversity of the national judicial systems, as it enables the judicial area to be implemented maintaining the differences between each State’s system.

2.3.- Mutual Trust

As has been seen, the relevance of mutual recognition is based on the respect for the diversity of the national judicial systems, which is mirrored in mutual trust, i.e., effective functioning of the principle of mutual recognition requires genuine trust in the

⁶ See Manuel LÓPEZ ESCUDERO, “La aplicación del principio del reconocimiento mutuo en el Derecho Comparado”, *Gaceta Jurídica de la CE y de la Competencia*, GJ 1993 D-19, p 121 *et seq.*

⁷ See Fernando IRURZUN MONTORO, “La Convención Europea. Líneas de desarrollo en materia de cooperación judicial penal”, *Cuadernos de Derecho Judicial*, Volume on “Derecho penal supranacional y cooperación jurídica internacional”, edited by the General Council of the Judiciary, Madrid, 2004, p 528.

⁸ To this regard, let us be reminded that the EJC has been organised around the principle of subsidiarity, in such a way that this body has only been reserved those powers that cannot be attributed to national courts; see Gil Carlos RODRÍGUEZ IGLESIAS, “Consideraciones sobre la dimensión judicial de la Unión Europea en el umbral del siglo XXI”, p 425.

⁹ Gil Carlos RODRÍGUEZ IGLESIAS, “Consideraciones sobre...”, *op. cit.*, p 435.



functioning of the judicial systems of the EU Member States. Substandard functioning of the national judicial power, violating the fundamental rights or the procedural guarantees, will impede the elimination of intermediary measures by the enforcing State and will distract from achieving full mutual recognition.

As the Stockholm Programme states, “one of the consequences of mutual recognition is that rulings made at national level have an impact in other Member States, in particular in their judicial systems. Measures aimed at strengthening mutual trust are therefore necessary in order to take full advantage of these developments. The Union should support Member States’ efforts to improve the efficiency of their judicial systems by encouraging exchanges of best practice and the development of innovative projects relating to the modernization of justice.”

2.3.1.- Abstract Trust Between Legal Systems

At this point it would be advisable to bear in mind that we are faced with the impacts of a judgement¹⁰, i.e., handed down by an authority with certain guarantees of independence. When compared with other State bodies which also apply the legal system, the jurisdiction is essentially characterised by a statutory position of the judge designed to guarantee its independence¹¹ in the egalitarian application of the law to the specific case as an impartial subject¹². Thus, the guarantees surrounding exercising the jurisdictional function determine that the principle of mutual recognition acquires a special significance when applied to judgements¹³.

As the European Charter on the Statute for Judges correctly states¹⁴, the statute is not just an end in itself, but also a means of guaranteeing that the protection of people’s rights is entrusted to jurisdictions and judges with the necessary guarantees to render this protection effective; it adds that these guarantees in favour of people lie

¹⁰ As Mónica GUZMÁN ZAPATER states, foreign rulings should comply with some formal and substantive requirements essentially aimed at guaranteeing the effective legal protection of the parties involved and, in particular, the procedural position of the defendant in the main proceedings; in “Un elemento federalizador para Europa: el reconocimiento mutuo en el ámbito del reconocimiento de decisiones judiciales”, *Revista de Derecho Comunitario Europeo*, p 430.

¹¹ See Javier DELGADO BARRIO, “El Juez en la Constitución”, in the collective work “Constitución y Poder Judicial”, edited by the General Council of the Judiciary to mark the 15th anniversary of the Spanish Constitution, Madrid, 2003, pp 123 *et seq*; Pablo CACHÓN VILLAR, “La ubicación del Poder Judicial entre los poderes del Estado”, *Ponencias de la Escuela de Verano del Poder Judicial 1998*, edited by the General Council of the Judiciary, Madrid, 1999, pp 344 *et seq*.

¹² See Perfecto ANDRÉS IBÁÑEZ, “Poder Judicial y Juez en el Estado constitucional de Derecho. El sistema de Consejo”, *Cuadernos de Derecho Judicial*, Volume on “La experiencia jurisdiccional: del estado legislativo de derecho al estado constitucional de derecho”, edited by the General Council of the Judiciary, Madrid, 1999, p 18.

¹³ As the European Charter on the Statute for Judges correctly states (Approved in a multilateral meeting organised by the Council of Europe which took place in Strasbourg from 8 to 10 July 1998), the statute is not just an end in itself, but also a means of guaranteeing that the protection of people’s rights is entrusted to jurisdictions and judges with the necessary guarantees to render this protection effective; it adds that these guarantees in favour of people lie in the competence (in the sense of know-how), independence and impartiality. See also Report No. 1 of the Consultative Council of European Judges on the rules regarding independence and responsibility of Judges, approved in Strasbourg on 23 November 2001

¹⁴ Approved in a multilateral meeting organised by the Council of Europe which took place in Strasbourg from 8 to 10 July 1998.



in the competence (in the sense of know-how), independence and impartiality¹⁵. And, thus, the last safeguard of the rule of law has been entrusted to Judges¹⁶.

The work necessary to progress in the process of construction of the European Judicial Area must attend to this reality.

2.3.2.- Specific Trust Between Courts

However, it is not necessary solely with an abstract trust between systems; also of a crucial nature is the concurrence of a specific trust between the courts in the different countries called to be protagonists in the European judicial area¹⁷. This framework defines the grounds for the development of a new judicial culture.

2.4.- Dynamic Nature of the Idea of Mutual Recognition. Need for Additional Measures

2.4.1.- The Extent of the Principle of Mutual Recognition

Full mutual recognition will exist when court orders produce effects in the territory of all the European Union Member States without grounds for any type of monitoring by the Judge in the requested State, thus having the same consideration as a judgement handed down in this State. In short, it requires the concurrence of two requirements: the elimination of any monitoring by the courts in the State of destination; and the resulting in the same effects in all the Member States.

In this context the mutual recognition formula is born: the lower the number of points subject to monitoring by the court of enforcement, the greater the application of the principle of mutual recognition¹⁸, with the resulting streamlining and acceleration of the proceedings. A greater quantity of points to be monitored, however, implies a lower level of application of mutual recognition, and therefore greater delay. In short, there are different levels of application of mutual recognition.

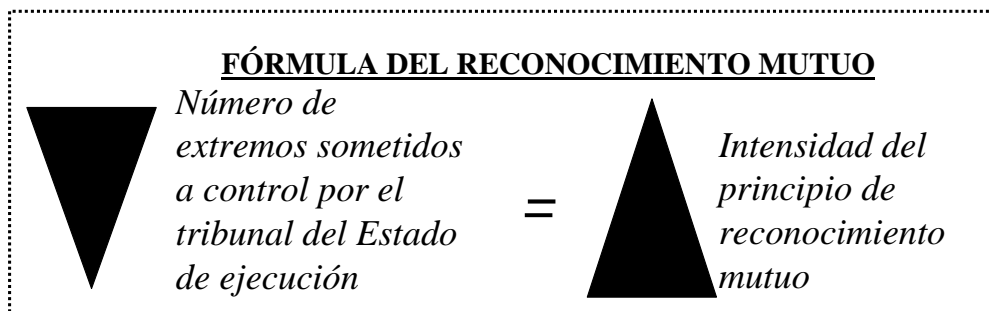
¹⁵ See also Report No. 1 of the Consultative Council of European Judges on the rules regarding independence and responsibility of Judges, approved in Strasbourg on 23 November 2001

¹⁶ Celso RODRÍGUEZ PADRÓN, “La conformación del Poder Judicial”, editorial DIJUSA, Madrid, 2005, p 27,

¹⁷ As Anne WEYEMBERG states, the implementation of an effective and effective area is not solely based on the existence and adoption of regulatory texts, but also on their application in practice by the actors on the ground; in “L’harmonisation des législations: condition de l’espace pénal européen et révélateur de ses tensions”, Editions de L’Université de Bruxelles, Bruxelles, 2004, p 146.

¹⁸ See Joaquín DELGADO MARTÍN, “La orden de detención europea y los procedimientos de entrega entre los Estados miembros de la Unión Europea”, Cuadernos de Derecho Judicial, Volume on “Derecho penal supranacional y cooperación jurídica internacional”, edited by the General Council of the Judiciary, Madrid, 2004, p 297.





FORMULA FOR MUTUAL RECOGNITION

Number of points subject to monitoring by the court in the State in which enforcement is sought = Strength of the principle of mutual recognition

Despite the unquestionable progress, it is true that achievement of full mutual recognition is still a long way off. In any case, effective progress towards improved levels of mutual recognition depends on the real increase in mutual trust between the European Union Member States, for which the adoption of additional measures aimed directly at increasing this trust is necessary.

2.4.2.- Additional Measures: Increase in Mutual Trust

The establishment of the principle of mutual trust entails the adoption of a series of additional measures aimed at facilitating mutual trust, among which the harmonisation or approximation of legislation can be highlighted. From this perspective, harmonisation is not established as an alternative to mutual recognition, but as its necessary adjunct¹⁹. It must be borne in mind that the instruments for the improvement of cooperation between courts in different EU Member States also facilitate the application of the principle of mutual recognition²⁰; these instruments are analysed in Unit 2.

3.- MEASURES FOR FACILITATING THE PROCESSING OF PROCEEDINGS WITH A CROSS-BORDER ELEMENT

3.1.- Improving International Private Law Instruments

When a citizen or company wishes to file a suit with regards to an international private law situation (of a cross-border nature), it should address four basic questions:

¹⁹ Joachim VOGEL, "Cooperation in Criminal Matters in the European Union: Five Major Tendencies. Five Proposals for Future Action", Paper presented at the International Conference on the European Judicial Area, Toledo 29 October 2003.

²⁰ Mónica GUZMÁN ZAPATER, "Un elemento federalizador...", p 435.





1.- Which <u>court</u> is seised of the case?	<ul style="list-style-type: none"> • <u>International judicial jurisdiction</u> (conflicts of jurisdiction)
2.- What <u>material legislation</u> is applicable by the court?	<ul style="list-style-type: none"> • Regulations on <u>conflicts of law</u>
3.- What <u>procedural regulations</u> are applicable by the court?	<ul style="list-style-type: none"> • Internal procedural law
4.- What <u>impact</u> does the judgement of a court have outside the country in which it is based?	<ul style="list-style-type: none"> • Extraterritorial efficiency of judgements <ul style="list-style-type: none"> ○ <u>Recognition</u> ○ <u>Enforcement</u>

As well as question 4 (recognition and enforcement of judgements) which has already been discussed in a previous section (principle of mutual recognition), we should consider the analysis of the three remaining questions.

3.1.1.- Which Court Has Jurisdiction Over the Action Brought?

Over the last few years, the European Union has worked intensely on international judicial jurisdiction (question 1), as well as in the field of the recognition and enforcement of judgements (question 4). The following regulations should be highlighted in this field: Regulation (EC) no. 44/2001 of the Council, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters; Regulation (EC) no. 2201/03, of the Council, of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility; Regulation 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; not forgetting Regulation (EC) no. 1346/2000 of the Council, of 29 May 2000, on insolvency proceedings.

3.1.2.- What Material Legislation is Applicable by the Court?

Over the last few years significant instruments on conflicts of laws have been approved, notably: Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"); and Regulation EC 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"); as well as Regulation 4/2009 of the Council of 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters related to maintenance obligations

3.1.3.- Which Procedural Regulations Should be Applied by the Court?

The court seised of the case will apply the regulation for the proceedings established by the internal legal system of the State in which the court is based. That said, the community institutions are adopting measures which have an impact on the processing of proceedings, and which are examined in other sections of this module: removing obstacles to the proper functioning of civil proceedings, improving access to



justice in cross-border disputes, and speeding up procedural actions in another EU country (judicial assistance).

3.2.- Improvement to the Conditions of Access to Justice

Community institutions have assumed the goal of ensuring that the incompatibility and complexity of national legal and judicial systems in the different Member States, or the difference between them, does not deprive or dissuade individuals and companies from exercising their rights. This consists of removing the obstacles which prevent or hinder the legal protection of rights, i.e., facilitating access to justice in disputes of a cross-border nature. To this end, the EU is focusing principally on three directions: legal aid, the simplification and acceleration of proceedings, and alternative methods of conflict resolution.

3.2.1.- Legal Aid

Of mention in this field is Council Directive, of 27 January 2003, to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes²¹. This Directive establishes a common minimum standard which should be applied to all natural persons involved in this type of dispute²², and which includes pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance and representation in court, and exemption from the cost of proceedings of the recipient (article 3).

3.2.2.- Simplification and Acceleration of Proceedings

The majority of the Member States have established simplified and accelerated proceedings in cases in which the claim value is lower than a certain threshold ("small claims" procedure), or in which the debtor does not contest the debt ("order for payment"). Since these procedures differ in the different countries, the EU seeks to establish common regulations for simplified and accelerated proceedings. It should be taken into account that cross-border disputes affect large companies, but also consumers and small and medium companies.

Of mention in this field is Regulation EC no. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment; and Regulation EC no. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

3.2.3.- Alternative Methods of Dispute Resolution

To this regard, the EU institutions have drawn up different instruments such as the Green Paper on alternative dispute resolution in civil and commercial law (April 2002), as well as the Code of Conduct for Mediators (July 2004).

²¹ Commission Decision of 9-11-2004 establishes a standard formula for applications in accordance with this Directive.

²² Ángeles LARA AGUADO, "Litigios transfronterizos y justicia gratuita", Revista de Derecho Comunitario Europeo, number 17, January-April 2004, p 87; see also Tomás GONZÁLEZ CUETO, "Acceso a la justicia: Directiva sobre asistencia jurídica gratuita", Diario La Ley, number 5613, 17 September 2002, pp 1 *et seq.*





The most significant instrument, however, is Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

WEBSITE LINKS

1.- Compendium of Community Legislation on Judicial Cooperation in Civil and Commercial Matters (December 2009)

In Spanish:

http://ec.europa.eu/civiljustice/publications/docs/civil_justice_compendium_2009_es.pdf

In English:

http://ec.europa.eu/civiljustice/publications/docs/civil_justice_compendium_2009_en.pdf

In German:

http://ec.europa.eu/civiljustice/publications/docs/civil_justice_compendium_2009_de.pdf

In French:

http://ec.europa.eu/civiljustice/publications/docs/civil_justice_compendium_2009_fr.pdf

2.- European Judicial Network in Civil and Commercial Matters

<http://ec.europa.eu/civiljustice>

3.- European Judicial Atlas in Civil Matters

http://ec.europa.eu/justice_home/judicialatlascivil

4.- Vademecum of International Judicial Assistance

<http://www.prontuario.org>

5.- Please see the links in the document “**A Virtual Journey Through the European Judicial Area in Civil and Commercial Matters**”, which are included as one of the additional materials in this Course.

