

The remedies and recourses in European civil procedure after the intended abolition of the *exequatur*

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Introduction

The term „European civil procedure“ should be understood as comprising the standard term in legal writing. It refers to primary and secondary EU legislation concerning judicial enforcement of subjective rights in civil procedure in several EU Members States. This is characterised by uniform

interpretation and exclusive competence for such an interpretation by the Court of Justice of the European Union.¹ The term “Regulations on European civil procedure” is a simplification used in this text to describe the following regulations and other legal acts adopted (also) by EU institutions such as the old repealed Regulation No 44/2001,² Regulations No 1346/2000,³ 1206/2001,⁴ 2201/2003,⁵ 805/2004,⁶ 1896/2006,⁷ 1393/2007,⁸ 861/2007,⁹ 4/2009,¹⁰ 650/2012,¹¹ 1215/2012.¹² Although it is not an EU regulation, the new Lugano Convention should be considered as part of EU civil procedure.¹³ The same applies to the Directive No 2003/8¹⁴. However, this enumeration is not the final stage of the European civil procedure *in statu nascendi*.¹⁵ One might also refer to the forthcoming regulation on mutual recognition of protection measures in civil matters.¹⁶ The essence of this text is the development in EU law concerning remedies after the abolition of the intermediate proceedings of *exequatur* in enforcement proceedings.

When dealing with cross-border enforcement of judicial decisions, the first issue is the precise legal distinction between a mere recognition (the *exequatur*) and enforcement.¹⁷ It would appear that such a distinction is not as evident to a *common law* lawyer than it is to *civil law* lawyers. It is asserted that “in most legal systems the distinction between recognition and enforcement is clear. Recognition refers to the *res judicata* effect of the foreign judgment which spreads to the country of reception, while enforcement pertains to an act of material execution on the assets or of committal of persons”¹⁸ It is stated that the *exequatur* “is placed just before the enforcement and it serves the

¹J. Kropholler, J. von Heim, Europäisches Zivilprozessrecht, 9th edition, Frankfurt am Main, 2011, pp. 11 – 18, J. Adolphsen, Europäisches Zivilverfahrensrecht, Springer, Heidelberg, 2011, p. 6 – 11.

²Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

³Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, p. 1.

⁴Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

⁵Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

⁶Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15.

⁷Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399, 30.12.2006, p. 1.

⁸Regulation (EC) 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), and repealing Council Regulation (EC) No 1348/2000, OJ L 324, 10.12.2007, p. 79.

⁹Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1.

¹⁰Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, p. 1.

¹¹Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107.

¹²Regulation (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, OJ L 351, 20.12.2012, p. 1.

¹³Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007/712/EC, OJ L 339, 21.12.2007, p.3.

¹⁴Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, p. 41.

¹⁵P. Franzina, Les acteurs de l'espace judiciaire européen en matière civile, p. 9 and 10 in: M. Douchy-Oudot, E. Guinchard, La justice civile européenne en marche, Dalloz, Paris 2012.

¹⁶Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, <http://register.consilium.europa.eu/pdf/en/13/st06/st06838.en13.pdf> (visited on 8 March 2013).

¹⁷K. D. Kerameus, Enforcement in the International Context, Recueil des Cours de l'Académie de droit international de la Haye, Vol. 264 (1997), p. 334 – 338, paras. 96 - 99.

¹⁸Kerameus, op. cit., para. 96, see also B. Audit, Droit international privé, 5th edition, Economica, Paris 2008, para. 457, for the definition of three levels of *exequatur* see H. De Cock, Effets et exécution des jugements étrangers, Recueil

enforcement, however the *exequatur* is not enforcement”¹⁹ or “the *exequatur* solely assimilates a national and a foreign title.”²⁰ According to CJEU case law the *exequatur* is described as the second stage of the procedure.²¹ The next step is the proceedings of enforcement.

In classic private international law proceedings of cross border enforcement comprise three stages: the first stage is the litigation in the state of origin, the second intermediate phase is the *exequatur* in the enforcement state and the third phase is the enforcement proceedings in the state in which enforcement is sought.²² The *exequatur* used to be the standard legal instrument of a state in which the enforcement was sought allowing to perform a certain review of foreign enforceable (and final) judicial decisions. On the other hand, the *exequatur* was also necessary to give to a foreign compelling judicial decision that is *ipso jure* capable of enforcement in the state of origin the quality of an enforceable decision or enforcement title in the state in which enforcement is being sought.²³ A foreign *titulus executionis* is then considered as a national title by virtue of the principle *nulla executio sine titulo*.²⁴ In history such a review has ranged from a *révision au fond* to an extremely limited marginal review. On the other hand the *exequatur* was open to challenge by various legal remedies (opposition, appeal, etc) in the state in which enforcement was sought. Perhaps the most interesting defence of the *exequatur* is to be found in constitutional law. *Acta jure imperii* adopted by foreign *fora* lack the democratic legitimisation that is to be found in national (judicial) authorities.²⁵ Newer developments have progressively reduced the importance of the *exequatur*; legal writers have started to speak of a recognition *ipso jure*.²⁶ The European integration is now creating a phenomenon of direct enforcement of enforceable judicial decisions rendered in an EU Member State of origin without any intermediate proceedings in an EU Member State in which enforcement is being sought.²⁷ In other words, judicial decisions rendered in the EU Member State of origin (adjudicatory jurisdiction) are being enforced in an EU Member State in which enforcement is sought (jurisdiction to enforce) without any intermediary (judicial) proceedings for constituting and creating enforceable effects of a foreign judicial decision of a Member State of origin under the *lex fori* of the Member State in which enforcement is sought.²⁸ A *titulus executionis*

des cours de l'Académie de droit international, vol. 10 (1925), p. 431 (437-440).

¹⁹A. Remiro Brotóns, La reconnaissance et l'exécution des sentences arbitrales étrangères, Recueil des Cours de l'Académie de droit international de la Haye, vol. 184 (1985), para. 88 (p. 256)

²⁰G. de Leval, Eléments de procédure civile, 2nd edition, Larcier, Brussels, 2005, p. 268.

²¹CJEU, Case C-619/10 Trade Agency [2012], not yet reported in the ECR, para 31.

²²de Leval, op. cit., p. 268.

²³An enforceable national condemnatory judicial decision is *ipso jure a titulus executions*.

²⁴de Leval, op. cit., p. 269. P. Meyer; V. Heuzé, Droit international privé, 9th edition, Montchrestien, Paris 2007, para. 426. Professors Meyer and Heuzé speak of “*force exécutoire*” of a foreign *titulus executionis*. It has to be said that lawyers in French speaking countries make a distinction between la *force exécutoire* and le *titre exécutoire* (de Leval, op. cit., p. 257). As far as enforceability in the addressed state is concerned legal writers have always stated that “*jamais on ne reconnaîtra, on n'exécutera un jugement étranger s'il ne possède pas la qualité d'être exécuté par les tribunaux civils et leurs huissiers dans son pays d'origine*” (H. Sperl, L'exécution des jugements étrangers, Recueil des Cours de l'Académie de droit international de la Haye, vol. 36 (1931), p. 385 (431)).

²⁵M. Weber, Europäisches Zivilprozessrecht und Demokratieprinzip, Veröffentlichungen zum Verfahrensrecht 61, Mohr Siebeck, Tübingen, 2009, p. 167.

²⁶H. Schack, Internationales Zivilverfahrensrecht, 5th edition, C.H. Beck, Munich 2010, para. 971, J. Leifeld, Das Anerkennungsprinzip im Kollisionsrechtssystem des internationalen Privatrechts, J. C. B. Mohr, Tübingen 2010, p. 140 and 141, P. Wautelet, En guise d'introduction : sources et concepts de base, p. 28 et 29, in: P. Wautelet, Relations familiales internationales, L'actualité vue par la pratique, Commission Université Palais, Vol. 118, Anthemis, Liège 2010, Audit, op. cit., paras. 481-485, G. Monteleone, Manuale di diritto procesuale civile, Vol. II, 5th edition, CEDAM, Milano 2009, p. 491. Professor Monteleone explains that foreign judgments are automatically accepted in Italian legal order as if they were Italian ones. However, one might add that Italian legal situation was modified as explained by prof. Consolo (C. Consolo, Il nuovo rito sommario (a cognizione piena) per il giudizio di accertamento dell'efficacia delle sentenze straniere in Italia dopo il D.LGS N. 150/2011, Rivista di diritto internazionale privato e processuale 68(2012), vol. 3, p. 513 et seq.).

²⁷Th. Rauscher, Internationales Privatrecht, 4th edition, C. F. Müller, Heidelberg 2012, paras. 2270 and 2271.

²⁸R. A. Schütze, Die Doppelreuequierung ausländischer Zivilurteile, in: J. Bernreuther/R. Freitag/St. Leible/H. Sippel/U. Wanitzek, Festschrift für Ulrich Spellenberg, Sellier, 2010, p. 517 and 518, Schack, op. cit., paras. 865 et seq..

in the EU Member State of origin means that this title shall be enforced in the whole European judicial area as such and accepted in all EU Member States as such.²⁹ This, however, is an important evolution of international civil procedure.³⁰ The effects of the abolition of the *exequatur* are best seen in the *Povse* case. “A certified judgment (i.e. a foreign enforceable title) cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child.”³¹

In the EU some of the old doctrines in private international law on the importance and nature of the *exequatur* like the doctrine of territorial transfer of effects of a foreign judgment or title import are (slowly) losing their importance.³² Such a development did not come as *deus ex machina*, it was just a step in the gradual evolution of European civil procedure.³³ In 1999 the Tampere European Council had announced a gradual abolition of the *exequatur* by calling „upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State.“ It instituted political guidance for automatic recognition „throughout the Union without any intermediate proceedings or grounds for refusal of enforcement“.³⁴ We might also cite the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.³⁵ It had already been observed, that „such considerations aim at perfect equal treatment of all enforcement titles and the unlimited territorial implementation in the EU (*ratione loci*) of all effects of a judicial decision in the European judicial area.“³⁶ The Stockholm programme is extremely specific on this issue: “Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union.”³⁷ As a result, an enforceable judgment given by the courts of a Member State of origin should be treated as if it is given in the Member State addressed. This doctrinal assumption has now been lately confirmed by the Recital No 26 in the statement of reasons (preamble) to the Regulation No 1215/2012 by the following words: “Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure”.³⁸ The doctrinal impulse for “**great and general**” abolition of the *exequatur* was finally codified and proposed by German Professors Hess, Pfeiffer and Schlosser in their study by reference to sectorial Regulations No 805/2004, 1896/2006 and 861/2007.³⁹ This impulse has then been used by the Commission in preparation of the Regulation

²⁹W. H. Rechberger, D.-A. Simotta: Zivilprozessrecht, 8th edition, Manz, Vienna, 2010, para. 1220.

³⁰A. Stein, Der Europäische Vollstreckungstitel für unbestrittene Forderungen – Einstieg in den Ausstieg aus dem Exequaturverfahren bei Auslandsvollstreckung, EuZW 22/2004, p. 679.

³¹CJEU, Case C-211/10 PPU, Povse [2010] ECR I-6673, para. 83.

³²See for the brief overview of the doctrinal debate in J. Adolphsen, op. cit., p. 160-162. European law defined the *Theorie der Wirkungserstreckung* in terms: „A foreign judgment which has been recognised by virtue of Article 26 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given”, CJEU, Case 145/86, Hoffmann [1988] ECR 645, para. 9.

³³See the exact narration of development in G. Biagioni, L’abolizione dei motivi ostativi al riconoscimento e all’esecuzione nella proposta di revisione del regolamento Bruxelles I, Rivista di diritto internazionale privato e processuale 67(2011), vol. 4, p. 971 (972 and 973).

³⁴Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, para. 34.

³⁵OJ 2001 C 12, 15. 1. 2001, p. 1.

³⁶H.-P. Mansel, Anerkennung als Grundprinzip des Europäischen Rechtsraums, RabelsZ 70 (2006), p. 651 (663).

³⁷The Stockholm Programme - An open and secure Europe serving and protecting the citizen, Council Document No 17024/09.

³⁸However, in typical European doublespeak the real motivation is then disclosed in the second sentence of the recital that reads as follows: “In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed.”

³⁹B. Hess, Th. Pfeiffer, P. Schlosser, Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, Ruprecht-Karls-Universität Heidelberg, Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht, Heidelberg 2007, paras 903 – 905. This study also confirms the *communis opinio doctorum* that the most complete and influential legal doctrine in international civil procedure comes from Germany (see M.

No 1215/2012, which shall in the future serve as the *lex generalis* also in future European civil procedure.⁴⁰ The new Regulation No 1215/2012 is the culmination of the abolition of *exequatur* and reviews performed in the EU Member State in which enforcement is sought of judicial decisions originating in an EU Member State.⁴¹

However, the end of old (albeit nowadays more doctrinal) problems linked to the *exequatur* does not preclude the creation of new ones. It is true that problems of judicial cooperation like the level of protection of fundamental rights in judicial cooperation in civil matters in various Members States are being discussed.⁴² The issue of remedies in the Member State of origin and in the Member State in which the enforcement is sought is therefore gaining new and somehow different importance, as substantive and procedural defences (*exceptiones*) raised by the judgment debtor can no longer be submitted during the intermediary phase of the *exequatur*. The judgment debtor must be allowed to raise his defences (*exceptiones*) in a different manner (be it during the trial phase in the Member State of origin or during the enforcement phase in the Member State of enforcement).⁴³

In order to understand the interplay between purely national and European law created by the abolition of the *exequatur* in the field of remedies in civil procedure the first chapter examines issues of European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: the „ECHR“) and EU law in civil procedure on national level (A.). The second chapter examines modifications in the EU legislative framework in civil procedure *de lege lata* and *de lege ferenda* (B.).

A. European civil procedure is conditioned by requirements of the ECHR and EU law

One consideration concerning the interaction between national and European civil procedure is to be found in the nature of EU law. EU law also applies in the field of private international law, civil procedure and international civil procedure (II.). One must also not forget the requirements of the ECHR (I.).

I. Requirements of the ECHR

The starting point might be the respect of fundamental rights. Indeed, „*if the enforcement State grants an exequatur, it will in most cases interfere with human rights of the judgment debtor. If, on*

Virgós Soriano, F. J. Garcimartín Alférez, Derecho Procesal Civil Internacional Litigación Internacional, 2nd edition, Thomson Civitas, Madrid: 2007, p. 783).

⁴⁰See e.g. Commission Documents: *COM(2009) 174 final* Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *COM(2009) 175 final* Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *COM(2010) 748 final* Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast).

⁴¹*D. Müller*, Die Abschaffung des Exequaturverfahrens nach dem EuGVVO-Reformentwurf – Wegfall überflüssiger Gläubigerblockaden oder Abschied vom effektiven Rechtsschutz für den Schuldner, *ZeuS* 15 (2012) vol. 3, p. 329 (332).

⁴²*G. Britz*, Grundrechtsschutz in der justiziellen Zusammenarbeit – zur Titelfreizügigkeit in Familiensachen, *Juristenzeitung* 68 (2013), vol. 3, p. 105 *et seq.* and *Th. Schilling*, The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights, *Rivista di diritto internazionale privato e processuale*, 68(2012), vol. 3, p. 545 (547), the issue already addressed as “*awareness and understanding of the quality of justice provided by other members*” by *A. T. von Mehren*, Recognition and Enforcement of Foreign Judgments, *Collected Courses of the Hague Academy of International Law*, vol. 167 (1980 II), p. 87 and 88.

⁴³On that specific question see *B. König*, Die Oppositionsklage (§35 EO) und Art. 22 Nr. 5 EuGVVO, *Österreichische Juristen-Zeitung* 60 (2006), vol. 23/24, p. 931 *et seq.*

the other hand, an *exequatur* is denied, that decision might interfere with human rights of the judgment creditor.”⁴⁴ Therefore, in order to understand the nature of opposition and similar remedies against direct enforcement of foreign enforceable judicial decisions without any intermediate procedures in European civil procedure, one must start with the ECHR. The most important provisions of the ECHR being Art. 6(1) and Art. 13.⁴⁵

1. ECHR is also used for assessing the validity of regulations on European civil procedure

The starting point might also comprise Art. 6(3) TEU imposing for the time being a substantial equivalence between the ECHR and the TEU. Indeed, under Art. 6(3) TEU „*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law*“. This means that the validity of EU regulations and directives on civil procedure will be assessed by reference to the ECHR. However, from the point of view of an individual, the fact that Member States of the EU have transferred some sovereign powers to the EU and are bound by EU law comprising also regulations and directives on European civil procedure does not mean that Member States are not bound by the requirements of the ECHR when implementing such regulations.⁴⁶ On the one hand the CJEU declared that „*the principle of effective judicial protection is a general principle of [EU] law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.*“⁴⁷ Therefore the CJEU was able by referring to the rights of defence as a general principle of EU law to state that the “*European Union law must be interpreted as precluding certification as a European Enforcement Order within the meaning of Regulation No 805/2004 of a judgment by default issued against a defendant whose address is unknown.*”⁴⁸

On the other hand, the ECHR is an international treaty and parties to the treaty are bound by the *pacta sunt servanda* principle (Art. 26 of the 1969 Vienna Convention), even if they conclude other treaties comprising a transfer of parts of national sovereignty to an international organisation like the EU, otherwise there would be no *effet utile* of the ECHR.⁴⁹ This might be quite a heretical consideration for lawyers specialising in EU Law. However, international law is the basis of EU law and even though it is widely recognised in legal writing that the EU has some “constitutional” characteristics,⁵⁰ legal acts referred to by the CJEU as “constitutional charter of a Community based

⁴⁴Schilling, The Enforcement, p. 546. See from the point of view of the debtor also J. Stamm, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, Habilitationsschrift, J. C. B. Mohr, Tübingen, 2007, p. 212.

⁴⁵However, both cited provisions are not the only connecting point between European civil procedure and the ECHR. See as far as Art. 8 ECHR is concerned for example P. Kinsch, Private International Law Topics Before the European Court of Human Rights, Selected Judgments and Decisions, Yearbook of Private International Law 13 (2011), p. 37 (48 and 49).

⁴⁶See to that effect, ECHR case *Bosphorus v. Ireland* [GC] (no 45036/98, ECHR 2005-VI), para. 154, case *Michaud v. France* (no 12323/11, not yet reported, paras. 102 – 104, and 112-116). See also questions opened by B. Nunner-Krautgasser, Ph. Anzenberger, General Principles in European Small Claims Procedure – How Far Can Simplifications Go?, *LeXonomica* 4 (2012), Vol. 2. p. 133 (141).

⁴⁷CJEU, Case C-432/05 Unibet [2007] ECR, I-2271, para. 37.

⁴⁸CJEU, Case C-292/10 G v Cornelius de Visser [2012] not yet published in the ECR, paras 65, 66 and 68.

⁴⁹See to that effect, ECHR *Michaud v. France* (no 12323/11, not yet reported, para. 102. At the time of writing this article, the English version of the judgment had not yet been published. The relevant part of the text reads in French: „*Autrement dit, les Etats demeurent responsables au regard de la Convention des mesures qu’ils prennent en exécution d’obligations juridiques internationales, y compris lorsque ces obligations découlent de leur appartenance à une organisation internationale à laquelle ils ont transféré une partie de leur souveraineté.*“

⁵⁰Franzina, op. cit., p. 8.

on the rule of law” are still legal acts of international law.⁵¹

2. Requirements of Art. 6(1) ECHR

Art. 6(1) ECHR guarantees fair trial in civil matters.⁵² It shall not be forgotten that minimum standards as a specific institution of European civil procedure are based on that provision of the ECHR.⁵³ Some European legal writers deduce from the case law of the ECHR – at least in principle – „a human right of the foreign-judgment creditor to an *exequatur*“.⁵⁴ In doing so such authors adhere to the traditional European viewpoint in private international law perceiving “*the whole process of recognition as, at the same time, a right and, still more, an obligation of the receiving State*”⁵⁵ However, the above mentioned opinion on existence of a fundamental right to *exequatur* can apply only if the judicial decision to be enforced is rendered in a State that is a party of the ECHR.⁵⁶ As all EU Member States are for the time being also States of the ECHR, there seems to be no problem in that regard. On the other hand one cannot ignore that an *exequatur* against the judgment debtor might interfere with his protection of property guaranteed under Art. 1 of the 1st Protocol to the ECHR.⁵⁷ Such an interference might be undertaken only after a closed fair trial offering effective remedies against judicial decisions. Offering effective remedies, on the other hand, is a positive obligation of a State under the ECHR.

3. Abolition of the *exequatur* from the point of view of the ECHR – direct and indirect infringements

The ECHR has developed a doctrine of derived or indirect infringement of the right to a fair trial under Art. 6(1) ECHR. The *exequatur* and enforcement proceedings in the State in which enforcement is sought can therefore be considered a mere continuation of the trial in which a decision infringing Art. 6(1) has been given in the state of origin.⁵⁸ In other words, the infringement of Art. 6(1) ECHR committed in the State of origin is then *ratione loci* transferred in the State in which enforcement is sought. The phenomenon of cross-border enforcement does not suppress the infringement of essential procedural requirements posed by Art. 6(1) ECHR.⁵⁹ Indeed, the multilateral obligation of fair trial in every State which has ratified the ECHR also implies obligations of cooperation in the field of international civil procedure in such States.⁶⁰ The legal

⁵¹A. Pellet, Les fondements juridiques internationaux du droit communautaire, Collected Courses of the Academy of European Law, Volume V, Book 2, p. 193 (211 and 212).

⁵²Schilling, The Enforcement, p. 545.

⁵³Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, point B.1.

⁵⁴Schilling, The Enforcement, p. 547.

⁵⁵Kerameus, op. cit., para. 99.

⁵⁶See to that effect ECHR, case *Pellegrini v. Italy*, paras. 40 and 47. The ECHR stated that “*The Court’s task therefore consists not in examining whether the proceedings before the [foreign] courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties (at §40)*”.“*the Court considers that the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota’s judgment, that the applicant had had a fair trial in the proceedings under canon law (at at §47)*.” See also *D. Bureau, H. Muir-Watt*, Droit international privé, tome 1, partie générale, 2nd edition, Presses universitaires de France, Paris 2010, p. 289 - 291.

⁵⁷Th. Schilling, Das Exequatur und die EMRK, IPRax 31 (2011), vol. 1. p. 31 (31).

⁵⁸See ECHR, case *Pellegrini v. Italy*, para. 47 and *D. Bureau, H. Muir-Watt*, Droit international privé, tome 1, partie générale, 2nd edition, Presses universitaires de France, Paris 2010, p. 290 – 291, *Biagioni*, op. cit., p. 980.

⁵⁹*Bureau, Muir-Watt*, Droit international privé, tome 1, p. 290 and 291.

⁶⁰A. Sengstschmid, Handbuch Internationale Rechtshilfe in Zivilverfahren, Linde, Vienna, 2010, p. 75-76.

basis of such reasoning being the previously mentioned principle of *pacta sunt servanda* and the *effet utile* of the ECHR. German legal writers therefore put greater emphasis on the compliance with the ECHR of a remedy having a devolutive effect in the State of origin. They also consider that by abolishing the requirement of the *exequatur* the positive obligation under Art. 13 ECHR to protect the judgment debtor against foreign titles in an unfair trial might be infringed in the state in which enforcement is sought, if there is no possibility of effective judicial remedy (i.e. remedy having a *devolutive* effect) against the enforcement of such a decision.⁶¹

However, there is also a possibility of a direct or original infringement of Art. 6(1) ECHR. We might speak of a derived or indirect infringement only if the judgment debtor was not served the application commencing proceedings and was not able to lodge remedies against the decision *in merito* in the state of origin (the debtor was not able to arrange his defence). However, if the debtor was correctly informed of the pending proceedings, if summons were served on him, if a decision *in merito* was rendered, and if a period for lodging judicial remedies has already expired and if the judicial decision became enforceable only after such an expiry, the above mentioned legal opinion seems to be at odds with the doctrine of exhaustion of remedies.⁶² As far as the question of (procedural and substantial) exhaustion of remedies is concerned,⁶³ a party who has not appealed against the enforcement order is precluded, „at the stage of the execution of the judgment, from relying on a valid ground which he could have pleaded in such an appeal against the enforcement order, and that that rule must be applied of their own motion by the courts of the state in which enforcement is sought.“⁶⁴ The next step is then undertaken in the State in which enforcement is being sought. A final and enforceable judicial decision is then enforced in the State of enforcement. Even under EU law the enforcement remains purely national, as it is covered by the exception of exercise of the powers of a public authority.

The question that should be asked is therefore, where the violation of the ECHR has been committed? In the state of origin or the state in which the enforcement is sought? In the specific case of the abolition of the *exequatur* and direct enforcement the answer seems to be that the infringement of Art. 6(1) ECHR could have been committed either in the state of origin or in the state in which the enforcement is sought. An infringement is possible in the state which has jurisdiction of adjudication and in the state which has the jurisdiction to enforce. Enforcement is an *actum jure imperii*, this means the performance of the powers of a public authority on the territory of the state in which enforcement is sought (jurisdiction to enforce implies the principle of territoriality).⁶⁵

4. Orality and adversarial proceedings

The next question addressed by Art 6(1) is the thorny issue of orality, i.e. of a public hearing in an open court.⁶⁶ A decision rendered by a national judge without a public hearing is not *per se* incompatible with the ECHR, as this requirement has to be assessed according to the nature of the

⁶¹*Schilling*, Das Exequatur, p. 39 and 40, for the doctrine on positive obligations of ensuring fundamental rights see *L. Khadzadeh-Leiler*, Die Grundrechte in der zivilrechtlichen Judikatur des Obersten Gerichtshofes, Springer, Vienna, 2011, p. 27 – 33.

⁶²This situation does not wholly correspond to the situations given by regulations on European civil procedure, one might refer to the Hoffmann case (CJEU, Case 145/86 *Hoffmann* [1988] 645, para. 34) which can also be read as a case on the exhaustion of remedies in due procedural order.

⁶³Under the old Art. 36 of the Brussels Convention and the modified Art. 43 of the Regulation No 44/2001 and Art. 49(1) Regulation No 1215/2012.

⁶⁴CJEU, Case 145/86 *Hoffmann* [1988] 645, para. 34.

⁶⁵*Britz*, op. cit., p. 106. See also *V. Rijavec*: Civilno izvršilno pravo, Ljubljana GV, 2003, p. 43, *Rechberger*, *Simotta*, op. cit., para. 39, *Virgós Soriano*, *Garcimartín Alférez*, op. cit., p. 683 and 684.

⁶⁶*Nunner-Krautgasser*, *Anzenberger*, op. cit., p. 142 - 143.

proceedings.⁶⁷ Explanation has already been put forward previously that there are exceptional circumstances where a judge can render a decision *inaudita altera parte*.⁶⁸ Such exceptional circumstances are however typical of the reversal of the procedural initiative like in proceedings for issuing a payment order. Legal writers have rightly stated with reference to the *Kloms* case,⁶⁹ that a public hearing, *a posteriori* is a sufficient guarantee of a fair trial.⁷⁰

As far as the right to adversarial proceedings is concerned, no direct i.e. legislative issues seem to be addressed by regulations on European civil procedure. It should also be borne in mind that “*the right to be notified of procedural documents and, more generally, the right to be heard, [...] occupy an eminent position in the organisation and conduct of a fair legal process*” in European civil procedure.⁷¹

II. Requirements of EU law

As far as the EU is concerned precedence (*la primauté, Anwendungsvorrang*), direct effect, direct application and *effet utile* are widely known terms in EU law. The most important issue, however, is the autonomous and uniform interpretation of EU law. Legal notions which were referred to in the last two sentences apply to any binding EU legal act be it nominate (Art. 288 TFEU) or innominate. They apply also to regulations on European civil procedure. Therefore it is necessary to examine some obligations imposed by substantive EU law on Member states that are *ratione materiae* applicable also in civil procedure (be it purely national or European).

1. Precedence of EU law in national civil procedure

EU regulations on European civil procedure take precedence over autonomous national law of civil procedure.⁷² It is the standard case law that „*to the extent that [EU] law prevails over provisions of national law, the primacy of [EU] law obliges the national court to apply [EU] law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.*“⁷³

However, the specifics of national civil procedure are duly acknowledged. The standard doctrine on that question bears the name *van Schijndel case*.⁷⁴ EU „*law does not require national courts to raise of their own motion an issue concerning the breach of provisions of EU law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other*

⁶⁷F. Sudre, *Droit européen et international des droits de l’homme*, 10th updated edition, Presses universitaires de France, Paris 2011, p. 449.

⁶⁸Nunner-Krautgasser, *Anzenberger*, op. cit., 142.

⁶⁹CJEU, Case 166/80 *Kloms* [1981] ECR 1593.

⁷⁰O. Feraci, *Riconoscimento ed esecuzione all’estero dei provvedimenti provvisori in materia familiare: alcune riflessioni sulla sentenza Purrucker*, *Rivista di diritto internazionale privato e processuale* 67(2011), Vol. 1, p 107 (120 and 120).

⁷¹CJEU, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, para. 66.

⁷²B. Nunner-Krautgasser, *Die Anerkennung ausländischer Entscheidungen – Rechtsentwicklung im Überblick*, *Österreichische Juristen-Zeitung*, 60 (2009), Vol. 12, p. 533 (534).

⁷³CJEU, Case C-314/08 *Filipiak* [2009] ECR I-11049, para. 859.

⁷⁴CJEU, Case C-430/93 *van Schijndel and van Veen* [1995] ECR I-4705, para. 15 “In proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court to apply mandatory provisions of EU law (*jus cogens*) „even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application by the national court”.

than those on which the party with an interest in application of those provisions bases his claim“.⁷⁵ That limitation on the power of the national court is justified by the principle that, in a civil suit, it is for the parties to take the initiative, and that, as a result, the court is able to act of its own motion only in exceptional cases where the public interest requires its intervention.⁷⁶ The continuation of that doctrine was then codified in the *Eco Swiss* case concerning the recognition of an arbitral award infringing national (Dutch) rules of public policy (*ordre public*). According to the CJEU: “[EU] law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held to be valid in law is nevertheless void under Art. [101 TFEU].”⁷⁷ The *van Schijndel* doctrine is the most important factor for the discussion of the question of appeals against *exequatur* and enforcement decisions. Can a judge hearing opposition or appeal apply grounds for refusal of recognition and enforcement of a foreign decision of its own motion or does the court decide on the recourse confined to the pleas (in law) raised by the appellant.⁷⁸

Application of substantive EU Law in national civil litigation is not as rare as one might think. EU law is applied for example also in an *actio negatoria* under §364(2) of the Austrian ABGB, i.e. an action typical of private (property) law (albeit in situation of an application against cross-border potential nuisance relating to the ionising radiation allegedly originating in the Czech nuclear plant in Temelin).⁷⁹ The CJEU applied primary law in a simple *actio negatoria* and concluded that „the principle of prohibition of discrimination on grounds of nationality [...] precludes the application of the legislation of a Member State [...] under which an undertaking in possession of the necessary official authorisations for operating a nuclear power plant situated in the territory of another Member State, may be the subject of an action for an injunction to prevent an actual or potential nuisance to neighbouring property emanating from that installation, whereas undertakings having an industrial installation situated in the Member State where the action is brought and in possession of an official authorisation may not be the subject of such an action and may only be the subject of a claim for damages for harm caused to a neighbouring property.”⁸⁰ Therefore it can be concluded that the application of substantive EU law (be it primary or secondary legislation) still offers unexpected surprises in European civil procedure.⁸¹

As far as international civil procedure is concerned, one should refer to the *Kloms* case,⁸² where it was decided that EU law takes precedence and is to be applied “where the defendant has lodged an objection against the decision given in default and a court of the state in which the judgment was given has held the objection to be inadmissible on the ground that the time for lodging an objection has expired.” This might explain the recital (30) to the regulation No 1215/2012.⁸³ In national law

⁷⁵Case C-430/93 *van Schijndel and van Veen* [1995] ECR I-4705, para. 22.

⁷⁶Case C-430/93 *van Schijndel and van Veen* [1995] ECR I-4705, para. 21 and case C-227/08 *Martín* [2009] ECR I-11939, para. 20.

⁷⁷CJEU, Case C-126/97 *Eco Swiss China Time* [1999] ECR I-3055, operative part.

⁷⁸The Pocar Report on the parallel Lugano convention, paras. 155 and 156 (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, Eplanatory report by prof. Fausto Pocar, OJ 2009 C 319, 23.12.2009, p. 43).

⁷⁹CJEU, Case C-115/08 *Land Oberösterreich* [2009] ECR I-10265, para. 41.

⁸⁰CJEU, Case C-115/08 *Land Oberösterreich* [2009] ECR I-10265, para. 139.

⁸¹One might also refer to the famous *cautio judicatum solvi* case C-122/96 *Saldanha and MTS*, [1997] ECR I-5325 where the issue of *cautio judicatum solvi* was adjudicated on the basis of the principle of prohibition of discrimination on grounds of nationality.

⁸²CJEU, Case 166/80 *Kloms* [1981] ECR 1593, operative part.

⁸³That recital reads as follows: “A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to

such findings are interpreted in such a way that national requirements on the information about legal remedies are nevertheless to be applied to foreign (*in concreto* Italian) European enforcement order for uncontested claims.⁸⁴

Perhaps the most renowned recent case in the field of European civil procedure where due to precedence EU law changed national concepts, is the recent *West Tankers* case,⁸⁵ in which the CJEU held that *common law* anti-suit injunction in arbitration proceedings delivered by courts of European common law jurisdictions in cases where courts in other EU Member States would have jurisdictions to hear the case under the regulation No 44/2001 might come within the scope of regulation No 44/2001 and that they are not compatible with that regulation. Indeed, such anti-suit injunctions “are contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it”.

2. Principle of mutual recognition as *de jure* justification for abolition of the *exequatur*

The most important provision of codified primary law (in the sense of *jus positum*) concerning the (direct and indirect) enforcement of judicial decisions rendered in the Member State of origin in the Member State in which enforcement is sought is undoubtedly the principle of mutual recognition under Art. 81 TFEU. That principle has to be read together with the principle of loyal cooperation laid down in Art. 4(3) TEU. Art. 81 TFEU introduces judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments with the aim of free movement of judicial decisions in EU Member States. In the area of freedom, security and justice, especially in the area of European judicial cooperation the principle of mutual recognition implies the end of traditional geographical limitation of exercise of sovereign powers to national territories of a given Member State.⁸⁶ Individuals are being subjected to foreign *acta jure imperii* in the form of judicial decisions adopted in other EU Member States.⁸⁷ However, such a principle must imply and also require an equivalent and efficient protection of human rights in every Member State.⁸⁸ This equivalence and efficiency might be referred to as the presumption of horizontal equal protection of fundamental rights.⁸⁹ *Fora* of the Member State in which enforcement is sought will always be confronted with defence and objections on infringement of fundamental rights in the Member State of origin.⁹⁰ Cases like *Gambazzi* and *Zarraga* may serve as an indication that previously mentioned presumption, which must be considered as *juris tantum*.⁹¹ Whereas on the one hand *Gambazzi* judgment can be read as a clash of common and civil law procedural notions (concerning default judgments), i.e. the incompatibility of certain *common law* instruments with

invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law.”

⁸⁴Supreme Court of the Republic of Slovenia, order of 4 October 2010 in case Cpg 2/2008, ECLI:SI:VSRS:2010:CPG.2.2008.

⁸⁵CJEU, Case C-185/07 Allianz and Generali Assicurazioni Generali v West Tankers [2009] ECR I-663, paras 22 – 32.

⁸⁶M. Möstl, Der unionsrechtliche Grundsatz der gegenseitigen Anerkennung – Einige Anmerkungen aus öffentlich-rechtlicher Perspektive, p. 717 (721), in: J. Bernreuther/R. Freitag/St. Leible/H. Sippel/U. Wanitzek, Festschrift für Ulrich Spellenberg, Sellier, 2010.

⁸⁷M. Möstl, loc. cit..

⁸⁸L. Carpaneto, Reciproca fiducia e sostrazioni internazionale di minori nello spazio giudiziario europeo, Rivista di diritto internazionale privato e processuale 67(2011), Vol. 2, p. 361 (361).

⁸⁹G. Britz, Grundrechtsschutz in der justiziellen Zusammenarbeit – zur Titelfreizügigkeit in Familiensachen, Juristenzeitung 3/2013, p. 108 – 109.

⁹⁰See e.g. Supreme Court of Austria (Oberster Gerichtshof), order of 22 February 2007 in case 3Ob253/06m (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013).

⁹¹CJEU, Case C-491/10 PPU, Aguirre [2010] ECR I-14247 and Case C-394/07, Gambazzi [2009] ECR I-2563.

civil law consideration on civil justice⁹² or alternatively how to lodge a new version of the Italian torpedo when litigating in courts of *common law* Member states, on the other hand the *Zarraga* judgment has far more serious implications. The referring court in the *Zarraga* case considered as a general rule, that there is no power of review under Article 21 of the regulation No 2201/2003. None the less the referring court clearly stated that it should be able to perform a review where there is a particularly serious infringement of a fundamental right.⁹³ This is an issue that the EU cannot accept. In principle “a foreign judgment is presumed to be in order. It must, in principle, be possible to enforce it in the State in which enforcement is being sought.”⁹⁴

It can be argued that the *effet utile* of the principle of mutual recognition implies *a majore ad minus* also enforcement between Member States of judgments and of decisions in extra judicial cases without the *exequatur*.⁹⁵ This provision of codified primary law is to be regarded as the legal basis for abolishing the *exequatur* and introducing the possibility of more or less direct enforcement in the addressed Member State of a judgment given in the Member state of origin. Especially as *de jure* – with the exception of a *clause contraire* in a treaty – there is no obligation of *exequatur* and enforcement in general public international law.⁹⁶ The principle of mutual recognition is nowadays the cornerstone of judicial co-operation in civil matters within the EU.⁹⁷ The importance of that principle *in concreto* is then shown in various recitals in the preambles of regulations on European civil procedure and in the references by the CJEU to such recitals.⁹⁸ According to the CJEU, “it is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts are required to respect, and as a corollary the waiver by Member States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions”⁹⁹

3. National procedural and institutional autonomy in EU law – what’s left of national civil procedure when national courts are implementing and applying European civil procedure

Much has been written on national procedural autonomy in the field of administrative procedure and procedure before administrative tribunals and courts.¹⁰⁰ However, the majority of findings in the field of EU direct administration undertaken by administrative authorities and administrative tribunals in Member States also apply in the field of civil procedure. There is the same legal

⁹²G. Cuniberti, La reconnaissance en France des jugements par défaut anglais, Rev. crit. DIP 98 (2009), vol. 4. p. 685 (paras. 35 – 39).

⁹³CJEU, Case C-491/10 PPU, Aguirre [2010] ECR I-14247, para. 34.

⁹⁴P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968), OJ 1979 C 59 of 5 March 1979, p. 47.

⁹⁵The interpretation of a treaty in international law and even of an act of EU law under the principle of *effet utile* is closely linked to the teleological method of interpretation (See T. Stein, Ch. von Buttlar, Völkerrecht, 12th edition, C. Heymanns Verlag, Cologne 2009, para. 84).

⁹⁶Schilling, The Enforcement, p. 546, with reference to R. Michaels, Recognition and Enforcement of Foreign Judgments, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship.

⁹⁷See e.g. Tampere European Council 15 and 16 October 1999, Presidency Conclusions, para. 33.

⁹⁸CJEU, Case C-92/12 PPU, Health Service Executive v S.C. and A.C [2012] not yet reported in the ECR, para. 101 and Case C-256/09, Purrucker [2010] ECR I-7353, par 70.

⁹⁹As far as regulation No 2201/2003 is concerned case C-256/09, Purrucker [2010] ECR I-7353, par 72 and as far collective insolvency proceedings under regulation No 1346/200 are concerned case C-341/04 Eurofood IFSC [2006] ECR I-3813, par 40 and as far as the repealed Brussels Convention is concerned case C-116/02 Gasser [2003] ECR I-14693, para. 72.

¹⁰⁰Cf. Th. Öhlinger, M. Potacs, EU-Recht und staatliches Recht, 4th edition, Vienna LexisNexis, 2011, p. 154 - 190, C. Blumann, L. Dubouis, Droit institutionnel der l’Union européenne, 4th edition, LexisNexis, Paris 2010, p. 490 – 491, 501, A. Haratsch, Ch. Koenig, M. Pechtsein, Europarecht, 8th edition, Mohr Siebeck, Tübingen, 2012, p. 263-266.

problem: national (judicial) authorities are applying EU law. However, even a large competence of the EU in the area of judicial cooperation in civil matters does not suppress the principle of procedural autonomy, especially in its organisational limb.¹⁰¹ Member States remain competent for organisational issues of their enforcement agencies, however procedural autonomy is nowadays becoming limited.

Procedural autonomy of Member States and especially procedural autonomy of courts and tribunals is one of the fundamental characteristics of the legal order of the EU.¹⁰² The contents of judicial procedural autonomy were set up by the 1976 *Rewe-Zentral* case.¹⁰³ According to the CJEU „*in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.*“ Therefore the CJEU ruled in *Szyrocka* case that „*in the absence of harmonisation of domestic mechanisms for the recovery of uncontested claims, and subject to the conditions laid down in Article 25 of Regulation No 1896/2006, the procedural rules for determining the amount of the court fees is a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States.*“¹⁰⁴

This doctrine of national procedural autonomy was then further developed in the *Unibet* case. In that case the CJEU stressed the importance of the principle of sincere cooperation and stated that „*EU law requires that the national legislation does not undermine the right to effective judicial protection. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right.*“ Then the CJEU stated the standard formula on principles of equivalence and effectiveness. „*The detailed procedural rules governing actions for safeguarding an individual’s rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) and stressed that.*“¹⁰⁵

The logical consequence being that it is „*for the national court to give, in so far as possible, to the domestic legislation which it must apply an interpretation which complies with the requirements of [EU] law. If such an application in accordance with [EU] law is not possible, the national court is bound to apply [EU] law in full and protect the rights it confers on individuals, and to disapply, if necessary, any provision in so far as application thereof, in the circumstances of the case, would lead to a result which is contrary to [EU] law.*“¹⁰⁶

Therefore no general or individual acts can be undertaken by national authorities (also judicial) that might frustrate the aim of EU law. If a regulation contains *expressis verbis* judicial remedies they must be applied according to EU law and not according to national law.

However, some instruments of national civil procedure that actually preclude the *effet utile* of application of EU law might nevertheless be applied. In that regard, attention should be drawn to the importance, both for the EU legal order and national legal systems, of the principle of *res*

¹⁰¹ P. Franzina, Les acteurs de l’espace judiciaire européen en matière civile, p. 8 in: M. Douchy-Oudot, E. Guinchard, La justice civile européenne en marche, Dalloz, Paris 2012.

¹⁰² C. Blumann, L. Dubouis, op. cit., p. 501,

¹⁰³ CJEU, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para. 5, Claude Blumann, Louis Dubouis, Droit institutionnel der l’Union européenne, p. 501,

¹⁰⁴ CJEU, Case C-215/11 *Szyrocka* [2012] not yet reported in the ECR, paras. 34 and 35.

¹⁰⁵ CJEU, Case C-432/05 *Unibet* [2007] ECR, I-2271, paras. 38-44, 54.

¹⁰⁶ CJEU, Case C-115/08 *Land Oberösterreich* [2009] ECR I-10265, para. 140.

judicata.¹⁰⁷ EU „law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of [EU] law on the part of the decision in question.“¹⁰⁸ The limit of application of the *res judicata* principle being on the one hand the abuse of rights (*abusus*)¹⁰⁹ and on the other a situation where due to the *res judicata* principle the application of exclusive competencies of the EU is rendered impossible.¹¹⁰ In order to avoid the frustration of European civil procedure and under the impulse of EU law the doctrine on civil procedure starts considering the European civil procedure as being as far as possible separated from national civil procedure and procedural law.¹¹¹ Such considerations can be interpreted as a slow creation of limits of national procedural autonomy in the field of European civil procedure.

4. Uniform and autonomous interpretation of any EU legal act on civil procedure

The starting point is the transfer of powers to the EU. According to the CJEU „to the extent to which Member States have transferred legislative powers to the EU in a specific field the legislative powers of Member States cease to exist in this field. As EU regulations are directly applicable in all Member States, the latter, unless otherwise expressly provided, are precluded from taking steps, for the purpose of applying such regulations, which are intended to alter their scope or supplement their provisions.“¹¹² It should be noted, that this finding applies more to substantive law than to procedural law. However, the importance of the previous statement will become clear when the nature of remedies in direct enforcement is analysed. The uniform interpretation is linked to the principle of equal treatment. Hence, once a “judgment is incorporated into the legal order of the Member State in which enforcement is sought, national legislation of that Member State relating to enforcement applies in the same way as to judgments delivered by national courts.”¹¹³

The legislative power of Member States and its transfer to the EU might be a more abstract issue for a lawyer specialised in private international law and international civil procedure. However, a direct consequence of transfer of legislative powers to the EU is a need for uniform interpretation of a text of EU law. Legal writers explained this phenomenon with terms like „international legal unity will have been achieved only when unified legal acts are also interpreted in a uniform manner“¹¹⁴ In order to achieve such a unification the CJEU stated: „The Court has consistently held that the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation.“¹¹⁵ One might explain also the ruling in *Szyrocka* case by this axiom of EU law.¹¹⁶ Regulations on European civil procedure establish uniform provisions of EU law concerning particular issues of civil

¹⁰⁷CJEU, Case C-234/04 Kapferer [2006] ECR I-2585, para. 20.

¹⁰⁸CJEU, Case C-2/08 Fallimento Olimpiclub [2009] ECR I-7501, para. 23 and case C-234/04 Kapferer [2006] ECR I-2585, paras. 20 and 21.

¹⁰⁹CJEU, Case C-2/08 Fallimento Olimpiclub [2009] ECR I-7501, para. 30.

¹¹⁰CJEU, Case C-119/05 Lucchini [2007] ECR I-6199, para. 63.

¹¹¹*Rechberger, Simotta*, op. cit., para. 1226.

¹¹²CJEU, Case 40/69 Bollmann [1970] ECR 69, para. 4.

¹¹³CJEU, Case 148/84 Deutsche Genossenschaftsbank [1985] ECR 1981, para. 18, case 119/84 Capelloni and Aquilini [1985] ECR 3147, para. 16.

¹¹⁴*B. von Hofmann, K. Thorn*, Internationales Privatrecht, 9th edition, C.H.Beck, Munich, 2007, p. 122.

¹¹⁵CJEU, Case 327/82 Ekro [1984] ECR 107, para. 11, Case C-287/98 Linster [2000] ECR I-6917, para. 43, Case C-190/10 Génesis [2012] not yet reported, para. 40 and Case C-376/11 Pie Optiek [2012] not yet reported, para. 33.

¹¹⁶CJEU, Case C-215/11 *Szyrocka* [2012] not yet reported in the ECR, para. 36.

procedure, which guaranteeing a level playing field for parties to such a procedure throughout the European Union. As far as the European order for payment is concerned „*that objective would be undermined if the Member States were able generally to impose in their national legislation additional requirements to be met by an application for a European order for payment. Such requirements would lead not only to the imposition of different conditions in the various Member States for such an application but also to an increase in the complexity, duration and costs of the European order for payment procedure. Accordingly, only an interpretation to the effect that Article 7 of Regulation No 1896/2006 governs exhaustively the requirements to be met by an application for a European order for payment can ensure that the objective of the regulation is attained.*“¹¹⁷ In one of the last cases in the field of European civil procedure the CJEU explained the danger of reference to national law in interpreting EU law and stated that „*to refer the assessment as to whether the sub-buyer may rely on a jurisdiction clause incorporated in the initial contract between the manufacturer and the first buyer to national law [...] would give rise to different outcomes among the Member States liable to compromise the aim of unifying the rules of jurisdiction pursued by the Regulation [No 44/2001...]. Such a reference to national law would also be an element of uncertainty incompatible with the concern to ensure the predictability of jurisdiction which is [...] one of its objectives.*“¹¹⁸

Member States are in principle responsible for remedies and recourses under the principle of national procedural autonomy. After the „*communitarisation*“ of European civil procedure the best example of this statement is the modified importance of the 1984 case *Deutsche Genossenschaftsbank*. The principal objective of the regulations on civil procedure is to simplify procedures in the state of enforcement by abolishing the intermediate *exequatur* proceedings. „*In order to attain that objective the [Brussels] Convention established an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals. It follows that article 36 of the [Brussels] Convention*¹¹⁹ *excludes procedures whereby interested third parties may challenge an enforcement order under domestic law.*“¹²⁰ The continuation of that case law is to be found in the *Sonntag* case. „*Second paragraph of Article 37(2) of the [Brussels] Convention*¹²¹ *must be interpreted as meaning that it precludes any appeal by interested third parties against a judgment given on an appeal brought under Article 36 of the Convention, even where the domestic law of the State in which enforcement is sought confers on such third parties a right of appeal.*“¹²² The consequence being that only remedies against judgments from Member States of origin set up by EU legislation may be lodged in enforcement proceedings in Member States in which enforcement is sought. However, national courts of some Member States are quite reticent to accept and follow that case law.¹²³

¹¹⁷CJEU, Case C-215/11 *Szyrocka* [2012] not yet reported in the ECR, paras. 31 and 32.

¹¹⁸CJEU, Case C-543/10 *Refcomp* [2013] not yet reported in the ECR, para. 39.

¹¹⁹Roughly old Art. 43 of the Regulation No 44/2001. According to correlation table this text does not seem to be present in the new regulation No 1215/2012. This can be explained by the “radical” new solution in the new regulation. However, in certain situations it might correspond to Art. 49(1) of the regulation No 1215/2012.

¹²⁰CJEU, Case 148/85 *Deutsche Genossenschaftsbank* [1985] ECR 1981, para. 17.

¹²¹The relevant text read at the relevant time as follows: “The judgment given on the appeal may be contested only: - in the Federal Republic of Germany, by a *Rechtsbeschwerde*”. This text corresponds roughly to Art. 43 and 44 of the regulation No 44/2001. According to correlation table this text does not seem to be present in the new regulation No 1215/2012. However, in certain situations it might correspond to Art. 49(1) of the regulation No 1215/2012.

¹²²CJEU, Case C-172/91 *Sonntag* [1993] ECR I-1963, para. 35.

¹²³See e.g. Supreme Court of Slovenia, order of 9 January 2013 in joined cases Cp 16/2012 and Cp 17/2012, para. 9, in which the Supreme Court interpreted the regulation No 44/2001 solely on grounds of the Slovenian text for determination of the remedy before the Supreme Court of Slovenia (there are quite substantive differences between on the one side the Slovenian, German, French and on the other side the English text of the Annex IV). The short commentary on that decision might be that the need for a uniform interpretation of [EU] regulations makes it impossible for that passage to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official languages (Case 9/79, *Koschniske* [1979] ECR 2717, para. 6). It should also be pointed out that, in any event, the word in question interpreted by the Supreme Court of Slovenia in the above mentioned order cannot be examined solely in the Slovenian version of that point, as EU provisions must

Any EU legal act in the field of civil procedure is interpreted via such an autonomous and uniform interpretation. If it was still possible to refer to specific autonomous interpretation of a treaty under the old Brussels convention and its Protocol as a phenomenon of international law, the modern European civil procedure devolves directly from EU law and is part of EU law. In other words, opposition under EU Regulations is not the same remedy as opposition against national payment order. This might complicate the life of lawyers, as it is a similar, yet not identical remedy. As far as the autonomous and uniform interpretation is concerned, „*the need for uniform application and accordingly a uniform interpretation of the provisions of EU law makes it impossible for one version of the text of a provision to be considered, in case of doubt, in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages.*“¹²⁴

In the end it might also be added that the interpretation of legal texts in several languages is also a recurring issue in EU law. “*All the language versions of a Community provision must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question. In order to maintain a uniform interpretation of EU law, in the case of divergence between those versions the provision in question must therefore be interpreted by reference to the purpose and general scheme of the rules of which it forms part.*”¹²⁵ “*Where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part*”.¹²⁶

B. The legislative framework *de lege lata* and *de lege ferenda*

It is argued that a unified legal text and a single and unified *exequatur* procedure in the EU could *a maiore ad minus* also unify the review, remedies and the scope of judicial remedies.¹²⁷ It is contended that such an opinion is an oversimplification of complex issues and does not address questions linked to the enforcement. Such an opinion forgets the notion of the procedural autonomy of Member States. Even if legal remedies are harmonised solely on a broader level by the EU, there are still national issues that might frustrate the uniform application of EU law. The best example (due to its longevity) are the review proceedings in public procurement. Indeed, the Directive 89/665¹²⁸ introduced review proceedings. But one just needs to look around Europe in order to see that there are enormous differences in the implementation of such review proceedings (such as administrative litigation in France and special appeals before ordinary courts of appeal in Germany).

Secondly it can be argued that the unification of the *exequatur* would have serious consequences on the enforcement stage. Since the Jenard report,¹²⁹ it is widely acknowledged that “*at the enforcement stage solutions must be found which follow from the rules on jurisdiction.*” EU regulations abolishing the *exequatur* are therefore to be compared to “*conventions doubles*” or even to “*conventions triples*”, as they contain rules on jurisdiction and rules on enforcement without

be interpreted and applied uniformly in the light of the versions existing in all European Community languages (Case C-187/07, Endendijk [2008] ECR I-2115, para. 23).

¹²⁴CJEU, Case C-63/06 Profisa [2007] ECR I-3239, para. 13.

¹²⁵CJEU, Case C-152/01, Kyocera [2003] ECR I-13821 paras 32 and 33.

¹²⁶CJEU, Case C-187/07, Endendijk [2008] ECR I-2115, para. 24.

¹²⁷P. Oberhammer, The Abolition of the Exequatur, IPrax 2010 Heft 3, p. 198.

¹²⁸Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

¹²⁹P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed at Brussels, 27 September 1968), OJ 1979 C 59 of 5 March 1979, p. 47.

exequatur and even rules on applicable substantive law.¹³⁰

Point I. will deal with sources of remedies and recourses. Point II. Will deal with the modifications of the principle *nulla executio sine titulo*, where the certificate of foreign title becomes the substance of foreign title.

I. Overview of regulations on European civil procedure on remedies and recourses in (direct) enforcement

This contribution neither gives an exhaustive overview of legislation nor a comprehensive analysis of regulations on European civil procedure. It deals solely with sections in regulations linked to (direct) enforcement and remedies or recourses against judicial decisions in the framework of such (direct) enforcement. As far as the *exequatur* is concerned, the texts are quite easy to understand. The *lex specialis* reads as: “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.” (Art. 36(1) of the Regulation No 1215/2012).¹³¹ However, the abolition of the *exequatur* does not mean unification or even harmonisation of civil procedure, a fact that can be seen by several references to the *lex fori* of the Member State either either of origin or of enforcement.¹³²

The first finding in European civil procedure as far as enforcement is concerned is a lack of systematic development and of common systematics.¹³³ However, this does not mean that it is not possible to recognize and analyse basic “methods of cooperation” in the European judicial area in civil matters.¹³⁴ The common denominator of all regulations is the “firm distinction” between judicial decisions given in Member State of enforcement and judicial decisions rendered in the Member State of origin on one hand and on the other with judicial decisions adopted in third States, i.e. Non-member States.¹³⁵ Regulations on direct enforcement did not go as far as to introduce the

¹³⁰For the definition of a *convention double* see *Schack*, op. cit., para. 84 and *J. Kropholler*, Internationales Privatrecht, 6th edition, J.C.B. Mohr, Tübingen, 2006, p. 66 and 608.

¹³¹Similar text in Art. 16(1) of the regulation No 1346/2000 “Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.”, in Art. Article 21(1) of the regulation No 2201/2003 “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required” and in Art. 39(1) of the regulation No 650/2012 “A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.” Art. 5 of the regulation No 805/2004 goes even further: “a judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition”, similar provisions can be found in Art. 19 of the regulation No 1896/2006 “A European order for payment which has become enforceable in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition”, in Art. 17 of the regulation No 4/2009 “1. A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition. 2. A decision given in a Member State bound by the 2007 Hague Protocol which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability.”

¹³²*J. - P. Correa Delcasso*, La proposition de règlement instituant une procédure européenne d’injonction de payer, *Revue internationale de droit comparé*, 57 (2005), vol. 1, p 143 (149).

¹³³*Rechberger, Simotta*, op. cit., para. 1226.

¹³⁴See *Franzina*, op. cit., p. 11 - 19. Professor Franzina examines three methods of cooperation between judicial authorities in Member States of the EU, namely the method of direct cooperation between judicial authorities of the requesting and the requested Member State, informal coordination without any specific details and multilateral cooperation within the European Judicial Network in civil and commercial matters.

¹³⁵*G. Biagioni*, L’abolizione dei motivi ostativi al riconoscimento e all’esecuzione nella proposta di revisione del regolamento Bruxelles I, *Rivista di diritto internazionale privato e processuale* 67(2011), vol. 4, p. 971 (974).

“universal clause”¹³⁶ like in Art. 2 of the regulation Rome I¹³⁷ and in Art. 3 of the regulation Rome II,¹³⁸ even though regulations like No 4/2009 and No 650/2012 also contain substantive parts. It would seem that the application of foreign substantive law is indeed not such an important issue as the automatic recognition of direct enforceability of foreign *acta jure imperii*.¹³⁹ One reason for the reticence of the automatic recognition of judicial decisions might be the respect of human rights. Some jurisdictions might not have a level of respect of fundamental rights which is comparable to Europe. Some might have different considerations in civil justice than in Europe (e.g. punitive damages, incompatibility of US pre-trial discovery with the European data protection *de lege lata*.¹⁴⁰). The result might also be linked to the principle of general international law according to which only the addressed State having jurisdiction to enforce can set up and determine the remedies and recourses in enforcement proceedings.¹⁴¹ As far as enforcement is concerned the regulation No 4/2009 is a phenomenon *sui generis*. It is also linked to the Hague 2007 Protocol¹⁴² (Art. 16). A similar statement might be adopted as far as the regulation No 1346/2000 is concerned. Due to specific nature of collective insolvency proceedings, there is only an automatic *exequatur* with no subsequent individual enforcement, as collective insolvency proceedings already imply a form of enforcement.

As far as sources are concerned, one might already speak of first and second generation of regulations on civil procedure. The model for the first generation might be the repealed regulation No 44/2001 and regulations No 2201/2003 and No 650/2012. The model for the second generation might be the regulations No 805/2004, No 1896/2006 and No 861/2007.

In the beginning the *lex generalis* will be examined, namely the enforcement in civil and commercial matters, i.e. the repealed regulation No 44/2001 and the new regulation No 1215/2012. Then the *leges speciales* will be examined, namely regulations No 2201/2003, 805/2004, 1896/2006, 861/2007, 4/2009, 650/2012, and the forthcoming regulation on mutual recognition of protection measures in civil matters will be examined.

1. Civil and commercial matters¹⁴³ - the (new) Brussels I regulation

¹³⁶That clause can also be found in Art. 4 of the Council regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343, 29.12.2010, p. 10.

¹³⁷Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

¹³⁸Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.

¹³⁹*Schack*, op. cit., para. 134. Prof. Schack explains such a reticence by the opposition to the recognition of US judgments which comprise punitive damages and US exorbitant jurisdiction that would allow the US to export such judgments often motivated by considerations of economic policy.

¹⁴⁰For problems with the US institute of pre-trial discovery in a civil law jurisdictions see *M. Kleyr*, La production forcée de pièces par voie de référé dans un contexte international : la pre-trial discovery à la luxembourgeoise, *Journal des Tribunaux Luxembourg*, Nr. 1/2011, p. 16 and 17 and *M. De Lummen*, Les entreprises françaises à l'épreuve du contentieux américain, quel arsenal juridique et judiciaire, *Revue de droit des affaires internationales/International Business Law Review* Nr. 1/2003, p. 41, 42 and 44.

¹⁴¹*Schack*, op. cit., para. 1093.

¹⁴²Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, see also Council Decision 2009/941/EC of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, OJ 2009 L 331, p. 17 and *Bureau, Muir-Watt*, *Droit international privé*, tome II, par. 789.

¹⁴³The term civil and commercial matters has an autonomous European content (see CJEU, Case 29/76, *LTU v. Eurocontrol* [1976] ECR 1541, para. 5): “in the interpretation of the concept ‘civil and commercial matters’ for the purposes of the application of the Convention and in particular of Title III thereof, reference must not be made to the law of one of the states concerned but, first, to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems.”

The provisions on enforcement in the old Brussels I regulation (No 44/2001) were not as specific as the new one (regulation No 1215/2012). Art. 43 – 46 of the regulation No 44/2001 deal with remedies of the debtor and of the creditor in the Member State in which enforcement is being sought.¹⁴⁴ Under Art. 38(1) a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there. Proceedings are to be regulated by the *lex fori* (Art. 40). However, under Art. 43(1) each party to the proceedings adversely affected by a declaration of enforceability can appeal against it.¹⁴⁵ The deadline imposed on the judgment-debtor for appealing is fixed in Art. 43(5). The appeals of judgment creditor do not seem to be precluded by the regulation No 44/2001.¹⁴⁶ If the appeals proceedings under Art. 43 do not satisfy the adversely affected party, there is a possibility of a second appeal under Art. 44 referred to in Annex IV. Usually this kind of an appeal is the final appeal in cassation. Both recourses are adversarial and details are regulated by national procedural law.¹⁴⁷

German legal writers have correctly anticipated the *Prism Investments* judgment of the CJEU. The judgment-debtor is precluded from raising defences and objections (*exceptiones*)¹⁴⁸ that had existed before the judicial decision on the merits was delivered in the state of origin. Such defences and objections (*exceptiones*) can only be raised in appeals against the foreign decision. Such an appeal might be linked to stay of proceedings in the Member State in which enforcement is sought. It can be stated that substantive defences and objections (*exceptiones*) as far as the trial claim is concerned cannot be raised by the debtor in the enforcement proceedings. It has been correctly stated that the opposing approach would not be compatible with the interdiction of the *révision au fond* (Art. 45(2) regulation No 44/2001).¹⁴⁹ Even though not mentioned in Articles 45, 34 and 35 of the regulation No 44/2001 the debtor can raise defences and objections (*exceptiones*) enforcement proceedings regarding the declaration of enforceability during (Art. 38). They can do this by stating that there are no conditions for enforceability and that the decision is not enforceable under the procedural law of the EU Member State of origin, etc.¹⁵⁰ However, it has to be said, that there is a presumption in favour of recognition, as Art. 45, 34 and 35 do not deal with conditions for recognition, but with grounds for refusal of recognition.¹⁵¹ The classical objection of specific performance of the obligation originating in the enforceable title that can be raised by the debtor is not addressed by the regulation No 44/2001. However, it would be unreasonable not to allow it.¹⁵² A creditor does not have any interest in bringing enforcement proceedings, if the obligation to be enforced via

¹⁴⁴Kropholler, von Heim, op. cit., p. 634.

¹⁴⁵The Pocar Report on the parallel Lugano convention states in para. 153 that “in practice, however, only the party against whom the enforcement is sought will have an interest in challenging a declaration of enforceability, and only the applicant will have an interest in challenging a rejection of the application” (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, Eplanatory report by prof. Fausto Pocar, OJ 2009 C 319, 23.12.2009, p. 1.

¹⁴⁶The ultimate deadline for the judgment creditor is the statute of limitation fixed by national procedural law of the Member State of the Origin.

¹⁴⁷D. Müller, Die Abschaffung des Exequaturverfahrens nach dem EuGVVO-Reformentwurf – Wegfall überflüssiger Gläubigerblockaden oder Abschied vom effektiven Rechtsschutz für den Schuldner, ZeuS 15 (2012) vol. 3, p. 329 (338) and H. Boularbah, Requête unilatérale et inversion du contentieux, Larcier, Brussels 2010, p. 585.

¹⁴⁸Case C-139/10, Prism Investments [2011], not yet reported in the ECR, para 43. “[...] Article 45 of Regulation No 44/2001 must be interpreted as precluding the court with which an appeal is lodged under Article 43 or Article 44 of that regulation from refusing or revoking a declaration of enforceability of a judgment on a ground other than those set out in Articles 34 and 35 thereof, such as compliance with that judgment in the Member State of origin.” In other words the objection of performance can be examined only during the enforcement stage.

¹⁴⁹D. Müller, Die Abschaffung des Exequaturverfahrens nach dem EuGVVO-Reformentwurf – Wegfall überflüssiger Gläubigerblockaden oder Abschied vom effektiven Rechtsschutz für den Schuldner, ZeuS 15 (2012) vol. 3, p. 329 (340).

¹⁵⁰Kropholler, von Heim, op. cit., p. 644.

¹⁵¹The Pocar Report on the parallel Lugano convention states in para. 155.

¹⁵²B. Hess, Die Unzulässigkeit materiellrechtlicher Einwendungen im Beschwerdeverfahren nach Art. 43 ff. EuGVO, Iprax 2008, vol. 1, p 25 (26) refers to the corresponding German case law.

enforcement agency has already been performed without recourse to coercive means.¹⁵³ The question of interest does, however, not interfere with the obligation imposed on the Member State in which enforcement is sought to enforce the enforceable judicial decision which originates from another Member State.¹⁵⁴

Special emphasis is to be given to judgments given in default of appearance as explained recently in the *Trade Agency* case.¹⁵⁵

The new regulation No 1215/2012 is said to have abolished the *exequatur* requirement. The special proceedings under Art. 38 et seq. of the regulation No 44/2001 are indeed repealed. The abolition of the *exequatur* implied *eo ipso* that the system of remedies and recourses had to be modified in order to guarantee effective judicial remedies to the judgment-debtor.¹⁵⁶ It can also be observed that contrary to the proposal for the regulation No 1215/2012 the intended split of recourses and remedies in those in the Member State of origin and those in the Member State in which enforcement is sought is reduced to Art. 38, point a, and 50 of the regulation No 1215/2012.¹⁵⁷ Enforcement and the corresponding refusal of recognition and enforcement are dealt with in Sections II and III of Chapter III of the regulation No 1215/2012. The enforcement procedure *stricto sensu* is governed by the *lex fori* (Art. 41(1) and Art. 47(2) of the regulation No 1215/2012).

Legal writers put the emphasis on the difference between the new and the old text. This difference is demonstrated by the fact that the creditor can request the immediate application of the local provisions on the enforcement without prior leave to enforce in the Member State in which enforcement is sought.¹⁵⁸ The abolition of the *exequatur* also means that there is no intermediate procedure for adapting the foreign title to national *lex fori* of the Member State in which enforcement is being sought. This statement, however, is to be put into the context of Art. 45 and 46 of the regulation No 1215/2012. Art. 45 of the regulation No 1215/2012 states the grounds for the refusal of recognition. The novelty of this article is the reversal of procedural initiative. Either the competent courts refuse the recognition only on application of the party having an interest in refusal of recognition (Art. 45), or give a declaration that there are no grounds for refusal (Art. 36(2)). This implies that grounds for refusal of recognition are not examined by the courts of the Member State in which enforcement is sought of their own motion. The only consequence of the abolition of the *exequatur* in the new regulation No 1215/2012 is the abolition of an *ex officio* examination of grounds for refusal of recognition (before the commencement of the actual enforcement proceedings). Such an examination, however, can still be performed if a party having an interest in refusal of recognition raises correspondent application and pleas.

¹⁵³As far as the question of interest in bringing proceedings is concerned see *J. Sladič*, Nekatera vprašanja procesne predpostavke pravnega interesa v postopku pred Ustavnim sodiščem RS, Podjetje in delo 37 (2012), vol. 1, p. 19 (27).

¹⁵⁴CJEU, Case C-139/10, *Prism Investments* [2011], not yet reported in the ECR, para. 39 “[...] compliance with a judicial decision does not in any way deprive that decision of its enforceable nature and also does not lead to it being attributed, at the time of its enforcement in another Member State, with legal effects that it would not have in the Member State of origin. Recognition of the effects of such a judgment in the Member State in which enforcement is sought, which is precisely the subject of the enforcement procedure, concerns the specific characteristics of the judgment in question, without reference to the elements of fact and law in respect of compliance with the obligations arising from it.”

¹⁵⁵CJEU, Case C-619/10, *Trade Agency* [2012], not yet reported in the ECR, paras. 32-38.

¹⁵⁶*D. Müller*, Die Abschaffung des Exequaturverfahrens nach dem EuGVVO-Reformentwurf – Wegfall überflüssiger Gläubigerblockaden oder Abschied vom effektiven Rechtsschutz für den Schuldner, *Zeus* 15 (2012) vol. 3, p. 329 (346).

¹⁵⁷Proposal for a Regulation of the European parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM/2010/0748 final), Art. 45.

¹⁵⁸*A. Nuyts*, Bruxelles Ibis: présentation des nouvelles règles sur la compétence et l'exécution des décisions en matière civile et commerciale, p. 77 (81) in: *A. Nuyts*, Actualités en droit international privé, Bruylant Brussels 2013.

However, under the regulation No 1215/2012 (Art. 45) the refusal of recognition is a declaratory decision – much as any decision on refusal. However, due to the nature of enforcement proceedings one has difficulties comprehending that in the ordinary course of events (i.e. without bankruptcy) the creditor would have an interest in refusal of recognition. The legislator seemed to have been aware of the issue of interest in bringing proceedings. In order to understand this provision, one has to examine national civil procedure. The interest of such proceedings is to be found in the difference between an incident refusal (*incidenter*) and a refusal *in merito* (*principaliter*). In Slovenia and Austria there exists also a possibility of an “*intermediate claim on declaration*”¹⁵⁹ that can be raised in civil litigation which has a different subject matter. *In praxi* one can think at least of an application on inadmissibility or refusal of enforcement (Art. 46 of the regulation No 1215/2012) or the admission of foreign judgment debt in the bankruptcy estate from the point of view of the debtor because the judgment on such an intermediate claim from declaration acquires the substantive *res judicata* effect. Such a declaration *in merito* of non recognition might then serve as a perpetual ground for refusal of enforcement in the requested Member State. Apart from declaratory and constitutive judicial decisions it is quite difficult to see an independent scope of application of Art. 45 of the regulation No 1215/2012.

If a foreign judicial decision contains an operative part that might not be executed under the law of the addressed Member State, then Art. 54 of the regulation No 1215/2012 is to be applied. The mechanism found is the implementation *ratione materiae* in the field of procedural law of the doctrine on the “*Anpassung*” or “*la transposition*”, i.e. a modified application of foreign law in application of private international law by the *forum*¹⁶⁰ in such a way as to apply “*a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests*”. Under Art. 54(2) of the regulation No 1215/2012 any party may challenge the adaptation of the measure or order before a court. In order to understand this provision recourse *mutatis mutandis* is to be undertaken to the *Pocar Report* on the parallel Lugano convention. In § 153 of that report it is stated that “*in practice, however, only the party against whom the enforcement is sought will have an interest in challenging a declaration of enforceability, and only the applicant will have an interest in challenging a rejection of the application*”¹⁶¹ This means that the judgment creditor will have an interest to challenge the adaptation if the national court performed an adaptation that does not acknowledge the foreign title. Taking the *Szyrocka* case¹⁶² into consideration (and omitting the specifics of that case like the application of the regulation No 1896/2006) then at least a problem of fixing the interest rate in the field of monetary obligations will arise. The capital is usually fixed either expressly in the operative part of a judicial decision or at least in the statement of reasons, default or even other interests are a very different story that will cause problems to national enforcement judges. *Exequatur* also served to translate operative parts of foreign judgments into the *lex fori*, i.e. forms acceptable to enforcement agencies and judges.¹⁶³ In Slovenia the form usually used is: *the debtor is condemned to payment of a certain sum of money together with default interests fixed by the law in the deadline of 15 days after the pronouncement of the judicial decision.*

If even simple monetary obligations can cause such issues, then cross border enforcement of

¹⁵⁹See *Rechberger, Simotta*, op. cit., paras. 559-562 for the Austrian *Zwischenfeststellungsantrag* in §§ 236 and 259(2) of the Austrian Code of Civil Procedure, *U. Kežmah*, *Zakon o pravdnem postopku s komentarjem in sodno prakso*, Vol. II, Maribor, De vesta 2009, p. 33 and 34 for the Slovenian *vmesna ugotovitvena tožba* in Art. 181(1) Slovenian Law on Civil Procedure (ZPP).

¹⁶⁰*Kropholler*, op. cit., p. 234, *Bureau, Muir-Watt*, *Droit international privé*, tome 1, par. 474.

¹⁶¹Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, Eplanatory report by prof. Fausto Pocar, OJ 2009 C 319, 23.12.2009, p. 47

¹⁶²CJEU, Case C-215/11 *Szyrocka* [2012] not yet reported in the ECR.

¹⁶³*Schack*, op. cit., paras. 1031 and 1032 as far as the enforceability of foreign compelling titles containing a pecuniary condemnation with an interest rate is concerned. See also *C. Kleiner*, *Les intérêts de somme d'argent en droit international privé (ou imbroglio entre la procédure et le fond)*, *Rev. crit. DIP* 98 (2009), vol. 4, p. 639 – 683.

compelling judicial decisions ordering a specific performance of obligations of *dare, facere* and *praestare* will undoubtedly cause a rather impressive development of case law before the CJEU under Art. 267 TFEU due to recourses against decisions on adaptation of foreign titles.¹⁶⁴ It might be expected that due to a case law of that court that is very integration friendly, the *lacunae* in the regulation No 1215/2012 will be filled by case law and that the end result will be due to uniform interpretation and application of EU law an even more unified European civil procedure than expected.

In the end one might be surprised that articles 49 and 50 of the regulation No 1215/2012 set up a system of remedies in the structure of court in Member States against the decision on the application for refusal of enforcement. In other words, there are no EU remedies against decision on enforcement. Such remedies are covered by national procedural law (Art. 41 of the regulation No 1215/2012). This is the final consequence of Art. 41(2) of that regulation according to which “*the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.*”

Certificates concerning judgments in civil and commercial matters shall be dealt with below in point II of this chapter.

2. Family law and successions : regulations Brussels IIa (No 2201/2003), No 4/2009 and No 650/2012

Specifics of international enforcement in family law and successions require also special rules. Therefore one can speak of several enforcement procedures codified in the Brussels IIa Regulation and Regulation No 4/2009.

Brussels IIa regulation is a hybrid legal act, containing both the classic model of simplified *exequatur* comparable to the regulation Brussels I (No 44/2001) and a model of direct enforcement (Chapter III, Section 4 Brussels IIa regulation). It has been stated that an applicant can chose either one.¹⁶⁵ However, according to case law this choice seems to be rather limited.¹⁶⁶ As far as Brussels IIa is concerned it should also be said that there is no enforcement concerning decisions on divorces, legal separations or marriage annulments, as such decisions are *per definitionem* not capable of enforcement.¹⁶⁷ Enforcements upon simplified *exequatur* like in regulation Brussels I (No 44/2001) are possible in cases of Art. 1(b) of Brussels IIa regulation (concerning the attribution, exercise, delegation, restriction or termination of parental responsibility) and for foreign orders concerning costs and expenses of the procedure (Art. 49 of the Brussels IIa regulation).¹⁶⁸ It has been ruled that “*in order to ensure that the system intended by the Regulation operates properly, the use of coercion against a child in order to implement a judgment of a court of a Member State ordering her placement in a secure care institution in another Member State presupposes that the*

¹⁶⁴See *mutatis mutandis* Art. 48 of the Regulation No 2201/2003 as a concession to the diversity of European legal orders.

¹⁶⁵Rauscher, op. cit., para. 2393.

¹⁶⁶CJEU, Case C-92/12 PPU Health Service Executive [2012] not yet reported in the ECR, para. 118 “it is clear from the Regulation that only the two categories of judgments expressly referred to may, subject to certain conditions, be enforced in a Member State even though they have not been declared to be enforceable in that State. Consequently, the procedure for seeking recognition and enforcement must be adopted in the case of other judgments in matters of parental responsibility which require enforcement in another Member State.”

¹⁶⁷J. Adolphsen, op. cit., p. 284.

¹⁶⁸Rauscher, op. cit., para. 2351.

*judgment has been declared to be enforceable in the latter State.*¹⁶⁹

Direct enforcements are allowed under Art. 40 et seq. of the Brussels IIa regulation for enforcement of decisions on right to access (Art. 41 of the Brussels IIa regulation) and on return of the child (Art. 42 of the Brussels IIa regulation). Both enforcement procedures follow the same pattern, with the exception that Art. 42 of the Brussels IIa regulation contains specific provisions on default judgments. An enforceable judicial decision either on right to access or on the return of the child given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with the Brussels IIa regulation on the standard form for certificates. According to case law the requirement of enforceability was “*expressly waived, in the interests of expedition in respect of two categories of judgments, namely certain judgments concerning rights of access and certain judgments which require the return of the child. Such a declaration is replaced, to a certain extent, by a certificate issued by the judge of origin which must accompany, in those cases, a judgment falling within either of the two categories of judgments.*”¹⁷⁰ “*As is clear from Recital 24 and Articles 42(1) and 43(2) of the regulation, the issue of a certificate is not subject to appeal, and a judgment thus certified is automatically enforceable, there being no possibility of opposing its recognition.*”¹⁷¹ As far as recourses are concerned, there is a recourse in rectification of the certificate which is governed by the law of the Member State of origin (Art. 43 of the Brussels IIa regulation).

The specific nature of EU civil procedure gives precedence to certified foreign judgments.¹⁷² The certified judgment seems to have a substantive *res judicata* effect in the sense that it produces a certain cross border *non bis in idem* effect. New circumstances do create a *nova causa superveniens*. However, “*such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.*”¹⁷³

In the end it should be said that according to the *Health Service Executive* case the recourses and remedies should not have a suspensive effect.¹⁷⁴

The regulation No 4/2009 regulates maintenance obligations. An interesting split can be observed when studying that regulation. *Exequatur* is abolished and no remedies are allowed against automatic recognition (Art. 17(1) of the Regulation No 4/2009) and there is also automatic enforceability (Art. 17(2) of the regulation No 4/2009) if the Member State is bound by the 2007 Hague Protocol. However, if the Member State is not bound by the 2007 Hague Protocol, a simplified *exequatur* procedure is required in order to get an enforceable title (Art. 26 of the

¹⁶⁹CJEU, Case C-92/12 PPU *Health Service Executive* [2012] not yet reported in the ECR, para. 113.

¹⁷⁰CJEU, Case C-92/12 PPU *Health Service Executive* [2012] not yet reported in the ECR, para. 116.

¹⁷¹CJEU, Case C-211/10 PPU, *Povse* [2010] ECR I-6673, para. 70.

¹⁷²CJEU, Case C-211/10 PPU, *Povse* [2010] ECR I-6673, paras. 78 and 79. “to hold that a judgment delivered subsequently by a court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to circumventing the system set up by the regulation No 2201/2003. Consequently, a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child”.

¹⁷³CJEU, Case C-211/10 PPU, *Povse* [2010] ECR I-6673, para. 83. “A certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child.”

¹⁷⁴CJEU, Case C-92/12 PPU *Health Service Executive* [2012] not yet reported in the ECR, para. 133. “In order not to deprive the Regulation of its effectiveness, the decision of the court of the requested Member State on the application for a declaration of enforceability must be made with particular expedition and appeals brought against such a decision of the court of the requested Member State must not have a suspensive effect.”

regulation No 4/2009).

Typical for the regulation No 4/2009 is the split of recourses and remedies in the Member State of origin and remedies in the Member State in which enforcement is being sought. Under Art. 19 of the regulation No 4/2009 a defendant who did not enter an appearance in the Member State of origin bound by the 2007 Hague Protocol has the right to apply for a review of the decision where he was not served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence or he was prevented from contesting the maintenance claim by reason of *force majeure* or due to extraordinary circumstances without any fault on his part within 45 days. However, the nature of such recourse is close to oppositions against default judgments. The old challenged judicial decision is the *judicium rescindens* that will be replaced by a *judicium rescissorium*. What is the status of the challenged judicial decision *pendente lite*? According to Art. 19 of the regulation No 4/2009 if the application for a review is rejected on the basis that none of the grounds for a review apply, such a decision shall remain in force. Should *a contrario* this mean that the *effet utile* of EU law requires that the judicial recourse against judgment given in default of appearance has a suspensive effect? The question remains to be answered by the CJEU. However, the answer might lie in the national procedural autonomy, i.e. principles of equivalence and effectiveness concerning the national default judgments. If national law institutes a suspensive effect in national cases, then such an effect will also have to be recognised in European cases.¹⁷⁵

The authorities of the Member State bound by the 2007 Hague Protocol in which enforcement is sought are solely required to assist the creditor in enforcement.¹⁷⁶ In other words, national enforcement agencies of the Member State in which enforcement is sought enforce the foreign decision under the local *lex fori*. Recourses are therefore ruled by the national *lex fori*.

There are actually only two Member States not bound by the 2007 Hague Protocol, Denmark and Great Britain. The *exequatur* is similar to the one in regulation No 44/2001, i.e. there is a procedure for declaration of enforceability before the enforcement of judicial award.

Regulation No 650/2012 follows also the pattern regulation No 44/2001. Art. 50 set up an adversarial recourse against the declaration of enforceability open to both parties.

3. Special forms of civil procedure: regulations No 805/2004, No 1896/2006, No 861/2007 and protection measures in civil matters

Regulations No 805/2004, No 1896/2006 and No 861/2007 have set up a “system of direct enforcement with special initial trial procedures”¹⁷⁷ All three regulations are characterised by the abolition of the *exequatur* and the transfer of review of challenged decisions in the Member State of origin¹⁷⁸ Therefore it can be said that the review of grounds for refusal of recognition is preformed

¹⁷⁵CJEU, Case C-472/11 Banif Plus Bank [2013] not yet published in the ECR, paras 26 – 28. “26. In that regard, it must be noted that, in the absence of European Union legislation, the procedural rules governing actions for safeguarding the rights that individuals derive from European Union law fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness).”

¹⁷⁶Bureau, *Muir-Watt*, Droit international privé, par. 792.

¹⁷⁷Rauscher, op. cit., p. 578

¹⁷⁸Kropholler, *von Heim*, op. cit., p. 796.

in the Member State of origin.¹⁷⁹ The three regulations did indeed introduce the autonomous European enforcement titles that are independent from national procedural law.¹⁸⁰ As in all other regulations, the enforcement is purely national. This implies *a majore ad minus* that recourses in enforcement proceedings in the Member State of enforcement are regulated by national law.

a. European enforcement order for uncontested claims (regulation No 805/2004)

The essential rules are contained in Art. 5 - 11 of the regulation No 805/2004. In other words, once a title (be it a judgment, a court settlement or even an authentic instrument¹⁸¹) is certified as European enforcement order in the Member State of origin, it can be enforced in the Member State of enforcement without any intermediate proceedings. Solely infringement of the *res judicata* effect of a previous judicial decision can according to Art. 21(1) of the regulation No. 805/2004 constitute under certain circumstances a ground for refusal of enforcement.¹⁸² European enforcement title is composed of two documents, namely the enforceable national decision certified as European enforcement title and the European enforcement title certificate.¹⁸³ Slovenian national case law on regulation No. 805/2004 seems to confirm the unilateral nature of proceedings of issuing a European Enforcement Order. Indeed, only judicial decisions are served upon the debtor and not the application initiating proceedings.¹⁸⁴

There is no other recourse against the issuing of the certificate than rectification or withdrawal (Art. 10(4) of the regulation No 805/2004).¹⁸⁵ In proceedings for issuing a certificate under the regulation No 805/2004 there is no possibility of submitting an objection that the defendant lodged a reply without any statement of reasons as the application instituting proceedings.¹⁸⁶ Recourses under national law are therefore inadmissible.¹⁸⁷ The question of recourses against refusal to issue is not addressed by the regulation. Both remedies can only be lodged in the Member State of origin. There is actually a move towards the Member State of origin in abolishing any review of conditions or recognition in the Member State of enforcement.¹⁸⁸

Article 10 of the regulation No 805/2004 provides for rectification or withdrawal of the European enforcement order certificate upon application to the court of origin that adopts then a decision under the national *lex fori*. No recourse can be performed *ex officio* and the court of origin cannot rectify or withdraw the European enforcement order certificate of its own motion without

¹⁷⁹Rechberger, Simotta, op. cit., para. 1223

¹⁸⁰Rechberger, Simotta, op. cit., para. 1226.

¹⁸¹See as far as notary deeds are concerned e.g. Court of Appeal in Celje (Slovenia), order of 11 January 2012 in case I Ip 391/2011, <http://sodnapraksa.si/> (15 March 2013), stating that a Hungarian notary deed cannot be enforced as such in Slovenia, in order to achieve the enforceability in Slovenia, such a deed must be either certified by European Enforcement Certificate or by the Certificate under regulation No 44/2001.

¹⁸²See e.g. Supreme Court of Austria (Oberster Gerichtshof), order of 22 February 2007 in case 3Ob253/06m, p. 3 (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013).

¹⁸³J.-F. van Drooghenbroeck, S. Brijs, Un titre exécutoire européen, Larcier, Brussels, 2006, para. 113 and Court of Appeal of Vienna (Oberlandesgericht), order of 14 June 2007 in case 1R85/07p, p. 2 (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013).

¹⁸⁴Court of Appeal in Koper, order of 13 January 2011 in case Cpg 118/2010, <http://sodnapraksa.si/> (15 March 2013).

¹⁸⁵Kropholler, von Heim, op. cit., p. 819 and 820, Stein, op. cit., p. 681.

¹⁸⁶Court of Appeal in Celje (Slovenia), order of 2 June 2010 in case Cp 66/2010, <http://sodnapraksa.si/> (15 March 2013).

¹⁸⁷French Court of Cassation (Cour de cassation), judgment of 25 February 2013 in case 07/14921 (<http://www.legifrance.gouv.fr/initRechJuriJudi.do>, 15 March 2013).

¹⁸⁸Court of Appeal in Koper (Slovenia), order of 13. January 2011 in case Cpg 118/2010, <http://sodnapraksa.si/> (15 March 2013), see also recital 17 in the preamble to the regulation No 805/2004: "The courts competent for scrutinising full compliance with the minimum procedural standards should, if satisfied, issue a standardised European Enforcement Order certificate that makes that scrutiny and its result transparent".

corresponding pleas raised by the parties. The *lex fori* of the Member State of origin shall apply to the rectification or withdrawal of the European Enforcement Order certificate.

However, recourses for rectification and for withdrawal are completely independent from remedies against the judgment on an uncontested claim delivered in the Member State of origin. The setting aside or reforming of a national judgment certified as a European Enforcement Order in such a way that it ceases to be enforceable or even just the statute of limitation of a national enforcement title triggers a new procedure for issuing a certificate indicating the lack or limitation of enforceability (Art. 6(3)). Therefore one must speak of two parallel national procedures in the Member State of origin. The first one is the civil procedure under national law closed by delivery of a judgment on an uncontested claim. Remedies in the first procedure are completely national. The second procedure is the delivery of the European enforcement order certificate. Remedies are set up by Art. 10 and Art. 6(2) of the regulation No 805/2004. Remedies and recourses have *ratione materiae* an independent scope of application.¹⁸⁹ Therefore, the claimant in proceedings for the issue of the European enforcement order certificate is precluded from lodging pleas concerning the underlying application in civil proceedings for the obtention of the national title.¹⁹⁰ The question of suspensive effect of requests in rectification and withdrawal remains unsolved. By reference to Art. 23 of the regulation No 805/2004 Belgian doctrine considers that due to the existence of a *titulus executionis* such an effect might not be possible.¹⁹¹ However, the answer might lie in the national procedural autonomy, i.e. principles of equivalence and effectiveness concerning national judgments, if national law institutes a suspensive effect in national cases, then such an effect will also have to be recognised in European cases.¹⁹²

A rectification is used to correct discrepancies between the title and the certificate due to material errors (Art. 10(1)(a) of the regulation No 805/2004). In Slovenia for example a request in rectification would not even be considered as a recourse. However, under European law the rectification is a remedy for correcting material errors in the European enforcement order certificate and is more or less an instrument for eliminating non substantive errors of the title such as *errores calami*.

The withdrawal, on the other hand, is to be applied where the European enforcement order certificate was clearly wrongly granted (Art. 10(1)(b) of the regulation No 805/2004). The term wrongly granted can be interpreted as lack of conditions for granting such a European enforcement order certificate comprised in Art. 6 of the the regulation No 805/2004. As far as conditions for granting such a certificate are concerned, right of defence must be guaranteed. “*That guarantee would, however, be lacking if a judgment by default issued against a defendant who was unaware of the proceedings was certified as a European Enforcement Order.*”¹⁹³ “*It should therefore be held that a judgment by default issued against a defendant whose address is unknown must not be certified as a European Enforcement Order within the meaning of regulation No 805/2004.*”¹⁹⁴

However, there is also a “hidden” non devolutive recourse of Art. 19 of the regulation No 805/2004

¹⁸⁹van Drooghenbroeck, Brijis, op. cit., para. 113.

¹⁹⁰Court of appeal of Celje (Slovenia), order of 2 June 2010 in case Cp 66/2010, <http://sodnapraksa.si/> (15 March 2013).

¹⁹¹van Drooghenbroeck, Brijis, op. cit., para. 124.

¹⁹²CJEU, Case C-472/11 Banif Plus Bank [2013] not yet published in the ECR, paras 26 – 28. “26. In that regard, it must be noted that, in the absence of European Union legislation, the procedural rules governing actions for safeguarding the rights that individuals derive from European Union law fall within the internal legal order of the Member States by virtue of the principle of procedural autonomy of those Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law (principle of effectiveness).”

¹⁹³CJEU, Case C-292/10 G v Cornelius de Visser [2012] not yet published in the ECR, para. 66.

¹⁹⁴CJEU, Case C-292/10 G v Cornelius de Visser [2012] not yet published in the ECR, para. 67.

referred to as the minimum standards for review in exceptional cases. A judgment can only be certified as a European Enforcement Order if the debtor is entitled, under the *lex fori* of the Member State of origin, to apply for a review of the judgment where the service of initial document instituting the proceedings was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part or he was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly. When studying that recourse, a strong similarity can be seen between that European remedy and the request for *restitutio in integrum* under national law.

As far as refusal to deliver a European enforcement order certificate is concerned, this question seems to be regulated by national law.¹⁹⁵

The fact that e.g. a European enforcement title is to be enforced in the same way as a national enforcement title does mean that all national recourses against the title and the enforcement are available as in the case of a national *titulus executionis*.¹⁹⁶

b. European order for payment procedure (Regulation No 1896/2006) - the modern European *mandatum de solvendo cum clausula justificativa*

As far as conditions for delivering the European order for payment are concerned, Art. 7 of regulation No 1896/2006 contains rules by virtue of which requirements to be met by an application for a European order for payment are named exhaustively.¹⁹⁷ The certification is different compared to the European enforcement title. In order to get an enforcement of a European order for payment (Art. 21(1) of the regulation No 1896/2006) *in praxi* the European order for payment (Form E) and the declaration of enforceability (Form G) are needed.¹⁹⁸ The declaration of enforceability of the the European order for payment is dealt with in Art. 18 of the regulation No 1896. However, as far as procedure for recourses and remedies is concerned, the situation is not as clear cut, there are only two admissible remedies, namely the opposition under Art. 16 of the regulation No 1896/2006 and a request for review in both forms (Art 20 of the regulation No 1896/2006). No further appeal is allowed.¹⁹⁹

The first recourse is contained in Art. 11 of the regulation No 1896/2006. There is no right of appeal against the rejection of the application for issuing a European order for payment. On the other hand, the European order for payment can only be challenged by an opposition.²⁰⁰ According to Art. 16(1) of the regulation No 1896/2006 there appears to be a principle of strict formality in the field of remedies. The defendant may lodge a statement of opposition to the European order for payment with the court of origin using standard form F as set out in Annex VI, which shall be supplied to him together with the European order for payment. However, in interpreting that provision, account must be taken of recital No 23 in the preamble to the regulation No 1896/2006.²⁰¹ The opposition is to be lodged within 30 days of service of the order on the defendant and requires solely the signature and an indication that the defendant contests the claim, without having to specify the reasons for the opposition. Unless the claimant has explicitly requested that the proceedings be

¹⁹⁵J.-F. van Drooghenbroeck, S. Brijs, Un titre exécutoire européen, Larcier, Brussels, 2006, para. 125.

¹⁹⁶Supreme Court of Austria (Oberster Gerichtshof), judgment of 14 December 2010 in case 3Ob231/10g (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013).

¹⁹⁷CJEU, Case C-215/11 Szyrocka [2012] not yet reported in the ECR, para. 36.

¹⁹⁸Kropholler, von Heim, op. cit., p. 1033.

¹⁹⁹Rechberger, Simotta, op. cit., para. 1295.

²⁰⁰B. Sujecki, Das Europäische Mahnverfahren, Neue juristische Wochenschrift No 23/2007, p. 1622 (1625).

²⁰¹Recital No 23 reads as follows: “The defendant may submit his statement of opposition using the standard form set out in this Regulation. However, the courts should take into account any other written form of opposition if it is expressed in a clear manner.”

terminated, the opposition against the payment order is the triggering point for triggering the ordinary civil procedure under the technique of reversal of procedural initiative which is also applied in several national legal systems.²⁰² Perhaps the most important provision is the assimilation provision in Art 17(1) of the regulation No 1896/2006. Opposition against the European payment order has identical effects as oppositions lodged under national law against national payment orders. The logical consequence of the assimilation is the application of the *lex fori* of the Member State of origin in subsequent ordinary civil proceedings.

In exceptional cases there might be two types of review of the European enforcement order under Art. 20 of the regulation No 1896/2006. When studying Art. 20 there is a strong similarity between that European remedy and the request for *restitutio in integrum* under national law.²⁰³

After the expiry of the 30 day period the defendant has the right to apply for a review of the European order for payment before the competent court in the Member State of origin. Such a right exists where the European order for payment was served according to Article 14 of the Regulation No 1896/2006 and service was not effected in sufficient time to enable him to arrange for his defence. This is the case if there was no fault on his part, or if he was prevented from objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part, provided that he acts promptly.

After the expiry of the 30 day period the defendant has the right to apply for a review of the European order for payment before the competent court in the Member State of origin. Such a right exists where the order for payment was issued in breach of the requirements of the regulation No 1896/2006 or due to other exceptional circumstances. This rule might pose serious problems with the *res judicata* principle in national procedural law. However, it seems that the extraordinary review is a compromise for a one tier procedure of issue the European payment order, which joins the issuing of the order and the trial stage.²⁰⁴

As far as remedies are concerned, Art. 23 of the regulation No 1896/2006 provides for interim relief before the competent court in the Member State of enforcement, where the defendant has applied for a review in accordance with Article 20 of the regulation. However, conditions for granting an interim measure which limit or stay the enforcement are not clearly expressed by EU law. It is only clear that there has to be interim relief as an institute. Therefore one must again stress the importance of national procedural autonomy. In other words, if there is a possibility of interim relief in national enforcement law against the enforcement, such a relief must be granted under the same conditions also for limitation or stay of proceedings concerning the European enforcement order.

b. European small claims procedure (regulation No 861/2007)

The European small claims procedure is the extreme form of simplification justified by the nature of a small claim (i.e. up to € 2000 under Art. 2(1) of the Regulation No 861/2007).²⁰⁵ The starting point in the field of recourses is Art. 19 of the regulation No 861/2007 referring to the *lex fori* of the Member State of origin (or to be more precise to the procedural law of the Member State in which the procedure is conducted). In other words recourses in the trial and remedies concerning the enforcement title phase are regulated by the *lex fori* of the Member State of origin. In that context

²⁰²See historical and comparative developments in Europe in *J. - P. Correa Delcasso*, Le titre exécutoire européen et l'inversion du contentieux, *Revue internationale de droit comparé* 53 (2001), vol. 1, p. 61 (65-70) and *Boularbah*, op. cit., paras 336 - 339.

²⁰³*Kropholler, von Heim*, op. cit., p. 1028 and *Sujecki*, op. cit., p. 1625.

²⁰⁴*Sujecki*, op. cit., p. 1625.

²⁰⁵*I. Jahn*, Das Europäische Verfahren für geringfügige Forderungen, *Neue juristische Wochenschrift*, 40/2007, p. 2890 (2891).

reference is to be made to Art. 17 of the regulation No 861/2007 providing for a “database of information on national appeals in small claim procedures”. However, even if there is a remedy, remedies against judicial decisions in the Member State of origin are under Art. 15 of the regulation No 861/2007 not supposed to have a suspensive effect. Judicial decisions condemning the debtor to paying a sum of up to € 2000 in a cross-border dispute given under the regulation No 861/2007 are *ipso jure* of enforceable nature.

Articles 15(2) and 23 provide for an important limitation of national procedural autonomy, as they provide for interim relief against enforcement measures even if the judgment is to be enforced in the Member State where the judgment was given. In other words, this time EU law imposed interim relief also in national proceedings. However, the principle of national procedural autonomy still applies as far as the exact conditions are concerned.

The “hidden” recourse is contained in Art. 18 of the regulation No 861/2007. It has been observed that this remedy is similar with remedies under Art. 19 of the regulation No 205/2004 and Art. 20(1) of the regulation No 1896/2006 in sense that it is not devolutive.²⁰⁶

d. *De jure condendo*: protection measures in civil matters

For the time being the legislature is in the process of adopting the regulation on mutual recognition of protection measures in civil matters.²⁰⁷ A protection measure is to be enforced without a declaration of enforceability being required. It is to be enforced in the enforcement state upon production of a copy of the measures, a certificate and where necessary the translation/transliteration (Bulgaria, Cyprus and Greece).

Under the terms of Art. 5 of the proposal no appeal shall lie against the issuing of the certificate. However, under Art. 7 of the proposal there are recourses for rectification and for withdrawal of the certificate. Rectification and withdrawal can be performed upon request by either party to the issuing authority of the Member State of origin or on that authority's own initiative.

As far as rectification is concerned one might consider the proposal as an advance. A rectification will also be used to correct discrepancies between the protection measure and the certificate. However, this is not due to material errors (Art. 10(1)(a) of the Regulation No 805/2004) but due to clerical errors. The withdrawal follows the classical scheme. A withdrawal is possible where the measure was clearly wrongly granted in violation of the requirements of the proposal of the regulation.

Under Art. 7(2) of the proposal the procedure for the rectification or withdrawal of the certificate, including any appeal on the rectification or withdrawal, shall be governed by the law of the Member State of origin.

II. The Europeanised principle *nulla executio sine titulo* and the modern European *mandatum de solvendo* (the addressed court deals in certificates not the *exequatur*)

Nulla executio sine titulo seems to be the general principle of law applied in the whole of Europe as

²⁰⁶Rauscher, op. cit., para. 2449.

²⁰⁷Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, <http://register.consilium.europa.eu/pdf/en/13/st06/st06838.en13.pdf> (visited on 8 March 2013).

far as national titles are concerned.²⁰⁸ When studying the new civil procedure in Europe it could be concluded that the separation of the *authority to adjudicate* and the *authority to enforce* ordered by the *jurisdiction to prescribe* exercised by the EU might pose an interesting question in terms of international law.²⁰⁹ Apparently European legal doctrine will have to adopt the US distinction between the *jurisdiction to adjudicate* and the *jurisdiction to enforce*. This is limited to the definition that the *jurisdiction to adjudicate* shall be defined in following terms “a court may not enter a binding judgment in resolution of a matter unless it has jurisdiction to adjudicate the dispute”.²¹⁰ The reason for this is that the courts and tribunals in the EU Member State of origin will deliver an enforceable judicial decision that will be then enforced without any intermediate *exequatur* proceedings in the addressed EU Member State.²¹¹ If the definition of the jurisdiction to adjudicate is confined solely to the question of jurisdiction as addressed e.g. in the regulation No 1215/2012, then it can be accepted in the EU without reservations. The sole rationale in the EU for the separation of the *jurisdiction to adjudicate* and the *jurisdiction to enforce* is to be found in the exercise of the powers of a public authority performed on the territory of the the state of enforcement (jurisdiction to enforce implies the principle of territoriality).

No enforcement without a certified title might be the future in the EU. As far as enforcement goes there is a saying in Germany: *Titel, Klausel, Zustellung*.²¹² In Europe the saying will be: service of the application commencing proceedings in the Member State of origin, enforceable title in the Member State of origin, certificate in the Member State of origin, translation/transliteration and service of the title and of the certificate in the Member State of enforcement and the actual enforcement. The inspection of the title seems to have moved from the forum of the state in which enforcement is sought to the forum of the state in which the title was delivered.²¹³ In other words, the conditions of recognition that are usually examined during the *exequatur* are examined before the *forum* of the Member State of origin.²¹⁴ By reference to the definition of a letter of credit according to which *the issuing bank deals in documents, not goods*,²¹⁵ a similar approach might be adopted to analyse various certificates mentioned in the regulations on European civil procedure. Therefore the first chapter deals with the functional equivalence between the *exequatur* and the recourses in the enforcement stage (1.). The second chapter discusses the importance of the certificate (2.) and the third opens the question of minimal standards (3.).

1. Functional equivalence between the *exequatur* and recourses in the enforcement stage

Perhaps one should start by considering the Swiss experience. Indeed, legal writers from

²⁰⁸ *Stamm*, op. cit., p. 211.

²⁰⁹ *Sengstschmid*, op. cit., p. 48-62, *Virgós Soriano, Garcimartín Alférez*, op. cit., p. 684. Professors Virgós Soriano and Garcimartín Alférez see the difference between the two jurisdictions in the absence of territorial exclusivity. Whereas the jurisdiction to adjudicate (and also the jurisdiction to prescribe) are not limited by the principle of territorial sovereignty, the jurisdiction to enforce is the exclusive competence of the state comprising the territory in which enforcement is sought. On the other hand Professor Shaw considers that there is only a separation in prescriptive jurisdiction and enforcement jurisdiction. The enforcement jurisdiction comprises the executive action or action through courts (*M. N. Shaw*, *International Law*, 6th edition, Cambridge University Press, 2008, Cambridge, p. 456 and 456), and earlier definition of *la compétence judiciaire* (jurisdiction to adjudicate) and *la compétence législative* (jurisdiction to prescribe) in *De Cock*, op. cit., p. 443-444.

²¹⁰ *A. Benjamin Spencer*, *Jurisdiction to adjudicate: A Revised Analysis*, *The University of Chicago Law Review*, 73 (2006), vol. 2, p. 617 (617).

²¹¹ See § 401. *Categories of Jurisdiction in the Third Restatement of Law on Foreign Relations of the United States*.

²¹² Enforcement title, clause of enforceability, service.

²¹³ Supreme Court of Austria (Oberster Gerichtshof), order of 22 February 2007 in case 3Ob253/06m, p. 2 (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013).

²¹⁴ Court of Appeal of Ljubljana, order of 6 May 2008 in case II Ip 533/2008, <http://sodnapraksa.si/> (15 March 2013).

²¹⁵ See *J. H. Dalhuisen*, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd edition, Hart Publishing, London 2007, p. 506

Switzerland consider that due to national enforcement law „the *exequatur* [...] is not required as a protection against foreign titles because the judgment debtor can raise all his objections against enforcement in recourses provided for under national enforcement law.“²¹⁶

Both the *exequatur* procedure and the enforcement procedure are governed by the *lex fori*. If the foreign decision to be enforced contains a condemnatory part, i.e. a condemnation to an obligation of *dare, facere, praestare*, then both procedures have the same aim, namely the satisfaction of the judgment-debtor. If there is a prohibition of the *révision au fond*²¹⁷ and only a limited scope of the *exequatur* like in regulations No 44/2001 and No 2201/2003, then there is no reason why the *exequatur* should be maintained if the grounds for refusal of recognition can be raised during enforcement proceedings. It should also be recognised that the only effective protection of the judgment creditor was usually the *exequatur* performed *incidenter* during national enforcement proceedings.

When analysing the *exequatur* under the EU regulations on civil procedure the obvious conclusion is that functions of the *exequatur* since the Brussels regulation No 44/2001 are:²¹⁸

1. protection of the procedural public policy and to much lesser a degree of substantive public policy (*ordre public*) in the Member State of enforcement²¹⁹;
2. protection of the rights of defence (i.e. right to be heard) in cases of default judgment entered without fault by the defendant;
3. if the judgment is irreconcilable with a judgment given between the same parties in the Member State of the enforcement;
4. Protection of the substantive *res judicata* effect (*ne bis in idem*);
5. Protection of certain provisions on exclusive jurisdiction.

Such a protection can be effectively granted also in enforcement proceedings, namely when deciding on recourses against enforcement orders. The prohibition of the *révision au fond* reduces the scope of control of the *exequatur* to merely a formal review that cannot annul the enforceability of a foreign enforcement title, in other words the substantive legality of an enforcement title cannot be verified. From this point of view it must also be stated that remedies (like an opposition) in enforcement proceedings usually allow only a review of formal legality and not of the substantive legality of the enforcement title.²²⁰ The enforcement judge is not entitled to review the concrete substantive legality and is bound by the enforcement title, any other solution would mean that the principle *ne bis in idem* is not complied with.²²¹

Certain recourses in enforcement proceedings are referred to in English by terms such as application to oppose enforcement. They are referred to in Germany as *Volstreckungsgegenklage* under § 767 of the German ZPO,²²² in Austria as *Oppositionsklage* under § 35 EO²²³ and in Slovenia as

²¹⁶*Oberhammer*, op. cit., p. 198.

²¹⁷See e.g. Art. 36 and Art. 45(2) of the Regulation No 44/2001, Art. 55 of the Regulation No 1215/2012, Art. 26 and Art. 31(3) of the Regulation No 2201/2003, Art. 42 of the Regulation No 4/2009, Art. 41 of the Regulation No 650/2012, Art. 21(2) of the Regulation No 805/2004, Art. 22(3) of the Regulation No 1896/2006, Art. 22(2) of the Regulation No 861/2007.

²¹⁸See e.g. Art. 34 and 35 of the Regulation No 44/2001, Art. 45 of the Regulation No 1215/2012, Art. 22 and 23. 31(3) of the Regulation No 2201/2003, Art. 24 of the Regulation No 4/2009.

²¹⁹See e.g. *B. Hess, Th. Pfeiffer, M. Bever*, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, European Parliament, document PE 453.189, <http://www.europarl.europa.eu> (15 March 2013), 152 – 154

²²⁰*Monteleone*, op. cit., p. 265.

²²¹*Rijavec*, op. cit., p. 63.

²²²*H. Brox, W.-D. Walker*, Zwangsvollstreckungsrecht, 7th edition, C. Heymanns Verlag, Cologne 2003, para. 1312 *et seq.*

²²³*P. Angst, W. Jakusch, H. Pimmer*, Exekutionsordnung, 15th edition, Manz, Vienna, 2009, p. 97 *et seq.*

opozicijska tožba under Art. 59 ZIZ.²²⁴ Even though they are not unified in Europe, all these applications allow the debtor to prevent or to achieve annulment of the enforceability of an enforcement title due to objections (*exceptiones*) of substantive law. However, one has also to consider the EU wide dimension also comprising the autonomous and uniform interpretation of such applications to oppose enforcement in cases of *tituli executionis* originating from other EU Member States.²²⁵ The consequence of that EU dimension as seen by some legal writers is the interdiction of application of defences (*exceptiones*) of substantive law in applications to oppose enforcements.²²⁶ The defence of set-off (*exceptio compensationis*) against a European enforcement order is certainly not allowed in enforcement proceedings if the debtor could have declared the set off before the creation of the European enforcement order.²²⁷ The debtor is therefore precluded in lodging such a defence in the last stage of civil procedure – namely in the enforcement stage.²²⁸ However, the defence of specific performance cannot be included in such an interdiction.

All previously mentioned applications allow for a certain review of a foreign enforcement title in enforcement proceedings. In other words, as far as foreign enforceable titles are concerned, such recourses might have the same role as the *exequatur* and are to be qualified as “*proceedings concerned with the enforcement of judgments*”. There seems to be a *forum exclusive* for such actions in the courts of the Member State in which the judgment has been or is to be enforced.²²⁹ The Europeanised question of *vis attractiva executionis* certainly creates numerous unsolved legal problems.²³⁰ Does this also mean that foreign titles might be reviewed in the framework of such recourses with the aim of depriving the judgment given in the Member State of origin of the nature of *titulus executionis*?²³¹ This interpretation of regulations No 44/2001 and No 1215/2012 is not confirmed by legal writers.²³² The first argument which counters the power of an unlimited review would already be the interdiction of the *révision au fond*, that is also applied to the enforcement proceedings. The second argument is that the acknowledgement of a *clausula rebus sic stantibus*, which is implied in some applications to oppose enforcement against existing foreign titles, would jeopardise the exclusive jurisdiction under regulations No 44/2001 and No 1215/2012.²³³ Due to national procedural autonomy it cannot be disputed that the defences which may be raised and the conditions under which they may be raised are governed by national law.²³⁴ However, such a ruling applies only to the situation where a defendant raises such a claim, as a pure defence and not to claims by defendants which seek the pronouncement of a separate judgment or decree.²³⁵ Such a defence must be intrinsically connected with “*proceedings concerned with the enforcement of*

²²⁴Rijavec, op. cit., p. 214.

²²⁵See e.g. Supreme Court of Austria (Oberster Gerichtshof), judgment of 14 December 2010 in case 3Ob231/10g and order of 24 March 2010 in case 3Ob12/10a (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013).

²²⁶See P. Oberhammer, *Oppositionsklage und Europäisches Zivilprozessrecht*, p. 88, in: B. König/P. G. Mayr (eds.) *Europäisches Zivilverfahrensrecht in Österreich III, 10 Jahre Brüssel I-Verordnung*, Manz, Vienna, 2012.

²²⁷Supreme Court of Austria (Oberster Gerichtshof), judgment of 14 December 2010 in case 3Ob231/10g.

²²⁸See P. Oberhammer, *Oppositionsklage und Europäisches Zivilprozessrecht*, p. 91 and 92.

²²⁹Art. 22, point 5, of the regulation No 44/2001 and Art. 24, point 5, of the regulation No 1215/2012 and CJEU, case 220/84 AS-Autoteile Service [1985] ECR p 2267, para. 12

²³⁰See P. Oberhammer, *Oppositionsklage und Europäisches Zivilprozessrecht*, p. 85 and 86.

²³¹See Rijavec, op. cit., p. 214. The question of *clausula rebus sic stantibus* in the scope of the European civil procedure has not yet been discussed in Slovenia.

²³²König, op. cit., p. 933.

²³³Supreme Court of Austria (Oberster Gerichtshof), order of 24 March 2010 in case 3Ob12/10a, p. 14 and 15 (<http://www.ris.bka.gv.at/Jus/>, 15 March 2013) with reference to application (in Austria) for reduction of a maintenance obligation fixed by an enforcement title originating from another Member State (Poland) due to worsened economic conditions of the father who is domiciled in Austria. The aim of such applications according to the Austrian Supreme court is the revocation of the previous foreign enforcement title and replacement by a new national one. It has been correctly stated that such applications for reduction of a maintenance obligation are not always linked to proceedings concerned with the enforcement of judgments (see P. Oberhammer, *Oppositionsklage und Europäisches Zivilprozessrecht*, p. 94).

²³⁴CJEU, case C-341/93 Danværn Production [1995] I-2053, para. 18.

²³⁵CJEU, case C-341/93 Danværn Production [1995] I-2053, para. 18.

*judgments" i.e. "proceedings which may arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments"*²³⁶. Therefore a judgment debtor opposing the enforcement of a foreign title is solely not allowed to lodge all oppositions in the Member State of enforcement, he is redirected in the Member State of origin.²³⁷ The reason is simply that a question of procedural law like jurisdiction does not comprise questions of substantive law linked with the extinguishing of the claim.²³⁸ One might therefore speak of the principle *qui elegit iudicem, non elegit jus*. Therefore it can be stated that the enforcement judge can perform the same review as the judge granting an *exequatur*, if he is not reviewing the substance of the foreign enforcement title. If recourses and remedies against enforcement measures can have the same effect as the refusal of the *exequatur*, then the intermediary proceedings may be merged with enforcement proceedings.

From the Slovenian point of view the main remedy in the enforcement proceedings i.e. the opposition under Art. 55 of the Law on enforcement and interim measures (ZIZ) provides for three different groups of grounds for opposing the enforcement against national and foreign titles, namely:

1. defences concerning the conditions of admissibility of enforcement proceedings,
2. defences stating that the enforcement is not allowed, as the creditor's claim is extinguished, even though a valid enforcement title exists;
3. defences concerning the enforcement proceedings linked to the maturity and enforceability of the claim (*impugnatio*).²³⁹

One can see that the reasons for refusing an *exequatur* stated above are also contained in those three grounds. There is no reason why a judgment creditor should commence two proceedings, where the debtor gets the same degree of guarantee of his rights of defence in the enforcement proceedings.

2. The importance of the certificate

In the beginning it can be stated that the issuing of the certificate is a right for the judgment creditor that is protected under Art. 6(1) ECHR.²⁴⁰ The issue was then addressed by the CJEU when it confirmed the enforcement of a judicial decision given in an EU Member State of origin in the territory of Northern Cyprus. The answer given by the CJEU could be read as a textbook example of public international law. According to the CJEU the fact that claimants might encounter difficulties in having judgments enforced in Northern Cyprus cannot deprive English judgments of their enforceability and, therefore, does not prevent the Cypriot courts in which enforcement is sought from declaring such judgments enforceable.²⁴¹

Traditionally under regulation No 44/2001 the certificate seemed to be of lesser importance.²⁴² The certificate could be understood as a European clause of declaration of enforceability before the court of origin much like similar national clauses of declaration of enforceability. Therefore, the

²³⁶CJEU, case C-261/90 Reichert II [1992] ECR I-2149, para. 27.

²³⁷See *P. Oberhammer*, *Oppositionsklage und Europäisches Zivilprozessrecht*, p. 90.

²³⁸See CJEU, case 220/84 AS-Autoteile Service [1985] ECR 2267, paras 12-17.

²³⁹*Rijavec*, op. cit., p. 196.

²⁴⁰See Opinion of Advocate General Kokott delivered on 18 December 2008 in Case C-420/07 Apostolides [2009] ECR I-3571, para. 52.

²⁴¹CJEU, Case C-420/07 Apostolides [2009] ECR I-3571, paras 70 and 71. This can also be read as the fact that the lack of effective performance of *acta jure imperii* over a certain territory within internationally recognised borders of a Member State does not change the borders of the state.

²⁴²CJEU, Case C-619/10, Trade Agency [2012], not yet reported in the ECR, para. 34. "[...] it must be observed that the fact that the foreign judgment is accompanied by the certificate cannot limit the scope of the assessment to be made pursuant to the double control, by the court of the Member State in which enforcement is sought, once it examines the ground for challenge mentioned in Article 34(2) of Regulation No 44/2001."

information in such certificates can only have *prima facie* value and the presentation is not obligatory.²⁴³ Slovenian case law for example follows a principle that even though certificates under regulation No 44/2001 and No 805/2004 certify the same legally important fact – namely the enforceability, each certificate has a different aim. The aim of the certificate under regulation No 44/2001 is the *exequatur*, whereas under regulation No 805/2004 the aim is direct enforcement.²⁴⁴ As far as regulation No 44/2001 is concerned “it must be observed that the fact that the foreign judgment is accompanied by the certificate cannot limit the scope of the assessment to be made pursuant to the double control, by the court of the Member State in which enforcement is sought.”²⁴⁵ A certificate cannot be issued unless a judgment has been issued beforehand,²⁴⁶ as “the enforceability of the judgment in the Member State of origin is a precondition for its enforcement in the State in which enforcement is sought”²⁴⁷

However, the evolution of European civil procedure changed that assumption. The importance of a certificate has grown since the European enforcement title. If the form of the European enforcement order certificate is duly completed, the judgment creditor is entitled to enforcement before national courts of enforcement.²⁴⁸ In other words, *forma dat esse rei*. The same conclusion might be applied in the case of Regulation No 650/2012. Another function of the European certificate of succession deserves special attention, namely that one of its effects is to “constitute a valid document for the recording of succession property in the relevant register of a Member State”. In addition to establishing the individual’s status as an heir, it would seem that the European certificate of succession can also serve as a property deed.²⁴⁹

EU law “expressly waived, in the interests of expedition, the imposition of the requirement of a declaration of enforceability.” “Such a declaration is replaced, to a certain extent [...], by a certificate issued by the judge of origin which must accompany, in those cases, a judgment”. “Consequently, the issue of the certificate in the Member State of origin is to be recognised and is to be automatically enforceable in another Member State, there being no possibility of opposing its recognition”.²⁵⁰

In the scope of application of regulation No 2201/2003 the effects of certification are described as follows: “once the certificate has been issued, the judgment requiring the return of a child referred to in Article 40(1)(b) is to be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.”²⁵¹

Certificates (i.e. uniform forms) are becoming the focal point of judicial cooperation in civil matters. An issued certificate creates the *praesumptio juris tantum* of legality of foreign judicial and extrajudicial decisions. According to the principle *locus regit actum*, the natural solution is that challenges of the uniform certificates are allowed only under uniform conditions and that proceedings for challenges are ruled by the *lex fori* of the Member State of origin. Due to extreme variety of forms of judicial decisions and due to differences in substantive law in Member States the

²⁴³CJEU, Case C-619/10, Trade Agency [2012], not yet reported in the ECR, para. 36.

²⁴⁴Court of Appeal of Ljubljana (Slovenia), order of 6 May 2008 in case II Ip 533/2008 and Court of Appeal of Koper (Slovenia), order of 13 January 2011 in case Cpg 118/2010, <http://sodnapraksa.si/> (15 March 2013).

²⁴⁵C-619/10, para. 34

²⁴⁶See to that effect, CJEU Case C-195/08 PPU Rinau [2008] ECR I-5271, para. 59.

²⁴⁷CJEU, Case C-267/97 Coursier [1999] ECR I-2543, para. 23 and case C-420/07 Apostolides [2009] ECR I-3571, para. 66.

²⁴⁸Court of Appeal of Ljubljana (Slovenia), order of 22 November 2011 in case II Ip 4333/2011, <http://sodnapraksa.si/> (15 March 2013).

²⁴⁹A. Devaux, The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not? (March 8, 2013). Available at SSRN: <http://ssrn.com/abstract=2230663>, p. 18 – 19. This last conclusion must be read together with Art. 21 – 23 of the regulation No 650/2012.

²⁵⁰CJEU, Case C-92/12 PPU Health Service Executive [2012] not yet reported in the ECR, paras. 116 and 117.

²⁵¹CJEU, Case C-195/08 PPU Rinau [2008] ECR I-5271, para 68.

certificates represent a common connecting point. They are identical in all Member States. Identical documents i.e. certificates enhance mutual trust and are the basis of the recognition. Their role cannot be underestimated. In newer regulations such certificates serve as the vehicle (*instrumentum*) for certifying the enforceable nature of an enforcement title (*negotium*).

3. Minimal standards for review as a tool to protect fundamental rights determined by the ECHR

As far as civil matters are concerned, 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 measures in respect of procedural law as well as of conflict-of-law rules.²⁵² The importance of fundamental rights, where *exequatur* is abolished, seemed clear to the European legislature.²⁵³

Regulations on civil procedure, by establishing minimum standards, amount to a gradual, but limited, waiver of certain attributes of sovereignty which are necessary in direct enforcement in the Member State in which enforcement is sought of an enforcement title given in the Member State of origin.²⁵⁴

Minimum guarantees are an inordinate way of harmonising civil procedure without recourse to directives and onerous legislative enterprises. In other ways it is the triumph of case law over legislation, as minimum standards will be determined by case law. The EU has, since the inception considered minimum standards as ancillary measures accompanying mutual recognition in civil matters (minimum standards for certain aspects of civil procedure).²⁵⁵ The EU defined minimum standards as: “*a number of procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States' legal systems. These guarantees will make it possible, inter alia, to ensure that the requirements for a fair trial are strictly observed, in keeping with the European Convention for the Protection of Human Rights and Fundamental Freedoms.*”²⁵⁶ Therefore it would seem that the minimum standards are actually expressed by the contents of Art. 6(1) ECHR. This can also be confirmed by recital No 4 in the preamble to the directive 2003/8.²⁵⁷

Due to differences between the Member States in civil procedure and especially those governing the service of documents, it is necessary to lay down a specific and detailed definition of those

²⁵²Stokholm Programme p. 24, point 3.1.2

²⁵³Recital 29 in the preamble to the Regulation No 1215/2012: “The direct enforcement in the Member State addressed of a judgment given in another Member State without a declaration of enforceability should not jeopardise respect for the rights of the defence. Therefore, the person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. This should include the ground that he had not had the opportunity to arrange for his defence where the judgment was given in default of appearance in a civil action linked to criminal proceedings. It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Article 59 of the 1968 Brussels Convention.”

²⁵⁴See to that effect Opinion of Advocate General Bot delivered on 20 September 2012 in Case C-325/11 Alder [2012] not yet reported in the ECR, para. 40.

²⁵⁵Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.1.2001, p. 1.

²⁵⁶*Ibidem*, point B.1.

²⁵⁷That recital reads as follows: “All Member States are contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute”.

minimum standards.²⁵⁸

Under Art. 6(1) ECHR there is a right to a fair trial before an impartial court. Minimal standards as an obstacle to enforcement seem to be the replacement of the grounds for non recognition (under Art. 22(b) of the regulation No 2201/2003, Art. 34(2) of the regulation No 44/2001).

For the time being minimum standards mainly refer to the right to be heard in civil cases where decisions are given in defendant's default of appearance, if there were irregularities with service of the initial summons and applications commencing proceedings precluding the defendant to participate in the trial.²⁵⁹ The practical point of the right to be heard is the service and the proof of service and eventual cure of defects.²⁶⁰

Conclusion

1. The abolition of *exequatur* and direct enforcement of foreign judicial decisions are *per se* not incompatible with the ECHR. The first condition for such a compatibility is an effective (i.e. *devolutive*) remedy which offer in principle a public and oral examination before the court in both the State of origin of the judicial decision and in the State in which enforcement is sought (debtor's point of view). The second condition is that the enforcement proceedings are effective (creditor's point of view). This conclusion is also confirmed by the fact that all EU Members States are also contracting parties to the ECHR and have to respect requirements of the ECHR. At procedural level such a finding implies that the trial phase in the Member State of origin and the enforcement phase in the State in which enforcement is sought both comply with requirements of the ECHR.²⁶¹

2. In examining the principle of precedence of EU law the conclusion is that the precedence of EU regulation on civil procedure imposes to national court the obligation to disapply national law on civil procedure if the scope of application of both national and EU legal acts is *ratione materiae* identical. If EU law provides for remedies and recourses to be applied in national civil procedure, such remedies and recourses have to be applied in a uniform manner in the EU regardless of the national procedural autonomy.

3. Due to requirements of EU law and ECHR national civil procedure is being transformed in such a manner that the final interpretation of legislative texts on civil procedure in the hands of the European judges in Strasbourg (ECHR) or Luxembourg (CJEU). Vested instruments of national civil procedure developed over a long time in the national *usus fori* might become irrelevant as a result of EU law and the ECHR. This finding implies that when dealing with European civil procedure no national method of interpretation shall be used, reference to versions of EU regulations on civil procedure in national languages shall not be sufficient for interpreting the text in question. However, the procedural and institutional autonomy of EU Member States still play an important role. The interaction between purely national procedural law and directly applicable EU law will be future point of friction and will result in the further development of case law.

4. The European legislature has started building a framework for European civil procedure virtually in every field of private law. The current trend in the legislation is the abolition of the

²⁵⁸Recital (12) in the preamble to the regulation (13) No 805/2004.

²⁵⁹Recital (12) in the preamble to the regulation No 805/2004: "Minimum standards should be established for the proceedings leading to the judgment in order to ensure that the debtor is informed about the court action against him, the requirements for his active participation in the proceedings to contest the claim and the consequences of his non-participation in sufficient time and in such a way as to enable him to arrange for his defence.", Art. 18 of the regulation no 861/2007.

²⁶⁰See Art. 13 – 18 of the regulation No 805/2004 and Art 13 -15 of the regulation No 1896/2006 concerning questions of service.

²⁶¹*Kropholler, von Heim, op. cit., p. 797 – 798.*

exequatur and direct enforceability. However, even the EU law cannot break the classic division between trial in the Member State of origin and enforcement in the Member State of enforcement. Therefore, enforcement is always ruled by the *lex fori* of the Member State of enforcement. Also the debtor has to be protected. Therefore, objections that are usually raised during the *exequatur* are nowadays raised in the enforcement stage. Issues linked with the discrepancies between foreign and domestic titles are solved either by adaptation of foreign titles to *lex fori* of the enforcement Member State or by certificates. Issuing the certificates requires special remedies against issuing of certificates.

5. Where the debtor gets the same degree of guarantee of his rights of defence in the enforcement proceedings as he would in the *exequatur*, the *exequatur* plainly starts being an obstacle to effective administration of justice.

6. Certificates (i.e. uniform forms) are becoming the focal point of judicial cooperation in civil matters. Identical documents i.e. certificates which enhance mutual trusts and are the basis of mutual recognition. Their role cannot be underestimated. In newer regulations such certificates serve as the vehicle (*instrumentum*) for certifying the enforceable nature of an enforcement title (*negotium*).

7. For the time being minimum standards mainly refer to the right to be heard under Art. 6(1) ECHR in civil cases where decisions are given in the defendant's default of appearance.

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