

## **CORPORATE ENTITIES AT THE MARKET AND EUROPEAN DIMENSIONS**

**Portorož**

**20<sup>th</sup> May 2016**

### **German understanding of abolition of the exequatur according to B Ia**

#### **I. Introduction**

A common saying is “Enforcement is about acting not debating”. But I fear this is only a saying. We can fill whole libraries and write extensive books about the enforcement proceedings and the remedies in the enforcement proceeding. I will focus my paper mainly on two topics. The first question deals with the inspection and implementation function of the exequatur and how we have substituted or kept them alive in Brussels Ia (IV). My second topic deals with the question, which may arise in regards to § 1117 ZPO. No 30 of the recital of Brussels Ia may support the prevailing position in Germany that the countermeasures against execution (Vollstreckungsgegenklage oder Oppositionsklage - action to oppose enforcement or opposition claim) are in conformity with the Brussels Ia (V.).

However, before I can deal with these questions I have to give you a brief introduction of the basic structure of German enforcement proceedings (II.). In this context I will also address the German legal policy discussion about the abolition of the exequatur (III.).

#### **II. The basic structure of the German enforcement system**

We distinguish between the trial proceeding and the enforcement proceeding, what is more or less a common classification in the European enforcement law. This bisection not only means a two-step procedure, but also two separate proceedings. The trial court is not responsible for the enforcement of its own judgement. – despite some minor exceptions. The competence for the enforcement lies at the Vollstreckungsgericht (courts responsible for execution, § 764 ZPO). These are the local courts (Amtsgericht). The hinge between the trial proceeding and the

enforcement proceeding is the court certificate of enforceability (Vollstreckungsklausel). To shift the information from the trial court, that the title is enforceable, to the court responsible for execution (Vollstreckungsgericht) we use the court certificate of enforceability (enforcement clause). Wording of the enforcement clause is quite simple and regulated in § 725 ZPO:

“The above execution copy is issued to (designation of the party) for the purposes of compulsory enforcement.”

The court certificate of enforceability is to be added to the execution copy at its end and is to be signed by the records clerk of the court’s registry. It furthermore needs to be furnished with the court seal.

More information about the trial proceeding is not required for the enforcement. Especially, we do not involve the trial court or a judge to permit the enforcement proceeding, like in Austria the Exekutionsbewilligung (enforcement permission).

Therefore, basically every German judgement needs a court certificate of enforceability. Very well-behaved, we followed the European requirements of Brussels Ia. Judgements which are enforceable under these requirements no longer need a court certificate of enforceability. This obviously is an exception from the normal requirements of enforcement. Therefore § 1112 ZPO states:

#### *§ 1112 ZPO*

##### *Dispensability of court certificate of enforceability*

*If a title which is enforceable in another Member State of the European Union, the enforcement domestically will take place, without the need for a court certificate of enforceability.*

Before the recast of Brussels Ia the court certificate of enforceability was regulated in § 9 AVAG. The clause has been pretty much the same as the clause for a domestic judgement.

We have had integrated the function of the European procedural law in our national system. We did not asked for more with respect to the European judgement than with respect to our domestic judgements.<sup>1</sup>

This may have been one of the reasons, why we have had some reservations in Germany against the abolishing of the *exequatur*. In our enforcement system we normally need the court certificate of enforceability (*Vollstreckungsklausel*).

As I already mentioned, we do have bisection between the trial proceeding and the enforcement proceeding. Furthermore, we also have a bisection within the enforcement proceeding. On the one hand, we have the real or physical enforcement acts like the *distrain* of an enforcement object. On the other hand, we have a legal remedy system which will address all the substantive law questions. This distinction is based on the principle of formalization<sup>2</sup> and the qualification and function of the enforcement officers.

Responsible for physical enforcement acts is the court-appointed enforcement officer, § 753 ZPO, our main institute in enforcement proceedings. The court-appointed enforcement officers have not studied law or require any other form of academic education. After finishing a lower secondary school, they are trained as *Justizfachwirte* during a state-organized and -recognized apprenticeship. After several years as a records clerk of the court registry, they have the opportunity to take part in an additional trainee program to become *Gerichtsvollzieher* (enforcement officer), which takes one and a half years and is between level 4 and 5 in the classification of the European Qualification Framework. .

It is not the task, nor part of the enforcement officer's qualification to answer difficult legal questions. Therefore and because an enforcement law in general does not match with extensive deliberation, our system is based on the principle of formalization.<sup>3</sup> The court-appointed enforcement officer does not prove, whether we still have an enforceable title, he or she just relies on the court certificate of

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<sup>1</sup> Oberhammer, IPRax, 2010, 199

<sup>2</sup> Rosenberg/Gaul/Schilken, § 5 Rz. 39

<sup>3</sup> Rosenberg/Gaul/Schilken, § 5 Rz. 39

enforceability. The enforcement officer does not prove whether the owner of the moveable physical object is the judgement debtor either. He or she will execute the enforcement act when the judgement debtor has physical control over the object (Gewahrsam, § 808 ZPO).

In the second stage of the enforcement proceeding one may clarify whether the requirements according the principle of formalization match with the requirements of substantive law. For example, if the judgement debtor has physical control over the seized object (Gewahrsam, § 808 ZPO) but is not its owner, the actual owner can rise this topic in a special legal remedy called the *Drittwiderspruchsklage* or third party opposition complaint against execution.

### **III. Trust is good or control is even better**

In our imagination, we have linked the exequatur process closely to the inspection of foreign titles. But the exequatur has two functions. The first function is the title import and declares the foreign title as enforceability. In a system which is largely based on the principle of formalization the abolition of the exequatur can raise some difficult technical questions. In my next bullet I will discuss how we can deal with the vagueness of a foreign title for example in regards to its interest rates.

The second function can be called the inspection function. Does the state, in which the foreign judgement is enforced, have any responsibility with respect to the judgement debtor? Following the program of European Council in Tampere from 1999 the free circulation of a judgement became one of the key aims of the European Commission's agenda.

The regulation idea can be seen in European Regulations of the second generation, like European Small Claims Regulation or the European Enforcement Order.

Art. 5 of the European Enforcement Order is claiming the Abolition of exequatur on the one side and Chapter III is demanding a minimum standards for uncontested claims.

Frankly speaking: why do we have to regulate standard minimum requirements, such as the service of judgement with proof of receipt by the debtor, if we are supposed to have complete trust in each other? And do we believe that a state, which courts did not meet the minimum standards restrain themselves from certification of an European enforcement order?

There have been two groups in this discussion. The first we can call the believers and the last the skeptics. The first group enraptured by the aim of creating an even closer union among the peoples of Europe (Art. 1 sec. 2 of The EU Treaty). An aim we may have to modify, if Great Britain stays in the European Union. The European integration became predominant. The legal system is not constructed and rethought from the perspective of individual rights, but from the demand for integration. Of course the underpinning reason is not only to implement a single area where judgements will freely circulate as a political target.<sup>4</sup> Of course the Commission furthermore argues with Economic Rationality. The Abolition of the exequatur will be cost saving.<sup>5</sup> As always the cost argument is understood in a utilitarian way. It is not decisive that the costs for individual creditor will be reduced; sufficient enough is that the costs of all creditors summed up will be reduced, even in some cases costs will increase.

In opposite to that the skeptic group argues with human rights. Each state has an obligation to protect the judgement debtor from the enforcement of an unfair judgement, which violates the debtor's human rights. Trust cannot substitute this obligation. More fundamentally, Thomas Pfeiffer raises the question, whether the motto of the Boston Tea Party "No taxation without representation" mutatis mutandis "No jurisdiction without representation" must not apply in the recognition and enforcement process of a foreign judgement. The exequatur is the democratic legitimation of the enforcement.

Indeed, our basic understanding of conflict of law and international civil procedure is dated back to Carl Friedrich of Savigny in the 19<sup>th</sup> Century. On the one hand, we do have the sovereign speaking monarch and his state and on the other hand we do

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<sup>4</sup> Gilles Cuniberti/Isabelle Rueda, *RabelsZ* p. 291 f.

<sup>5</sup> KOM(2009) 174 endg. sub 3.1.; Gilles Cuniberti/Isabelle Rueda, *RabelsZ* p. 291 f.; Stadler/KlöpperZeUP 758 ff.

have the civil society with the bourgeois. In this view the substitution of thinking in categories of sovereignty through the idea of trust is a huge improvement. The only problem is, that we ourselves are the sovereigns. Habermas is speaking in this context about the equiprimordiality of private autonomy and public autonomy. We are all Bourgeois and citizens in the same moment. What this means and what conclusions we have to draw of is still not solved.

Regarding our purpose, we do not have to discuss this extensively, because the Brussel recast has been – depending on the viewpoint – a step back or a an achievement comparing the regulation of the second generation like European Enforcement Order. Technical we have abolished the exequatur but we uphold the function of inspection and the function of implementation and adaptation.

#### **IV. The inspection and implementation function**

Originally, we put the inspection first and as far as necessary the implementation function second. The enforcement could have had only taken place after the title of a European judgement had been declared enforceable, Art. 38 Brussels I. Now, we have inversed the process. In every member state, except Denmark, a European judgement can be enforced only on the basis of the certificate in accordance with Art. 53 Brussels Ia.

Art. 42 sec lit b explicitly only asks for such a certificate from the court of origin and § 1112 ZPO mirrors this. Nevertheless, there are several possibilities to inspect the judgement in the country where the judgement shall be enforced.

First of all, we can only measure the judgement along the yardstick given by Art. 45 Brussel Ia. We do not have the right to review the substance of the Judgement, Art. 52 Brussels Ia.

We do have in my understanding four procedural tools to inspect the judgement<sup>6</sup>: From the perspective of the judgement creditor, he or she can question the enforceability and the recognition of the judgement from the court of origin Art. 45 and Art. 46 Brussels Ia.

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<sup>6</sup> Mäsch, Kindl/Meller-Hannich/Wolf, Art. 45 EUGVVO Rz 1 is speaking about five

From the perspective of the enforcement creditor, he or she only can clarify that the judgement must be recognized in the member state addressed. Art. 36 sec. 2 Brussels Ia. It is not necessary to give him or her a legal tool to proof whether the judgement can be enforced, as he or she can seek enforcement at once. The regulation serves the equal footing principle.

We do have two more sophisticate problems in this regard.

The first question is whether remedy of Art. 36 sec 2 Brussels Ia. must follow the procedural rules elaborated for the remedy of Art 45 Brussels Ia. If we answer that question with yes § 1115 ZPO will be applicable.<sup>7</sup> Closely related to that, is the question, whether we can draw from Art. 38 lit b the conclusion that a separate negative declaratory petition is allowed in Art. 36 sec 2 Brussels Ia. But beside Art. 45 sec 4 we do not need an additional tool. It will always create problems if one sticks with the old discussion and does not take notice of the new regulation.<sup>8</sup>

The second question is much more complex or sophisticated. In Germany we are very proud of our concept of the Streitgegenstand (subject matter of the dispute). We categories the procedural scholars in two groups, the first group has already written about the Streitgegenstand and the second group will do this pretty soon.

If we would apply our concept of the Streitgegenstand on the three legal remedies it would not be easy to answer, why a decision in one of the remedies would block the other two remedies. The problem is that res judicata and lis pendens are questions of the national civil procedure law and are not covered by Brussel Ia in this regard. Geimer suggest to apply Art. 29 Brussels Ia et. seqq. in analogy to that question, too.<sup>9</sup> And indeed the Kernpunkttheorie or the same cause of action in the understanding of the European court of justice as developed in the Gubisch case fits much better than the German Streitgegenstandstheorie. Art. 29 Brussels Ia is not directly applicable, as it is not a cross boarder question.

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<sup>7</sup> Stadler in Musielak/Voit, ZPO Art. 36, 3 f.

<sup>8</sup> Dörner in Saenger, Art. 36, Rz. 12.

<sup>9</sup> Zöllner/Geimer, Art. 36, RZ. 62

This brings me to my fourth legal remedy:

Art. 36 sec. 3 allows an incidental proofing of the judgement of origin, if the judgement has an impact on a German trial proceeding. This will create more problems than it will help to improve efficiency. First of all the relationship to the other the remedies is unclear. Art. 38 lit b. says that the court may suspend the proceeding if an application has been submitted for a decision that there are no grounds for refusal or the opposite. But what if the court does not suspend its own proceeding?

We then have a real risk that in the incidental case the court approves the recognition of the judgement of the court of origin and in the remedy in accordance to Art. 45 the same question will be denied. Even more critical is the question of what happens with the scope of recognition of such a judgement in other member states? For Example a French Judgement is a step in the reasoning of a German judgement. The German judge rules in accordance with Art. 36 sec. 3, that the French judgement cannot be recognized in Germany. In Art. 36 sec. 2 or Art. 45 it is crystal-clear that such a judgement does not have any effect outside the German border. But what is with such a judgement in which the recognition is only a step in the reasoning. We have to recognize this German Judgement in Austria, but a petition for an interlocutory declaration (Zwischenfeststellungsklage, § 253 Abs. 2 ZPO) about the question whether the French judgement is recognized in Germany should not be possible, and if so, at least not be recognized for example in Austria.

The implementation function of the *exequatur* now can be found in Art. 54 Brussels Ia. The implementation problems arise for example if a foreign judgement states just the legal interest must be paid. The problem is that the court-appointed enforcement officer may be overwhelmed in doing the adaption. Anyway this contradicts the formalization principle. Therefore, we discuss whether a declaratory proceeding should be allowed and how to implement the judgement.<sup>10</sup> § 1114 ZPO regulates the legal remedy system against the decision of the enforcement agent.

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<sup>10</sup> Gössl, NJW 2014, 3479



## **V. Action to oppose enforcement (Vollstreckungsgegenklage)**

We did have a lively discussion about § 14 AVAG (*Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Abkommen der Europäischen Union auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen*). This paragraph allowed action to oppose enforcement. With this action (Vollstreckungsgegenklage) the judgement debtor can claim, that he or she has paid the claimed amount. Or that the judgement was wrong because the judgement debtor had declared the avoidance of his declaration. Or the judgement debtor has declared the setoff claim. Requirement for such a claim is, that the circumstance, which now leads to the foundation of the unenforceability occurs after the judge has closed the hearing.

There have been very serious voices, like Paul Oberhammer,<sup>11</sup> who thoughtfully argued, that this contradicts the principle of Brussels I and violates Art. 35 Brussels I, now Art. 52 Brussels Ia. Special problems caused Art. 22. No. 5 Brussels, now Art. 24 sec 5 Brussels Ia. If the action to oppose enforcement is a proceeding concerning the enforcement, we do have an exclusive jurisdiction in the country in which the enforcement takes place. Furthermore such a judgement must be recognized in each member state.

If you put the focus on the aim to avoid the enforcement, the action to oppose enforcement makes pretty much sensible in the member state addressed. Especially, if it not sure how fast the judgement debtor is able to receive a remedy in the country of origin. If you put the focus on trial proceeding and understand the action to oppose enforcement as a continuation of the original trial Art. 24 sec. 5 could not be applicable.<sup>12</sup> In the German national system the court, which rendered the decision, is also competent for action to oppose enforcement.

Despite this discussion the lawmaker has adhered to his opinion. The action to oppose enforcement is still possible against the enforcement, § 1117 ZPO.

Coming back to Paul Oberhammer and the starting point of my paper.

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<sup>11</sup> Stein/Jonas, Art. 43, Rz. 15 ff.;

<sup>12</sup> Hess, Europäisches Zivilprozessrecht § 6 Rz 127f.

One year after Paul published his opinion in the Stein Jonas commentary (2011), he delivered a paper in Innsbruck (2012). In this paper he was rethinking his position: The closing remark had been: Now until revocation also Oberhammer: Art. 22 Nr 5 Brussel I is applicable to protect the debtor.

As I already have stated: “Enforcement is about acting not debating” is just a saying

Thank you

**VI. Annex I:** The inspection function

	Judgment debtor	enforcement creditor
Enforcement	Art. 46 Brussel Ia, § 1115 ZPO	
Recognition	Art. 45 sec. 1, § 1115 ZPO	
Recognition		Art. 36 sec. 2, § 1115 ZPO
Recognition	Art. 36 sec 3	Art 36 sec 3

**VII. Annex II:** German court certificate of enforceability

Landgericht Darmstadt

Verkündet am: 21.09.2012

Geschäftsnummer: 19 O 182/11

Es wird gebeten, bei allen Eingaben die vorstehende Geschäftsnummer anzugeben

Justizangestellte  
Urkundsbeamtin/-beamter der Geschäftsstelle

Laura Klöppinger  
Gerichtsvollzieherin  
Eing. 13. SEP. 2013  
1021/13  
DR I-II-JL Nr. ....



Verf.	19 O 182/11		
PA	EINGEFANGEN		Berechnung
dt.	- 0. Nov. 2012		Rechnung
Zust.	für Verzinsung von Mahnkosten auf Rechtsanwalts- und Postgeb.		Zahlung
APL			Bilanz
ZKA			Legen

## Versäumnisurteil Im Namen des Volkes

In dem Rechtsstreit

Klägerin

Prozessbevollmächtigte:

gegen

Beklagter

hat die 19. Zivilkammer des Landgerichts Darmstadt durch den Richter am Landgericht Breidert – als Einzelrichter - aufgrund der mündlichen Verhandlung vom 21.09.2012 **für Recht erkannt:**

Der Beklagte wird verurteilt, an die Klägerin 24.610,00 € nebst Zinsen in Höhe von 8 Prozentpunkten über dem Basiszinssatz gemäß § 247 BGB seit dem 31.10.2009 sowie 5,00 € außergerichtliche Mahnkosten zu zahlen.



Die Kosten des  
Das Urteil ist vor

Vorstehende Ausfertigung wird dem/dar

.....  
*Beigeladen*

zum Zwecke der Zwangsversteigerung  
erteilt.

Darmstadt, den ..... **6. NOV. 2012**

Der Urkundsbeamte der Geschäftsstelle  
des Landgerichts  
*B.* Zivilkammer



*B. Pm*  
.....  
Urkundsbeamte

Dieses Urteil wurde von Amte wegen dem  
Kläger-Vertreter am ..... *12. 10. 2012*

Beigeladen-Vertreter am ..... *11. 10. 2012*

Darmstadt, den ..... **6. NOV. 2012**

Der Urkundsbeamte  
der Geschäftsstelle des Landgerichts



*B. Pm*  
.....  
Urkundsbeamte

Die Kosten des Rechtsstreits werden dem Beklagten auferlegt.

Das Urteil ist vorläufig vollstreckbar.

Breidert



Ausgeteilt, den 10. OKT. 2012

Darmstadt, den

*[Handwritten Signature]*  
Justizangestellte(r)  
als Urkundsbeamter der  
Geschäftsstelle