

# PRIZNANJE I IZVRŠENJE PREMA UREDBI (EU) BR. 1215/2012 OD 12.PROSINCA 2012. O NADLEŽNOSTI TE PRIZNANJU I IZVRŠENJU SUDSKIH ODLUKA U GRAĐANSKIM I TRGOVAČKIM STVARIMA S POSEBNIM OSVRTOM NA UKIDANJE EGZEKVATURE

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Recognition and Enforcement According to the Brussels I bis Regulation with  
Special Reference to the Abolition of Exequatur

(Master Thesis)

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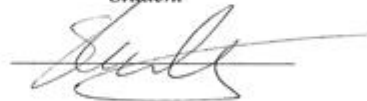
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# Contents

1. Introduction .....	5
2. The General Concept of Recognition and Enforcement .....	7
3. The Scope of the Brussels I bis Regulation.....	10
3.1. Material Scope .....	10
3.2. Territorial Scope.....	12
3.3. Temporal Scope .....	12
3.4. Personal Scope .....	13
4. Basic Definitions .....	15
4.1. “Judgments”, “Court Settlements” and “Authentic Instruments” .....	15
4.2. “Member State of Origin”, “Member State Addressed” and “Court of Origin” .....	17
5. Recognition According to the Brussels I bis Regulation .....	18
5.1. Automatic Recognition .....	18
5.2. Basic Requirements for Invoking a Judgment and Suspension of the Proceedings .....	18
5.3. Grounds for Refusal of Recognition .....	19
5.3.1. Public Policy .....	19
5.3.2. Failure of Document Service.....	22
5.3.3. Irreconcilability of Judgments.....	23
5.3.4. Contrariness to Jurisdiction Rules.....	26
6. Enforcement According to the Brussels I bis Regulation .....	28
6.1. The Abolition of Exequatur.....	28
6.2. Basic Requirements and the Suspension of Proceedings .....	29
6.3. Grounds for Refusal of Enforcement and the Procedure for Refusal of Enforcement .....	32
6.4. Enforcement of Authentic Instruments and Court Settlements.....	35
7. Critiques Addressed Towards the Abolition of Exequatur.....	36
7.1. The Proposal on the Brussels I Recast .....	36
7.2. The Heidelberg Report and the CSES Report.....	38
8. Concluding Remarks .....	40
List of Abbreviations.....	40
Bibliography.....	41

## 1. Introduction

Since the establishment of the European Economic Community, mutual recognition and enforcement of judgments has been perceived as one of the cornerstones of the internal market<sup>1</sup>. The main motive behind that perception is a long lasting dedication for the optimally tuned and fully functioning internal market. Therefore, early on, there was a necessity to establish a set of rules on recognition and enforcement primarily impelled by economic goals<sup>2</sup>. This was done in 1968 by introducing the Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters<sup>3</sup> (hereinafter: the Brussels Convention) which was the initial framework of recognition and enforcement relying on the *exequatur*. The next step was the Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial Matters<sup>4</sup> (hereinafter: the Brussels I Regulation) which led towards a more simplified process of recognition and enforcement. However, the current Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters<sup>5</sup> (hereinafter: the Brussels I bis Regulation) brought a much needed leap – the abolition of *exequatur*.

The abolition of *exequatur* became the policy objective in 1999<sup>6</sup>. It is understandable that the changes were introduced gradually especially if we take into consideration the fact that big systems need time and space for the adaptation to such changes and in the sense of the abolition, it all started with uncontested claims, small claims and ultimately all areas were covered<sup>7</sup>. The reasons which lead to the abolition of *exequatur* were those of a financial nature<sup>8</sup>. The *exequatur* was too expensive and represented a significant obstacle to the enhancement of cross-border trade. The

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<sup>1</sup> Kramer, Xandra E., Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights, *Netherlands International Law Review*. Dec. 2013, Vol.60 Issue 3, p. 347.

<sup>2</sup> *Loc.cit.*

<sup>3</sup> OJ L 299, 31.12.1972.

<sup>4</sup> OJ L 12, 16.01.2001.

<sup>5</sup> OJ L 351, 20.12.2012.

<sup>6</sup> Kramer, X. E., *op.cit.*, p.348.

<sup>7</sup> *Loc.cit.*

<sup>8</sup> The European Commission, Communication From the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, (The EU Justice Agenda for 2020-Strengthening Trust, Mobility and Growth Within the Union), Strasbourg, 11.03.2014., COM (2014) final, accessible at [ec.europa.eu/justice/effective-justice/files/com\\_2014\\_144\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf), p. 2.

aforementioned resulted, inter alia, in the Commission proposal to abolish the exequatur included in the 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<sup>9</sup> (hereinafter: the Proposal on the Brussels I Recast). Moreover, the necessity of the abolition was obvious regarding the fact that the proposal was ultimately supported by all Member States<sup>10</sup>. The concept of the internal market was compromised because its nature was in direct collision with the notion that citizens and businesses have to spend money to enforce rights in other member states<sup>11</sup>. Therefore, the recast of the Brussels I Regulation and the abolition of exequatur were primarily based on economic and political reasoning. However, there was also a need for introducing a special matrix of recognition and enforcement to States which are not a part of the European Union, similar to the one introduced with the aforementioned Brussels Regulations. Hence, the bringing of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 1988<sup>12</sup>, later replaced by the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in 2007 (hereinafter the Lugano Convention)<sup>13</sup>. The reason which led to the Lugano Convention was to achieve the same level of circulation of judgments between the EU Member States and Switzerland, Norway and Iceland<sup>14</sup>.

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<sup>9</sup> Brussels, 14.12.2010, COM (2010) 748 final, 2010/0383 (COD), C7-0433/10, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>.

<sup>10</sup> Nielsen, Peter A., Current Developments; The Recast Brussels I Regulation, *Nordic Journal of International Law*, 2014, Vol.83, Issue 1, p.64.

<sup>11</sup> Kramer, X. E., *op.cit.*, p.349.

<sup>12</sup> OJ L 319, 25.11.1988.

<sup>13</sup> OJ L 339, 21.12.2007.

<sup>14</sup> Strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention (2007), accessible at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:116029>, p. 1.

## 2. The General Concept of Recognition and Enforcement

The decisions of state courts and government bodies, as well as other entities with public authority specifying the substantive rights and obligations, originally had a limited, narrowed scope, primarily, within the national legal system<sup>15</sup>. The narrowed scope is primarily a result of the lack of trust and the differences between the legal systems of different countries. Moreover, the level of protection of individual rights has varied between different countries, both in the substantive and procedural sense. Soon it became necessary, especially in a partly supranational organization such as the European Union, that under certain conditions foreign decisions should be recognized and enforced<sup>16</sup>. The result of the court proceedings is a decision on merits which produces certain legal effects which sometimes need to be extended to the territory of another state as is often the case between the EU Member States<sup>17</sup>. There are several positive sides regarding the extension of legal effects of a judgment to other countries. The first is related to a more effective protection of individual rights. Secondly, the extension can be perceived as a sign of trust between countries. In the context of recognition and enforcement, that is the activity of two countries: the country of origin – the country where the decision was made, and the requested country<sup>18</sup>.

Under traditional procedural rules, in order to recognize the legal effects of foreign judgments it is necessary to conduct a special procedure in which it needs to be determined whether the required prerequisites are fulfilled. If the prerequisites are fulfilled, the procedure results with the *exequatur*<sup>19</sup>. This special court procedure initiated and conducted with the purpose of recognition of legal effects of a foreign judgment and ends with the recognition (or refusal of recognition) of legal effects of that judgment. Foreign judgments may also produce legal effects if the issue of recognition and enforcement is decided as a preliminary issue in the context of another proceedings<sup>20</sup>.

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<sup>15</sup> Vuković, Đuro; Kunštek, Eduard, *Međunarodno građansko postupovno pravo*, sec.ed., Zgombić & Partneri, Zagreb, 2005, p. 415.

<sup>16</sup> Loc. cit.

<sup>17</sup> Loc. cit.

<sup>18</sup> Vuković, Đ.; Kunštek, E., op.cit. p. 420.

<sup>19</sup> Ibid, p. 478.

<sup>20</sup> Loc.cit.



There are five systems of recognition. The first one is the system of unlimited control. In this system the requested state examines not only the fulfilment of the recognition prerequisites, but also the judgment both in the procedural and substantive sense<sup>21</sup>. This is the form that assumes the lowest level of trust between countries because the requested state reserves its right to assess the material facts once again even though those material facts were established in the court proceedings conducted in the country of origin. The negative side of this system, besides the trust problem, is the inevitable prolongation of the procedure for which it is important to be as short and as effective as possible. The second system of recognition is the one based on the review of the merits. This system is quite similar to the previously mentioned with one key difference, the judgment can be alternated in the dispositive part if the court of the requested state established that the judgment was based on error in facts or on misapplication of the law<sup>22</sup>. The third system is based on limited control. The court only examines if the required prerequisites are fulfilled, the judgment cannot be alternated nor examined on the basis of merits<sup>23</sup>. It assumes a certain level of trust between states and also accelerates the procedure<sup>24</sup>. The fourth system relies on prima facie evidence. In this system the creditor must bring upon an action in the requested state in order to actualize his right from the judgment which is sought to be recognized in the requested state and, in this procedure, the judgment is regarded as prima facie evidence meaning that it is the basis for the bringing of the new decision<sup>25</sup>. The fifth system is governed by international conventions. In this case, the effects of foreign judgments are recognized only if provided by international conventions<sup>26</sup>.

There are a number of conventions concerning the issue of recognition and enforcement and apart from the aforementioned ones, it is important to mention the Hague Convention of 1971 and the Inter-American Convention of 1979<sup>27</sup>. To that extent, there is a variety of approaches with regard

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<sup>21</sup> Vuković, Đuro, *Međunarodno građansko procesno pravo*, Zagreb, Informator, 1987, p. 171.

<sup>22</sup> *Loc.cit.*

<sup>23</sup> *Ibid*, p. 172.

<sup>24</sup> The system of limited control is the most widely accepted one in Europe and it is also integrated in the Croatian legal system (*Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima*, NN 53/91, 08.10.1991.)

<sup>25</sup> Vuković, Đ., *op.cit.* p. 172.

<sup>26</sup> *Ibid*, p. 173.

<sup>27</sup> The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, 1144 U.N.T.S. 249, Entry into force: 20.08.1979.; The Inter-American Convention on Extraterritorial Validity of Foreign judgments and Arbitral Awards 1979, 1439, I-24392, Entry into force: 14.06.1980.

to the level of governing. There are also bilateral conventions governing the issues between two countries.

The special procedure which needs to be conducted in order to obtain the exequatur is initiated through a request of an authorized person which is filed before the court of the requested state<sup>28</sup>. The court of the requested state then: a) evaluates the recognition prerequisites and other circumstances, b) evaluates if the required documents are at its disposal, and if needed, c) engages in a court hearing<sup>29</sup>. Consequently, the requested court either adopts or denies the recognition request<sup>30</sup>.

After the declaration of enforceability the judgment can be enforced<sup>31</sup>. It is important to stress the fact that there is a difference between the special procedure resulting in the declaration of enforceability of the judgment and the procedure of enforcement. These are two different procedures. The bringing of the decision in the enforcement procedure depends on the declaration of enforceability<sup>32</sup>.

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<sup>28</sup> Vuković, Đ.; Kunštek, E., op.cit. p.487.; The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, HCCH, (23 November 2007, Entry into force: 01 January 2013) provides a further simplified process through the establishment of Central Authorities both in the requested state and in the state of origin whose main functions involve mutual cooperation and problem solving directed towards, inter alia, the question of recognition and enforcement. This includes transmitting and receiving applications and initiating or facilitating the institution of proceedings in respect of such applications (Art. 5 and 6).

<sup>29</sup> Vuković, Đ.; Kunštek, E., op.cit., p. 488.

<sup>30</sup> Loc.cit.

<sup>31</sup> Vuković, Đ., op.cit. p.179.

<sup>32</sup> Loc.cit.

### 3. The Scope of the Brussels I bis Regulation

#### 3.1. Material Scope

Appropriate legal framework has always followed the upcoming economic challenges and not vice versa. In that sense, the civil and commercial nature of the Brussels I bis Regulation indicates that its primary objective is a simpler and faster recognition and enforcement of judgments to benefit the common economic space. The material scope of the Brussels I bis Regulation is established in article 1 of the Regulation. It is stated that: “This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of state authority (*acta iure imperii*)”<sup>33</sup>. From the aforementioned, it is evident that fiscal, customs and administrative matters are excluded<sup>34</sup>.

In case *LTU GmbH v. Eurocontrol*, the CJEU elaborated on the concept of civil and commercial matters<sup>35</sup>. The CJEU stated that article 1 serves to indicate the area of the application of the Convention, in order to ensure, as far as possible, the uniformity and equality of the rights guaranteed to States and individuals, and that these provisions should not be interpreted as a reference to national law of the States concerned<sup>36</sup>. Moreover, the CJEU stated that the concept of civil and commercial matters must be regarded as independent and must be interpreted in the light of the objectives and scheme of the Brussels Convention and to the general principles which stem from the corpus of the national legal systems<sup>37</sup>.

Although the objective of the Regulation is wide coverage of civil and commercial matters, there are certain matters, civil and commercial in their nature, which are left out outside the scope of the Brussels I bis Regulation such as, the status or legal capacity of natural persons, social security, arbitration, certain issues arising out of matrimonial property relationships, maintenance obligations arising from a family relationship, parentage, marriage of affinity, wills and

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<sup>33</sup> OJ L 351, 20.12.2012. Art.1.

<sup>34</sup> *Netherlands State v. Reinhold Ruffer*, C-814/79, ECLI:EU:C:1980:291, 16 December 1980, para.12.

<sup>35</sup> *LTU Lufttransportunternehmen GmbH & Co.KG v. Eurocontrol*, C-29/76, ECLI:EU:C:1976:137, 14 October 1976.

<sup>36</sup> *LTU v. Eurocontrol*, ECLI:EU:C:1976:137, para. 3.

<sup>37</sup> *LTU v. Eurocontrol*, ECLI:EU:C:1976:137, para. 3.

successions, maintenance obligations arising by reason of death and bankruptcy cases, as enumerated in Article 1 paragraph 2<sup>38</sup>. In case *Eirini Lechouritou, Vasilios Karkoulas, Georgios Pavlopoulos, Panagiotis Bratsikas, Dimitrios Sotiropoulos and Georgios Dimopoulos v Dimosio tis Omospondiakis Demokratias tis Germanias*, the CJEU elaborated the material scope of the then-current Brussels Convention<sup>39</sup>. The main proceedings were initiated because of the massacre of civilians during the Second World War committed by the soldiers of the German armed forces on 13 December 1943 in Kalavrita (Greece)<sup>40</sup>. The plaintiffs requested compensation from the Federal Republic of Germany for financial loss, non-material damage and mental anguish<sup>41</sup>. The referring court directed a question to the CJEU in which it asked whether Article 1 of the then-current Brussels Convention extends over a legal action brought for compensation in the sense of loss or damage suffered by the successors of the victims of acts committed by German armed forces in course of warfare<sup>42</sup>. The CJEU stated that the legal action in question has its origin in operations conducted by armed forces during the Second World War and that those operations represent one of the main characteristic features of State sovereignty<sup>43</sup>. In that sense, the fact that proceedings brought before the referring court are presented as being civil in their nature regarding the fact that they pursue financial compensation for material loss and non-material damage is irrelevant<sup>44</sup>. Consequently, the CJEU concluded that Article 1 of the then-current Brussels Convention does not cover a legal action for compensation in the sense of loss or damage suffered by the successors of the victims of acts committed by armed forces in course of warfare<sup>45</sup>.

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<sup>38</sup>Babić, D. et al., *Europsko građansko procesno pravo: izabrane teme*, Zagreb, Narodne novine, 2013., p. 8.

<sup>39</sup>*Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, C-292/05, ECLI:EU:C:2007:102, 15 February 2007.

<sup>40</sup>*Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, ECLI:EU:C:2007:102, para. 9.

<sup>41</sup>*Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, ECLI:EU:C:2007:102, para. 10.

<sup>42</sup>*Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, ECLI:EU:C:2007:102, para. 27.

<sup>43</sup>*Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, ECLI:EU:C:2007:102, para. 36. and 37.

<sup>44</sup>*Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, ECLI:EU:C:2007:102, para. 41.

<sup>45</sup> *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Demokratias tis Germanias*, ECLI:EU:C:2007:102, para. 46.

### 3.2. Territorial Scope

The Brussels I bis Regulation is applicable in all EU Member States, including Denmark. With the agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded in 2005<sup>46</sup>, specifically Article 3(2), and by amendment to the 2005 Agreement<sup>47</sup>, the provisions of the Brussels I bis Regulation will be applied to relations between the Union and the Kingdom of Denmark<sup>48</sup>.

### 3.3. Temporal Scope

Article 66 of the Brussels I bis Regulation alongside with article 81 defines the temporal scope. As it is stated “This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015”<sup>49</sup>. In order to ease the negative effects which may occur to the pending legal proceedings, the Brussels I Regulation will continue to apply to “judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation”<sup>50</sup>. Article 81 states that the Regulation will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. Furthermore, it is stated that it will apply from 10 January 2015, with the exception of Articles 75 and 76, which will apply from 10 January 2014<sup>51</sup>.

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<sup>46</sup> OJ L 299, 16.11.2005.

<sup>47</sup> OJ L79/4, 21.03.2013.; According to Article 3(2) of the EC-Denmark Agreement, whenever amendments to the Brussels I Regulation are adopted, Denmark will notify the Commission of its decision whether or not to implement the contents of the amendments. Denmark has by letter of 20 December 2012 notified the Commission its intention to implement the contents of the Brussels I bis Regulation (OJ L 79/4).

<sup>48</sup> Dickinson, Andrew, Lein, Eva: *The Brussels I Regulation Recast*, first ed., Oxford University Press, 2015, p. 31.

<sup>49</sup> OJ L 351, 20.12.2012. Art.66. (1)

<sup>50</sup> OJ L 351, 20.12.2012. Art.66. (2)

<sup>51</sup> Unlike in EU law, in the Croatian legal system, the terms entry into force and the beginning of the application are not separated, as it is stated in the Report of the Constitutional Court of the Republic of Croatia: “With the entry into force of the law or some of its sections/provisions its implementation begins, the consolidated text of the law should not interfere in the legal systematics or on the numerical designations of the articles” (The Croatian Constitutional Court, Report, U-X-80/2005, it can be accessed at:

### 3.4. Personal Scope

The personal scope of the Brussels I bis Regulation is defined in Article 4 where it is stated that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”. That means that in order for the Brussels I bis Regulation to apply, the defendant must be domiciled in a Member State. However, this rule has exceptions. One exception is exclusive jurisdiction provided by Article 24 of the Brussels I bis Regulation. Another exception is the prorogation of jurisdiction provided by Article 25. The domicile of a party (natural person) is to be determined by the internal law of the Member State whose courts are seized of a matter<sup>52</sup>. Therefore, when deciding about domicile, the court will apply its own internal law. Furthermore, paragraph 2 of Article 62 states that in order to determine whether the party is domiciled in another Member State if a party is not domiciled in the Member State whose courts are seized of the matter, the court will apply the law of that Member State. The determination of domicile of a company or other legal persons or association of natural or legal persons is established in Article 63. In case *Hypotečni banka a.s. v Udo Mike Lindner*, Mr. Lindner was the defendant sued to pay a certain amount of money plus default interest by way of arrears on the mortgage loan granted to him<sup>53</sup>. The defendant is a German national domiciled in the Czech Republic<sup>54</sup>. The bank brought an action before the court with general jurisdiction over the defendant instead of the local court of the bank<sup>55</sup>. The Cheb District Court granted the application by way of payment order and the defendant was ordered to pay to the applicant the sum claimed plus default interest and the costs of the proceedings<sup>56</sup>. However, the payment order was not able to be served on the defendant personally and it was set aside by the referring court by an order<sup>57</sup>. Given the fact that the defendant was not staying at any address known to the court and that the court was unable to establish the residence of the defendant in the Czech Republic, the court assigned a guardian ad litem to the defendant

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<http://sljeme.usud.hr/usud/praksaw.nsf/Ustav/C12570D30061CE53C125718100321C21?OpenDocument>, 01.06.2006., p.1.).

<sup>52</sup> Art. 62 of the Brussels I bis Regulation.

<sup>53</sup> *Hypotečni banka a.s. v Udo Mike Lindner*, C-327/10, ECLI:EU:C:2011:745, 17 November 2011., para. 20.

<sup>54</sup> *Hypotečni banka a.s. v Udo Mike Lindner*, ECLI:EU:C:2011:745, para.22.

<sup>55</sup> *Hypotečni banka a.s. v Udo Mike Lindner*, ECLI:EU:C:2011:745, para.23.

<sup>56</sup> *Hypotečni banka a.s. v Udo Mike Lindner*, ECLI:EU:C:2011:745, para.24.

<sup>57</sup> *Hypotečni banka a.s. v Udo Mike Lindner*, ECLI:EU:C:2011:745, para.24.

whose domicile was unknown<sup>58</sup>. The CJEU elaborated that the then Brussels I Regulation must be interpreted in the sense “that the application of the rules of jurisdiction laid down by that regulation requires that the situation at issue in the proceedings of which the court of a Member State is seized is such as to raise questions relating to determination of the international jurisdiction of that court”<sup>59</sup>. Such a situation arises in a case in which an action is brought before a court of a Member State against a national of another Member State whose domicile is unknown to the court, as is the case in the main proceedings<sup>60</sup>. The CJEU further elaborated that if the party of an agreement renounces his domicile before the proceedings against him are brought, the courts of the Member State in which the consumer had his last known domicile will have jurisdiction<sup>61</sup>. Moreover, the CJEU emphasized the fact that the then-current Brussels I Regulation leaves space for the application of a provision of national procedural law of a Member State which enables proceedings to be brought against a person whose domicile is unknown to avoid situations of denial of justice provided that the court seized of the matter is satisfied in the sense that all investigations required by the principles of diligence and good faith have been undertaken with the view of pursuing and tracing the defendant<sup>62</sup>.

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<sup>58</sup> Hypoteční banka a.s. v Udo Mike Lindner, ECLI:EU:C:2011:745, para.25.

<sup>59</sup> Hypoteční banka a.s. v Udo Mike Lindner, ECLI:EU:C:2011:745, para.57.

<sup>60</sup> Hypoteční banka a.s. v Udo Mike Lindner, ECLI:EU:C:2011:745, para.57.

<sup>61</sup> Hypoteční banka a.s. v Udo Mike Lindner, ECLI:EU:C:2011:745, para.57.

<sup>62</sup> Hypoteční banka a.s. v Udo Mike Lindner, ECLI:EU:C:2011:745, para.57.

## 4. Basic Definitions

### 4.1. “Judgments”, “Court Settlements” and “Authentic Instruments”

Article 2 of the Brussels I bis Regulation defines the types of court decisions which fall within the scope of the Regulation and which can benefit from the fairly liberal European system of recognition and enforcement. It should be noted that, only judgments which fall within the scope of application of the Brussels I bis Regulation and meet the prescribed criteria in Article 2, can be regarded as “judgments” in the sense of the Brussels I bis Regulation<sup>63</sup>. Article 2 of the Brussels I bis Regulation defines the concept of “any judgment” as it follows: “For the purposes of this Regulation: ‘judgment’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court”<sup>64</sup>.

In case *Gambazzi v. DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, the CJEU further elaborated the term “any judgment”<sup>65</sup>. Mr. Gambazzi claimed that the High Court decisions do not fall within the scope of the then-current Brussels Convention because they were adopted in infringement of the adversarial principle and the right to a fair trial. The CJEU stated that in order for decisions to fall within the scope of the then-current Brussels Convention, “it is sufficient that they are judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversarial proceedings”<sup>66</sup>. Consequently, the CJEU decided that the exclusion measure constituted a disproportionate infringement of the defendant’s right to be heard<sup>67</sup>.

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<sup>63</sup> Magnus, Ulrich, Mankowski, Peter, *European Commentaries on Private International Law: Brussels I Regulation*, sec.ed., Sellier European Law Publ., 2012, p. 621.

<sup>64</sup>OJ L 351, 20.12.2012. Art.2.; *Solo Kleinmotoren GmbH v Emilio Boch*, C-414/92, ECLI:EU:C:1994:221, 2 June 1994., para. 17.

<sup>65</sup>*Gambazzi v. DaimlerChrysler Canada Inc. & CIBC Mellon Trust Company*, C-394/07, ECLI:EU:C:2009:219, 2 April 2009.

<sup>66</sup>*Gambazzi v. DaimlerChrysler Canada Inc. & CIBC Mellon Trust Company*, ECLI:EU:C:2009:219, para. 23; *Bernard Denilauler v SNC Couchet Frères*, Case 125/79, ECLI:EU:C:1980:130, 21 May 1980., para. 18.

<sup>67</sup>*Gambazzi v. DaimlerChrysler Canada Inc. & CIBC Mellon Trust Company*, ECLI:EU:C:2009:219, para. 49.



According to Article 2 paragraph 2 of the Brussels I bis Regulation, the term “judgment” also includes provisional, including protective, measures ordered by the court which has jurisdiction as to the substance of the matter regarding the virtue of the Brussels I bis Regulation. However, there are several exceptions. The term “judgment” does not include provisional, including protective, measures which are ordered by a court or tribunal without the defendant being summoned to appear which guarantees a certain amount of protection regarding the individual’s right to a fair trial and against ex parte procedures. In case *Hengst Import BV v Anna Maria Campese*, the CJEU further elaborated on the issue of ex parte procedures<sup>68</sup>. The CJEU stated that, in that particular case, an inter partes hearing in the State was a possibility before recognition and enforcement were sought in the Netherlands<sup>69</sup>. However, there is an exception: If the judgment containing the measure is served on the defendant prior to enforcement then the term “judgment” applies<sup>70</sup>. This solution guarantees a certain amount of protection against abuse of right to a fair trial.

Article 2 paragraph (a) defines court settlements, which also fall within the scope of the Brussels I bis Regulation, as settlements approved or concluded before a court of a Member State in the course of proceedings. This definition is in line with the definition provided in the majority of the Member States where the court settlement is procedurally equated with the final judgment as it is the case in Croatia<sup>71</sup>. Moreover, Article 2 paragraph (c) defines authentic instruments, in the sense of the Brussels I bis Regulation, as documents formally drawn up or registered as authentic instruments in the Member State of origin. The authenticity of those documents must relate to the signature and the content of the instruments and must be established by a public authority or other authority empowered for the realization of that purpose<sup>72</sup>. Some typical examples of authentic instruments are: invoices, promissory notes, checks, return accounts when necessary for the establishment of the claim, public documents etc.<sup>73</sup>. In case *Unibank A/S v Flemming G. Christensen*, the CJEU elaborated on the term of authentic instruments<sup>74</sup>. The CJEU established that an acknowledgment of indebtedness whose authenticity has not been established by a public authority or other authority

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<sup>68</sup> *Hengst Import BV v Anna Maria Campese*, C 474/93, ECLI:EU:C:1995:243, 13 July 1995.

<sup>69</sup> *Hengst Import BV v Anna Maria Campese*, ECLI:EU:C:1995:243, para.14.

<sup>70</sup> Art.2 para. (a)

<sup>71</sup> Grbin, Ivo, Pravomoćnost odluka u parničnom postupku, *Godišnjak br. 9/02 - 17. savjetovanje Aktualnosti hrvatskog zakonodavstva i pravne prakse*, accessible at: <https://www.google.hr/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=IVO+GRBIN+UDK+347.953>, p. 4.

<sup>72</sup> Art. 2 paragraph (c) subparagraphs 1 and 2 and Art. 58 paragraph 2.

<sup>73</sup> Ovršni Zakon Republike Hrvatske, NN 112/12.

<sup>74</sup> *Unibank A/S v Flemming G. Christensen*, C-260/97, ECLI:EU:C:1999:312, 17.lipnja 1999.

empowered for that purpose by that State does not constitute an authentic instrument within the meaning of the then-current Brussels Convention<sup>75</sup>.

The next important thing which needs to be emphasized is the absence of the requirement of finality according to the Brussels I bis Regulation. In order for a “judgment” to benefit from Chapter III of the Brussels I bis Regulation, it does not have to be final. In that sense, judgments which are subjected to appeals and other challenges do fall within the scope of the Brussels I bis Regulation<sup>76</sup>.

#### 4.2. “Member State of Origin”, “Member State Addressed” and “Court of Origin”

Article 2 of the Brussels I bis Regulation provides the definitions of the “Member State of Origin”, the “Member State Addressed” and the “Court of Origin”. It defines the “Member State of Origin” as the Member State in which the judgment has been given, the court settlement has been approved or concluded and where the authentic instrument has been formally drawn up or registered. Furthermore, it defines the “Member State Addressed” as the Member State in which the recognition of the judgment is invoked or the enforcement of the judgment, the court settlement or the authentic instrument is sought. The “Court of Origin” refers to the court which has given the judgment whose recognition is invoked and enforcement sought.

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<sup>75</sup> Unibank A/S v Flemming G. Christensen, ECLI:EU:C:1999:312, para. 21.

<sup>76</sup> Magnus, Ulrich, Mankowski, Peter, *op.cit.* p. 627.

## 5. Recognition According to the Brussels I bis Regulation

### 5.1. Automatic Recognition

Article 36(1) of the Brussels I bis Regulation states that “A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required.” This article provides the automatic recognition of judgments without any prior proceedings or formal steps<sup>77</sup>. In this regard, the wording “without any special procedure” must be taken as denoting any procedure other than the one which is provided in paragraphs 2 and 3 of Art. 36<sup>78</sup>. Therefore, it is a mistake if we grasp the wording too widely. Paragraph 2 states that any interested party can apply for a decision that there are no grounds for refusal of recognition provided in Article 45. The wording “any interested party” generates a solution to a possibility where a party who was not involved in the litigation in the state of origin may also have an interest in obtaining a judgment on the status of the foreign decision<sup>79</sup>. Furthermore, if the outcome of proceedings before the court of a Member State depends on the determination of an incidental question of refusal of recognition, its jurisdiction will stretch over that question as it is stated in paragraph 3.

### 5.2. Basic Requirements for Invoking a Judgment and Suspension of the Proceedings

Article 37 proscribes the necessary requirements in order for an interested party to invoke judgments in other Member States. According to paragraph 1, any party who wishes to invoke in a Member State a judgment given in another Member State will need to produce a) a copy of the judgment which satisfies the conditions of authenticity and b) the certificate whose form is set out in Annex 1 of the Brussels I bis Regulation. The certificate contains important information about the court of origin, the parties and the judgment<sup>80</sup>. The certificate contains information regarding the a) appearance of the parties b) enforceability of the judgment c) date, language and short

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<sup>77</sup> Magnus, Ulrich, Mankowski, Peter, *op.cit.* p. 639.

<sup>78</sup> *Loc.cit.*

<sup>79</sup> *Ibid.*, p. 641.

<sup>80</sup> Kramer, Xandra E., *op.cit.*, p.357.

description of the subject matter d) details on monetary claims and other judgments and e) costs<sup>81</sup>. Paragraph 2 relates to the matter of language. In most cases, the requested court operates in a different language than the court of origin. In these cases it is sometimes necessary to translate the content of the previously mentioned certificate. However, the court or authority may require the party to provide a translation of the judgment instead of the certificate if it is unable to proceed with the procedure without the translation.

Article 38 proscribes a possibility for the Court before which a judgment is invoked to suspend the proceedings in whole or in part if a) the judgment is challenged in the Member State of origin, or b) on the basis of an application which has already been submitted for a decision that there are no grounds for refusal of recognition in the sense of article 45 or the decision that the recognition must be refused regarding one of the previously mentioned grounds.

### 5.3. Grounds for Refusal of Recognition

Article 45 regulates the grounds for refusal of recognition. They are discussed in details below.

#### 5.3.1. Public Policy

Thus, Article 45 paragraph 1 subparagraph (a) states that the recognition of a judgment will be refused on the application of any interested party if the recognition is contrary to public policy in the Member State addressed.

Generally, public policy is considered as one of the most significant and effective instruments which countries use in order to protect their interests from foreign law<sup>82</sup>. Domestic law determines which principles and rules belong to public policy<sup>83</sup>. The aforementioned rules and principles are usually political, economic, social and moral in their nature<sup>84</sup>. However, the concept of public

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<sup>81</sup> Loc.cit.

<sup>82</sup> Vuković, Đ.; Kunštek, E., op.cit. p. 465.

<sup>83</sup> Magnus, U., Mankowski, P., op.cit. p. 658.

<sup>84</sup> Vuković, Đuro; Kunštek, op.cit. p. 465.

policy is not uniformly perceived among Member States<sup>85</sup>. Although originating from national legal systems, the public policy concept includes the principles of community law which belong to the European public policy<sup>86</sup>. This is necessary in order to approach understandings of the public policy concept between Member States.

The violation of public policy can be manifested in the substantive and procedural sense. Firstly, a judgment can be manifestly contrary to the substantive law of another Member State<sup>87</sup>. However, the review of the merits must not be conducted<sup>88</sup>. Secondly, the violation of public policy can be constituted in the foreign procedure if the result of the procedure was a consequence of a serious procedural mistake<sup>89</sup>.

One of the most significant CJEU cases relating to the concept of public policy is case *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*<sup>90</sup>. The proceeding concerns the recognition and enforcement of two judgments, on an action brought by Mr. Apostolides against the Orams concerning immovable property, in the United Kingdom<sup>91</sup>. The immovable property is located at Lapithos (the northern part of Cyprus) and it belonged to Mr. Apostolideses' family<sup>92</sup>. After the Turkish occupation, Mr. Apostolides' family was forced to flee from the previously mentioned lands. The Orams stated that they purchased the property in 2002 in good faith from the third party<sup>93</sup>. The CJEU elaborated the concept of public policy stating that it is not the responsibility of the CJEU to establish the content of public policy of a Member State<sup>94</sup>. However, it is within the responsibility of the CJEU to review the limits within which the courts of the Member States can resort to that concept in order to refuse the recognition of a judgment from another Member State<sup>95</sup>. The CJEU further on stated that "the public policy clause can be taken into consideration only if the recognition and enforcement would be at variance to an unacceptable degree with the legal order of the State in which the enforcement is sought resulting in an

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<sup>85</sup> Loc.cit.

<sup>86</sup> Loc.cit.

<sup>87</sup> Babić, D. et.al., op.cit. p. 185.

<sup>88</sup> Loc.cit.; Art.52 of the Brussels I bis Regulation.

<sup>89</sup> Loc.cit.

<sup>90</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, C-420/07, ECLI:EU:C:2009:271, 28 April 2009.

<sup>91</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 17.

<sup>92</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 18.

<sup>93</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 19.

<sup>94</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 57.

<sup>95</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 57.

infringement of a fundamental principle<sup>96</sup>. In this particular case, the referring court (United Kingdom) has not indicated any fundamental principle within the legal order of the United Kingdom which would be infringed with the recognition or enforcement<sup>97</sup>. Consequently, the CJEU stated that the refusal to recognize the aforementioned judgments could not be justified on the grounds that a judgment given by a Member State cannot be enforced where the land is located considering that the disputed land is located in the area in which its Government does not have control<sup>98</sup>.

Therefore, public policy as a ground for refusal is not without limits. As it is stated in aforementioned judgment, the recognition and enforcement of a judgment must be threatening to infringe fundamental principles of the State in which the enforcement is sought in order to be recognized as a ground for refusal<sup>99</sup>. This narrow understanding was confirmed in the case *Renault SA v. Maxicar SpA and Orazio Formento* where differences between the law and errors in the application of law did not constitute an infringement of public policy<sup>100</sup>. Mr. Formento was found guilty of forgery, for manufacturing body parts for Renault (a French company), by a French court and was also declared jointly and severally liable with Maxicar (an Italian company) to pay damages to Renault<sup>101</sup>. Renault wanted to proceed with the enforcement of the judgment in Italy, however, Maxicar claimed that the enforcement would be contrary to public policy. There were two reasons supporting that claim. Firstly, the French law was enabling the abuse of dominant position and secondly, disabling the free circulation of goods<sup>102</sup>. The CJEU clarified that the court of the state in which the enforcement is sought, cannot refuse the recognition solely on the basis that it considers national or Community law misapplied in that decision<sup>103</sup>. Consequently, the CJEU decided that the judgment cannot be considered as contrary to public policy. The procedural

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<sup>96</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 59.; *Dieter Krombach v. Andre Bamberski*, C-7/98, ECLI:EU:C:2000:164, 28 March 2000, para. 37.

<sup>97</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 61.

<sup>98</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 62.

<sup>99</sup> *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, ECLI:EU:C:2009:271, para. 59.

<sup>100</sup> Magnus, Ulrich, Mankowski, Peter, *op.cit.* p.662; *Regie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, C-38/98, ECLI:EU:C:2000:225, 11 May 2000.

<sup>101</sup> *Regie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, ECLI:EU:C:2000:225, para. 11.

<sup>102</sup> *Regie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, ECLI:EU:C:2000:225, para. 15.

<sup>103</sup> *Regie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, ECLI:EU:C:2000:225, para. 33.

violation of public policy relates to foreign procedures which contained serious procedural mistakes<sup>104</sup>.

One of the most significant cases regarding the procedural violation of public policy is case *Krombach v. Bamberski*<sup>105</sup>. Mr. Krombach was found guilty of violence resulting in involuntary manslaughter by a French court<sup>106</sup>. Furthermore, he was ordered to pay compensation to Mr. Bamberski<sup>107</sup>. On application by Mr. Bamberski, a German court declared the judgment enforceable in Germany<sup>108</sup>. Mr. Krombach appealed to the decision stating that he was unable to defend himself effectively against the judgment given against him by the French court<sup>109</sup>. Consequently, the CJEU stated that the court in which the enforcement is sought can take account of the fact that the court of origin refused to allow him to present his defense unless he appeared in person<sup>110</sup>. This particular case is an example where resorting to public policy is possible only in exceptional cases where the guarantees, in the legislation of the State of origin and in the then Brussels Convention, are insufficient in order to protect the defendant from the breach of his right to defend himself before the court of origin<sup>111</sup>.

### 5.3.2. Failure of Document Service

The second refusal ground is contained in Article 45 paragraph 1 subparagraph (b). As it is stated, the recognition of a judgment shall be refused if the judgment was a) given in default of appearance and b) if the proceedings were instituted without the defendant being served in sufficient time with the document which instituted the proceedings or an equivalent document and in a way which would enable him to arrange for his defense, unless the defendant did not commence the proceedings to challenge the judgment when it was possible for him to do so.

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<sup>104</sup> Babić, D. et.al., op.cit. p. 185.

<sup>105</sup> *Krombach v. Andre Bamberski*, C-7/98, ECLI:EU:C:2000:164, 28 March 2000.

<sup>106</sup> *Krombach v. Andre Bamberski*, ECLI:EU:C:2000:164, para. 15.

<sup>107</sup> *Krombach v. Andre Bamberski*, ECLI:EU:C:2000:164, para. 15.

<sup>108</sup> *Krombach v. Andre Bamberski*, ECLI:EU:C:2000:164, para. 16.

<sup>109</sup> *Krombach v. Andre Bamberski*, ECLI:EU:C:2000:164, para. 16.

<sup>110</sup> *Krombach v. Andre Bamberski*, ECLI:EU:C:2000:164, para. 45.

<sup>111</sup> Magnus, Ulrich, Mankowski, Peter, op.cit. p.,669. ; *Krombach v. Andre Bamberski*, ECLI:EU:C:2000:164, para. 44.

This refusal ground is directed towards the protection of the right of the defendant to a fair hearing at the stage of recognition and enforcement<sup>112</sup>. Article 45 paragraph 1 (b) must be interpreted in relation with Article 28 of the Brussels I bis Regulation which provides specific duties on the adjudicating court when the defendant does not appear<sup>113</sup>. The main purpose of article 28 is protecting the position of the defendant before the adoption of a default judgment<sup>114</sup>. However, there are two important differences between those two articles. Firstly, article 45 concerns the defendants domiciled in the Member states as well as the ones domiciled in third States as oppose to Article 28 which concerns only the defendants domiciled in the Member States<sup>115</sup>. Secondly, the two articles apply independently<sup>116</sup>. The meaning of “the document which instituted the proceedings or an equivalent document” is consisted out of two main criteria: a) the document must be served before an enforceable judgment can be acquired and b) it must leave space for the defendant to decide if he wants to defend the action<sup>117</sup>. The wording “unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so” indicates that the proceedings which started unilaterally can be transformed into adversary proceedings if the defendant, after being informed of the commencement of the proceedings, moves in the appropriate direction and if he does not, the claimant can obtain an enforceable judgment against him<sup>118</sup>.

### 5.3.3. Irreconcilability of Judgments

The refusal grounds set in article 45 paragraph 1 subparagraphs (c) and (d) have the criterion of irreconcilability in common<sup>119</sup>. The criterion of irreconcilability enables the defendant to stop the enforcement of the judgment in case if it is irreconcilable with another judgment issued in the Member State of enforcement or, provided that certain conditions are fulfilled, in another

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<sup>112</sup> Magnus, Ulrich, Mankowski, Peter, op.cit. p. 675.

<sup>113</sup> Loc.cit.

<sup>114</sup> Loc.cit.

<sup>115</sup> Loc.cit.

<sup>116</sup> Loc.cit.

<sup>117</sup> Ibid., p.676.; Hengst Import BV v Anna Maria Campese, ECLI:EU:C:1995:243, para.19.

<sup>118</sup> Magnus, Ulrich, Mankowski, Peter, op.cit., 677.

<sup>119</sup> Ibid., p. 693.



country<sup>120</sup>. The CJEU elaborated on the term of irreconcilability in case *Hoffmann v. Krieg*<sup>121</sup>. The proceedings were between Mr. Hoffmann (the husband) and A. Krieg (the wife) concerning the enforcement in Netherlands of a judgment ordering the husband to make monthly maintenance payments to the wife<sup>122</sup>. On the application of the wife, the husband was ordered by a decision of a German court to make monthly maintenance payments to her as a separated spouse<sup>123</sup>. The Court in Maastricht granted a decree of divorce on the application of the husband<sup>124</sup>. The decree of divorce had not been recognized in Germany at the time which the national court considered material for the purposes of the case<sup>125</sup>. One of the questions referred to the CJEU deals with the criterion of irreconcilability. The CJEU elaborated that in order to determine whether the two judgments are irreconcilable it should be examined whether the legal consequences they entail are mutually exclusive<sup>126</sup>. This should be interpreted in the light of the legal effects. If the effects of the two judgments are mutually exclusive then those two judgments should be considered as irreconcilable<sup>127</sup>. Consequently, the CJEU stated that, in this particular case, a foreign judgment ordering a person to make maintenance payments to his spouse, in the sense of his conjugal obligations, is irreconcilable with a national judgment pronouncing the divorce of the spouses<sup>128</sup>.

The refusal ground set in article 45 paragraph 1 subparagraph (c) states that the recognition shall be refused “if the judgment is irreconcilable with a judgment given between the same parties in the Member state addressed”. The wording of this provision generates two conditions, the judgment a) must be rendered between the same parties and b) in the Member state addressed<sup>129</sup>. It is noticeable that the aforementioned wording does not include the statement “irreconcilable with an earlier judgment”. Thusly, the CJEU took a position on the interpretation of the provision which includes not only judgments which are rendered before the recognition is sought, but also judgments which are given after<sup>130</sup>. In case *Italian Leather SpA v. WECO Polestermobel GmbH & Co.*, the question

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<sup>120</sup> Brussels, 14.12.2010, COM (2010) 748 final, 2010/0383 (COD), C7-0433/10, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>. p. 6.

<sup>121</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, C-145/86, ECLI:EU:C:1988:61, 4 February 1988.

<sup>122</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, para. 2.

<sup>123</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, para. 3.

<sup>124</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, para. 4.

<sup>125</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, para. 4.

<sup>126</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, para. 22.

<sup>127</sup> Magnus, Ulrich, Mankowski, Peter, *op.cit.*, 693.

<sup>128</sup> *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, ECLI:EU:C:1988:61, para. 25.

<sup>129</sup> Magnus, Ulrich, Mankowski, Peter, *op.cit.*, 695.

<sup>130</sup> *Loc.cit.*

of irreconcilability between judgments of Member states was raised<sup>131</sup>. This question was raised in proceedings between Italian Leather SpA (Italian company) and WECO Polstermobilier GmbH Co. (German Company), concerning the conditions of use of a brand name under a contract for the exclusive distribution of leather furniture<sup>132</sup>. The CJEU elaborated that a foreign decision on interim measures ordering the obligor not to conduct certain acts is irreconcilable with a decision on interim measures not granting such an order in a dispute between the same parties in the member state addressed<sup>133</sup>. Consequently, the CJEU concluded that the court of a member state in which the recognition is sought is required to refuse the recognition of a foreign judgment when it finds that a judgment of a court of another Member state is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties<sup>134</sup>.

The refusal ground set in article 45 paragraph 1 subparagraph (d) provides that “on the application of any interested party, the recognition of a judgment shall be refused if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed”. It is noticeable that several conditions must be fulfilled. Firstly, the judgment must be irreconcilable with an earlier judgment. There are several difficulties in assessing which is the earlier judgment. However, the date when the judgment takes effect is used to determine which is the earlier judgment<sup>135</sup>. There are no differences in treatment regarding the conflict of judgments issued in a third state and the ones issued in another Member State<sup>136</sup>. Once again, the earlier judgment has priority<sup>137</sup>. It is necessary to stress the fact that Article 45 par.1 subpar. (d) does not cover irreconcilable judgments given by courts of the same Member State<sup>138</sup>. In case *Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA*, the dispute was between Laminorul SA (established in Romania) and Salzgitter (established in Germany). Laminorul SA brought an action seeking payment for a delivery of steel products against Salzgitter before the Romanian court<sup>139</sup>. Shortly after, Salzgitter claimed that the

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<sup>131</sup> *Italian Leather SpA v. WECO Polstermobilier GmbH & Co*, C-80/00, ECLI:EU:C:2002:342, 6 June 2002.

<sup>132</sup> *Italian Leather SpA v. WECO Polstermobilier GmbH & Co*, ECLI:EU:C:2002:342, para. 2.

<sup>133</sup> *Italian Leather SpA v. WECO Polstermobilier GmbH & Co*, ECLI:EU:C:2002:342, para. 47.

<sup>134</sup> *Italian Leather SpA v. WECO Polstermobilier GmbH & Co*, ECLI:EU:C:2002:342, para. 52.

<sup>135</sup> Magnus, Ulrich, Mankowski, Peter, *op.cit.*, p. 696.

<sup>136</sup> *Ibid.*, p. 697.

<sup>137</sup> *Loc.cit.*

<sup>138</sup> *Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA*, C-157/12, ECLI:EU:C:2013:597, 26 September 2013.

<sup>139</sup> *Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA*, ECLI:EU:C:2013:597, para.12.

action should have been brought against Salzgitter Mannesmann Stahlhandel GmbH, the actual party of the contract with Laminorul. The Romanian court dismissed the action and that judgment became final<sup>140</sup>. Laminorul SA then initiated new proceedings against Salzgitter before the same court for the same cause of action and, soon after that, the court delivered a judgment by default against Salzgitter ordering Salzgitter to pay a certain amount of money to Laminorul<sup>141</sup>. The judgment was declared enforceable in Germany by the German court and Salzgitter appealed against that order but it was dismissed as unfounded. Salzgitter then appealed against that decision before the German Federal Court of Justice<sup>142</sup>. Given the aforementioned facts, the German court referred the following question to the CJEU: “Does Article 34 (4) of the then-current (Regulation No 44/2001) also cover cases of irreconcilable judgments given in the same Member State (State of origin)?”<sup>143</sup> The CJEU elaborated that once the judgment has become final in the Member State of origin, the non-enforcement of that judgment on the ground that is irreconcilable with a judgment given in the same Member State would lead to the reviewing of the judgment as to its substance which is not allowed<sup>144</sup>. Moreover, the CJEU pointed out that the ground for refusal must be interpreted strictly and must not be subjected to interpretation by analogy in the sense that the judgments given in the same Member state would also be covered<sup>145</sup>. Therefore, the CJEU concluded that Article 45 par.1 subpar. (d), or former article 34 para. (4), does not cover irreconcilable judgments given by courts of the same Member State<sup>146</sup>.

#### 5.3.4. Contrariness to Jurisdiction Rules

Paragraph 1 subparagraph (e) contains a novelty adopted in the Brussels I bis Regulation<sup>147</sup>. As it is stated in the mentioned paragraph, recognition shall be refused if the judgment is in conflict with sections 3, 4 or 5 of Chapter II provided that the policyholder, the insured, a beneficiary of the

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<sup>140</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.13.

<sup>141</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.14.

<sup>142</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.19.

<sup>143</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.20.

<sup>144</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.37.

<sup>145</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.39.

<sup>146</sup> Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA, ECLI:EU:C:2013:597, para.40.

<sup>147</sup> Requejo Isidro, Marta, Recognition and Enforcement in the new Brussels I Regulation (Regulation 1215/2012, Brussels I recast): The Abolition of Exequatur (November 7, 2014), Barcelona, available at: [http://www.ejtn.eu/PageFiles/6333/Requejo\\_Doc.pdf](http://www.ejtn.eu/PageFiles/6333/Requejo_Doc.pdf), p.6.

insurance contract, the injured party, the consumer or the employee was the defendant<sup>148</sup>. Moreover, the recognition shall also be refused if the judgment conflicts with exclusive jurisdiction rules set out in section 6 of Chapter II<sup>149</sup>. Paragraph 2 indicates that during the examination of the grounds of jurisdiction stated in paragraph 1 subparagraph (e), the established facts on which the court of origin based its jurisdiction will be binding to the court to which the application was submitted. Furthermore, paragraph 3 states that the jurisdiction of the court of origin must not be reviewed, that is, without prejudice to paragraph 1 subparagraph (e) and that the rules on jurisdiction are not subjected to the test of public policy from paragraph 1 subparagraph (a). Paragraph 4 relates to the procedure established in Subsection 2 and Section 4 regarding the application for refusal of recognition.

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<sup>148</sup> Loc.cit.

<sup>149</sup> Loc.cit.

## 6. Enforcement According to the Brussels I bis Regulation

### 6.1. The Abolition of Exequatur

Article 39 of the Brussels I bis Regulation states that a judgment given in a Member State, enforceable in that Member State, shall be enforceable in other member states without the need of the declaration of enforceability. This article introduces a very important change in the Brussels I bis Regulation, the abolition of exequatur. With the abolition of exequatur, the procedure to declare a foreign judgment enforceable in another Member State is removed without a corresponding disappearance of the usual conditions<sup>150</sup>. The declaration of enforceability is now granted by the court of origin as oppose to before when the declaration of enforceability was granted by the court of the Member State in which the enforcement was sought<sup>151</sup>.

Furthermore, another novelty is article 40 of the Brussels I bis Regulation stating that an enforceable judgment carries with it, by operation of law, the power to proceed to any protective measures which exist under the law of the addressed Member State. The mentioned article provides the basis for using an adequate protective measure mechanism available in the addressed Member State in order to effectively facilitate the enforcement procedure, i.e. the seizure of assets<sup>152</sup>.

According to article 41 paragraph 1 the enforcement procedure is governed by the law of the Member state addressed. Moreover, the same paragraph states that a judgment given in a Member State enforceable in the addressed Member state will be enforced there under the same conditions as a judgment given in the Member State addressed. Article 41 paragraph 1 stands as a general rule indicating that the law of the addressed Member State regulates the enforcement procedure of judgments given in another state and that those judgments will be executed there under the same conditions as a purely domestic decision<sup>153</sup>. Paragraph 2 indicates that the grounds for refusal or suspension of enforcement provided under the law of the addressed Member State apply only if they are not incompatible with the grounds form Article 45<sup>154</sup>. In case Prism Investments BV v

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<sup>150</sup> Loc.cit.

<sup>151</sup> Loc.cit.

<sup>152</sup> Kramer, Xandra E., op.cit. , p.355

<sup>153</sup> Requejo Isidro, Marta, op.cit. p. 6.; Horst Ludwig Martin Hoffmann v. Adelheid Krieg, ECLI:EU:C:1988:61, para. 28.

<sup>154</sup> The aforementioned means that the grounds for refusal provided by Article 45 operate cumulatively with the grounds for refusal or suspension of enforcement granted by the law of the Member State addressed for judgments

Jaap Anne van der Meer, the CJEU ruled that a national ground of refusal could not be invoked at the exequatur stage as the appeal was limited to the grounds of refusal expressly set out<sup>155</sup>. However, the CJEU stated that such arguments can be invoked in accordance with national law at the enforcement stage<sup>156</sup>. In the light of the recent abolition of exequatur provided by Article 39, national grounds for the enforcement refusal in the Member State addressed may be raised alongside with the grounds provided by Article 45 as long as they are compatible with the grounds provided by Article 45<sup>157</sup>.

Article 41 paragraph 3 provides that a party seeking the enforcement of a judgment given in another Member State is not required to have a postal address in the Member State addressed. Furthermore, the party is not required to have an authorized representative in the Member State addressed unless the representative is mandatory irrespective of the nationality or the domicile of the parties. This solution is closely tied to the abolition of exequatur in the sense of reduction of formalities and related costs that justify the abolition of exequatur as it is stated in the Proposal on the Brussels I Recast<sup>158</sup>.

## 6.2. Basic Requirements and the Suspension of Proceedings

Article 42 paragraph 1 of the Brussels I bis Regulation relates to the required documents for the purposes of enforcement. In order to proceed with enforcement of a Member State judgment in another Member State, the creditor must submit two documents to the enforcement agency in the Member State addressed<sup>159</sup>. The required documents are: a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity and b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest<sup>160</sup>. There is a significant difference between this solution and the one

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given by their courts, however, these grounds must be mutually compatible with the grounds provided by Article 45 in order to apply (Requejo Isidro, Marta, op.cit. p.8.).

<sup>155</sup> Prism Investments BV v Jaap Anne van der Meer, C-139/10, ECLI:EU:C:2011:653, 13 October 2011, para.43.

<sup>156</sup> Prism Investments BV v Jaap Anne van der Meer, ECLI:EU:C:2011:653, para.40.

<sup>157</sup> Dickinson, Andrew, Lein, Eva, op.cit. p.417.

<sup>158</sup> Ibid., p. 421.

<sup>159</sup> Ibid., p. 423.

<sup>160</sup> OJ L 351, 20.12.2012 Art.42 (1)

provided by the Brussels I Regulation. According to the Brussels I Regulation these documents had to be submitted to the court having competence to give a declaration of enforceability as oppose to the Brussels I bis Regulation where the documents have to be submitted to the competent enforcement agency<sup>161</sup>.

According to paragraph 2, for the purposes of enforcement in a Member State of a judgment given in another Member State ordering a provisional, including a protective, measure the applicant needs to provide the competent enforcement authority with: a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity, b) the certificate issued pursuant to Article 53, containing the description of the measure and certifying that: 1) the court has jurisdiction as to the substance of the matter, 2) the judgment is enforceable in the Member State of origin and c) if the measure was ordered without the defendant being summoned to appear, proof of service of the judgment. The condition from subparagraph (c) is aimed at the protection of the debtor and it is in line with the exclusion of wholly one-sided judgments from Article 2 subparagraph (a)<sup>162</sup>.

Paragraph 3 states that the competent enforcement authority can, in the case of necessity, require the applicant to provide, in line with Article 53, a translation or a transliteration of the contents of the certificate. This paragraph relates to the common situation where the court of origin fills out the certificate in its own language and, in that case, the enforcement authority can, where necessary, request a translation or a transliteration of the contents of the Article 53 certificate<sup>163</sup>. According to paragraph 4, a translation of the judgment is necessary only if the enforcement authority is unable to proceed with the enforcement without the translation. The main motive behind this provision is to avoid the high costs of translation<sup>164</sup>.

Article 43 paragraph 1 states that the certificate issued pursuant to Article 53 needs to be served on the person against whom the enforcement is sought prior to the first enforcement measure. Furthermore, the certificate needs to be accompanied by the judgment, if not already served on that person. It is important to stress the fact that this paragraph requires service, the sole fact that the

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<sup>161</sup> Dickinson, A., Lein, E., op.cit. p.423.

<sup>162</sup> Ibid., p. 425.

<sup>163</sup> Loc.cit.

<sup>164</sup> Loc.cit.

judgment debtor has knowledge of the content of the certificate in any other way besides through service, is not sufficient<sup>165</sup>.

According to paragraph 2, if the person against whom enforcement is sought is domiciled in a Member State other than the Member State of origin, he can request a translation of the judgment so he can contest the enforcement if the judgment is not written in or accompanied by a translation in a) a language which he understands; or b) the official language of the Member State in which he is domiciled or, where there are several official languages in that Member State, the official language or one of the official languages of the place where he is domiciled. Additionally, paragraph 2 prescribes that in cases where a translation of the judgment is requested, no measures of enforcement can be taken other than protective measures until the translation in question has been provided to the person against whom enforcement is sought. Thusly, the enforcement cannot proceed until a reasonable amount of time has passed after the translation has been provided. Paragraph 2 further on states that its provisions will not apply if the judgment has already been served on the person against whom enforcement is sought in one of the languages indicated in the first subparagraph or is accompanied by a translation into one of the mentioned languages.

Paragraph 3 states that Article 43 will not apply to the enforcement of a protective measure in a judgment or where the person seeking enforcement proceeds to protective measures in accordance with Article 40. The ratio of this solution is directed towards securing the effectiveness of Article 40 measures which could be thwarted if the judgment debtor becomes aware of them before their enforcement<sup>166</sup>.

Article 44 paragraph 1 states that in the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3 of the Regulation, the court in the Member State addressed may<sup>167</sup>, on the application of the person against whom enforcement is sought: a) limit the enforcement proceedings to protective measures, b) make enforcement conditional on the provision of such security as it shall determine; or c) suspend wholly or in part, the enforcement proceedings. Subparagraph (a) is associated with the measures available in the Member State

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<sup>165</sup> Ibid., p. 427.

<sup>166</sup> Ibid., p. 429.

<sup>167</sup> The phrasing “may” suggests that the competent court has a discretion in granting these limitations and suspension measures, furthermore, it needs to assess if there is sufficient reason to limit or suspend the enforcement proceedings and to establish the scope and conditions of the appropriate suspension or limitation measure (Dickinson, A., Lein, E., op.cit. 431.).



addressed and available to the judgment creditor by the provisions of Article 40<sup>168</sup>. Subparagraph (b) enables the court to subject the taking of enforcement measures to the provision of security by the judgment creditor, offering protection to the judgment debtor in the case that the enforcement measures turn out to be unjustified<sup>169</sup>. According to subparagraph (c) the court may suspend the enforcement wholly or in part and such suspension may also be dependent on the provision of security by the judgment debtor in aid of future enforcement if the challenge does not succeed<sup>170</sup>.

Article 44 Paragraph 2 states that the competent authority in the Member State addressed will need to suspend the enforcement proceedings, on the application of the person against whom enforcement is sought, if the enforceability of the judgment is suspended in the Member State of origin. This solution is closely related to Article 39 and the abolition of exequatur where a judgment given in a Member State, enforceable in that Member State, shall be enforceable in other Member States without the need of the declaration of enforceability<sup>171</sup>. It would be a much better solution if the enforcement is automatically suspended when the enforceability of the judgment is suspended in the Member State of origin since the primary condition for the enforcement in other Member States is no longer fulfilled when the enforceability of the judgment is suspended in the Member State of origin<sup>172</sup>.

### 6.3. Grounds for Refusal of Enforcement and the Procedure for Refusal of Enforcement

Article 46 provides that on the application of the person against whom enforcement is sought, the enforcement of a judgment will be refused if one of the grounds from Article 45 is found to exist<sup>173</sup>. This means that the grounds for refusal are the same as in Article 45 for non-recognition<sup>174</sup>.

However, there is an important difference between Article 45 and 46 regarding the class of applicants. Article 45 provides that any interested party may apply for the refusal as oppose to

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<sup>168</sup> Dickinson, A., Lein, E., op.cit. 430.

<sup>169</sup> Loc.cit.

<sup>170</sup> Loc.cit.

<sup>171</sup> Ibid. p. 431.

<sup>172</sup> Loc.cit.

<sup>173</sup> Once again, it is important to emphasize the fact that under no circumstances may a judgment be reviewed as to its substance, as specified by Article 52, and that the review is strictly limited to the grounds of refusal (Kramer, X. E., op.cit., p. 359.)

<sup>174</sup> Requejo Isidro, M., op.cit. p. 7.

Article 46 which is limited on the person against whom enforcement is sought<sup>175</sup>. According to Article 47 paragraph 1, the application for refusal of enforcement needs to be submitted to the court which the Member State concerned has communicated to the Commission pursuant to subparagraph (a) of Article 75 as the court to which the application is to be submitted. Article 75 subparagraph (a) states that by 10 January 2014 the Member States had to communicate to the Commission the courts to which the application for refusal of enforcement can be submitted. Paragraph 2 of Article 47 states that the procedure for refusal of enforcement will be governed by the law of the Member State addressed, in so far as it is not covered by the Regulation<sup>176</sup>. The first subparagraph of paragraph 3 states that the applicant needs to provide the court with a copy of the judgment and, where necessary, a translation or transliteration of the mentioned judgment. The wording “where necessary” emphasizes the need to reduce the time and costs of the recognition and enforcement procedure<sup>177</sup>. The second subparagraph of paragraph 3 states that the court can dispense with the production of the documents in the first subparagraph if it already has them or if it considers it unreasonable to require the applicant to provide them. In the latter case, the court can require the other party to provide the aforementioned documents. This subparagraph discourages the production of duplicate and redundant documents by allowing the court to address three options<sup>178</sup>. Firstly, the court can decide to dispense with the production of the judgment (and translation or transliteration) from the first subparagraph if it already has them or has electronic access to them<sup>179</sup>. Secondly, the court can decide to dispense with the production of the documents if it considers it unreasonable<sup>180</sup> to require the applicant to provide them<sup>181</sup>. Thirdly, the aforementioned option is accompanied with a third option where the court can require the other party to provide the documents instead<sup>182</sup>. Article 47 paragraph 4 represents a mirror image of Article 41 paragraph 3 due to the fact that paragraph 4 of Article 47 relates to the party seeking the

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<sup>175</sup> Dickinson, A., Lein, E., op.cit., p. 481.

<sup>176</sup> Article 47(2) also includes procedures for the application for the refusal of recognition according to Article 45(4) and the application for a negative declaration provided by Article 36(2) (Dickinson, A., Lein, E., op.cit., p. 484.).

<sup>177</sup> Dickinson, Andrew, Lein, Eva, op.cit., p. 485.

<sup>178</sup> Loc.cit.

<sup>179</sup> Loc.cit.

<sup>180</sup> The production requirement is unreasonable when the information is accessible to the court by other means (Dickinson, A., Lein, E., op.cit, p. 486.).

<sup>181</sup> Ibid., p. 485.

<sup>182</sup> Ibid., p. 486.

refusal of enforcement as oppose to paragraph 3 of Article 41 which relates to the party seeking the enforcement of a judgment.

According to Article 48, the court will decide, on the application for refusal of enforcement without delay. The main purpose of this article is to restrict the court in the Member State addressed from imposing any unnecessary delay regarding the time needed in order to reach a decision in relation to a relevant application<sup>183</sup>. Article 49 and 50 provide that the decision on the application for refusal of enforcement can be appealed against by either party<sup>184</sup>. The appeal needs to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which the appeal needs to be lodged. Subparagraph (b) of Article 75 states that by 10 January 2014 the Member States had to communicate to the Commission the courts with which an appeal against the decision on the application for refusal enforcement needs to be lodged. The decisions given on the appeal can only be contested by an appeal if the courts, with which any further appeal needs to be lodged, have been communicated to the Commission by the Member State concerned pursuant to subparagraph (c) of Article 75. Subparagraph (c) of Article 75 states that by 10 January 2014 the Member States had to communicate to the Commission the courts with which any further appeal needs to be lodged. It is evident from the aforementioned that Article 50 provides a possibility (not an obligation) for the Member States to allow a second and final appeal in order to contest the result of the first<sup>185</sup>. Article 50 does not indicate the procedure which governs the second appeal, however, this question will be determined by the domestic law and procedures of the courts nominated by the Member State addressed<sup>186</sup>. It is very likely that the Article 49<sup>187</sup> and 50 appeal procedures will be inter partes and directed towards the form of an appeal on a point of law<sup>188</sup>.

Article 51 paragraph 1 allows any Member State court which is nominated to conduct Article 47, 49 and 50 hearings a discretion to grant a stay of the aforementioned proceedings is an ordinary appeal has been launched against the judgment in the Member State of origin<sup>189</sup>. Moreover, the proceedings can also be stayed by the court of the Member State addressed if an ordinary appeal

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<sup>183</sup> Dickinson, A., Lein, E., op.cit., p. 489.

<sup>184</sup> Requejo Isidro, M., op.cit. p.7.

<sup>185</sup> Dickinson, Andrew, Lein, Eva, op.cit., p. 491.

<sup>186</sup> Ibid., p.492.

<sup>187</sup> Article 49 also does not indicate the procedure which governs the appeal (Dickinson, A., Lein, E., op.cit., p. 490).

<sup>188</sup> Dickinson, A., Lein, E., op.cit., p. 492.

<sup>189</sup> Ibid., p. 493.

has not yet been launched as long as the time for the launching of the ordinary appeal in question in the Member State of origin has not yet elapsed, and in the latter case, the court can specify the time limit within which the ordinary appeal needs to be launched<sup>190</sup>. The purpose of paragraph 2, with regard to the legal systems of Ireland, Cyprus and United Kingdom, is to equate any form of appeal present in these systems with ordinary appeals for the purposes of paragraph 1 (stay of proceedings)<sup>191</sup>.

#### 6.4. Enforcement of Authentic Instruments and Court Settlements

Article 58 follows the path established with the abolition of exequatur providing that, an authentic instrument enforceable in the Member State of origin will be enforceable in other Member States without any declaration of enforceability being required. Furthermore, enforcement of the authentic instrument can be refused only if such enforcement is contrary to public policy in the Member State addressed. Moreover the same Article states that the provisions of section 2, subsection 2 of section 3 and section 4 of Chapter III will apply as appropriate to authentic instruments.

According to Article 59, a court settlement enforceable in the Member State of origin will be enforced in other Member States under the same conditions as authentic instruments. Furthermore, Article 60 provides a unique possibility for any interested party to request the competent authority to issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.

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<sup>190</sup> Loc.cit.

<sup>191</sup> Loc.cit.

## 7. Critiques Addressed Towards the Abolition of Exequatur

### 7.1. The Proposal on the Brussels I Recast

In response to certain shortcomings elaborated through a number of legal and empirical studies, the Commission started evaluating the Brussels I Regulation. The next step was the Proposal on the Brussels I Recast containing a detailed and systematic display of the previously mentioned shortcomings and a proposed course of action in addressing these issues<sup>192</sup>. One of the main shortages was the existence of exequatur. It was assessed that the level of trust between the Member States reached a desirable level which would allow a simpler, less costly and a more automatically driven system of circulation of judgments, removing the excessive formalities among Member States<sup>193</sup>.

However, the abolition of exequatur has suffered a great deal of criticism among legal scholars. It was pointed out that the exequatur is not a formal procedure but rather a mean for ensuring that foreign judgments meet some basic requirements of the Member State<sup>194</sup>. Further critiques were addressed regarding the protection of human rights. The European Court of Human Rights (ECHR) reasoned that the purpose of exequatur is, inter alia, to verify the compliance with Article 6 of the European Convention on Human Rights<sup>195</sup>. That was elaborated in case *Pellegrini v. Italy* where the applicant's defense rights were irremediably compromised before the Ecclesiastical Court<sup>196</sup>. The Proposal's solution was the adoption of procedural safeguards which will ensure that the defendant's right to a fair trial and his rights of defense are adequately protected<sup>197</sup>. Those procedural safeguards consist of three main legal remedies which will be at his disposition upon the occurrence of exceptional circumstances that could prevent judgments from one Member State

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<sup>192</sup> Brussels, 14.12.2010, COM (2010) 748 final, 2010/0383 (COD), C7-0433/10, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>.

<sup>193</sup> Brussels, 14.12.2010, COM (2010) 748 final, 2010/0383 (COD), C7-0433/10, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>, p.6.

<sup>194</sup> Cuniberti, Gilles, Some Remarks on the Efficiency of Exequatur (February 2, 2012), University of Luxembourg Law Working Paper No. 2012-1., accessible at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1998030](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998030), p.2.

<sup>195</sup> Cuniberti G., Rueda I., Addressing the Commission's Concerns, (October 12, 2010), University of Luxembourg Law Working Paper No. 2010-03., accessible at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1691001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691001), p.7.

<sup>196</sup> *Pellegrini v. Italy*, application no. 30882/96 (ECHR, 20 July 2001), para. 47.

<sup>197</sup> Brussels, 14.12.2010, COM (2010) 748 final, 2010/0383 (COD), C7-0433/10, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>, p. 6.

taking effect in another Member State<sup>198</sup>. The first legal remedy at his disposal ensures the possibility of contesting the judgment in the Member State of origin if he was not properly informed about the proceedings which took place in that State<sup>199</sup>. The second remedy consists out of an extraordinary remedy in the Member State of enforcement which would make possible for the defendant to contest any other procedural flaws which might have occurred during the proceedings before the court of origin and which may have infringed his right to a fair trial<sup>200</sup>. The third remedy refers to the criterion of irreconcilability enabling the defendant to stop the enforcement of the judgment in case it is irreconcilable with another judgment issued in the Member State of enforcement or, under certain conditions, in another country<sup>201</sup>. This form of review mechanism has had its share of criticism. A vast amount of criticism was pointed on the complexity issue stating that it was more complex than it should be and that it has various systemic inadequacies<sup>202</sup>. Furthermore, some of the scholars interpreted the existence of procedural safeguards as a sign of unresolved issues, problems regarding the level of trust among Member States and problems relating to possible fraudulent behavior<sup>203</sup>.

The Commission intended to abolish the exequatur for all civil and commercial matters with the exception of two cases, non-contractual obligations arising out of violations of privacy and rights relating to personality including defamation and collective redress proceedings<sup>204</sup>. The Commission elaborated that the abolition of exequatur would be premature for these matters regarding the fact that there are substantial differences in approach between the Member States<sup>205</sup>. This was criticized as being random and arbitrary because in other areas substantial law also differs

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<sup>198</sup> Ibid., p. 6.

<sup>199</sup> Brussels, 14.12.2010, COM (2010) 748 final, 2010/0383 (COD), C7-0433/10, accessible at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0748:FIN>. p. 6.

<sup>200</sup> Ibid., p. 6.

<sup>201</sup> Ibid., p. 6.

<sup>202</sup> Kramer, Xandra E., *op.cit.*, p. 353.

<sup>203</sup> Timmer, Laurens J., Abolition of Exequatur under the Brussels I Regulation: Ill Conceived and Premature? (April 2013), *Journal of Private International Law*, Vol.9 No.1, p.136.

<sup>204</sup> Dickinson, Andrew, Lein, Eva, *op.cit.* p. 409. Collective redress is a procedural mechanism which allows the combination of many similar legal claims into a single court action for the purposes of procedural economy and efficiency of enforcement (Trstenjak, V., & Weingerl, P. (2014). *Collective Actions in the European Union—American or European Model?* *Beijing Law Review*, 5, accessible at: <http://dx.doi.org/10.4236/blr.2014.53015>, p. 155.).

<sup>205</sup> Dickinson, Andrew, Lein, Eva, *op.cit.* p.409.

significantly in the Member States<sup>206</sup>. Consequently, the exceptions for privacy rights and collective redress proposed by the Commission were not adopted<sup>207</sup>.

## 7.2. The Heidelberg Report and the CSES Report

The main critiques directed towards the Commission's Proposal, regarding the abolition of exequatur, can be derived from the Heidelberg Report<sup>208</sup> and the CSES Report<sup>209</sup>. The Heidelberg Report gave a statistical background of the efficiency of the exequatur procedure. It is stated that, after the analysis of all national reports, the exequatur proceedings operate efficiently<sup>210</sup>. Moreover, the percentage of appeals was merely 1-5 % regarding all of the decisions and more than 90% of the exequatur application cases did not produce any problems<sup>211</sup>. In the sense of accuracy there are some shortcomings of the Heidelberg Report because it does not include the time applicants need to prepare the exequatur proceedings which is a matter of great importance when evaluating the duration criteria<sup>212</sup>. Furthermore, there was not a calculation on average costs of the exequatur proceedings<sup>213</sup>.

The main task of the CSES Report was to collect data and help identify the most appropriate policy options and their impacts regarding the revision of the Brussels I Regulation<sup>214</sup>. A special place in that analysis was reserved for the collection of data regarding the effectiveness of the exequatur. It was concluded that the economic effects of the abolition of exequatur could produce almost 48 million euros per year based on existing volumes of cross-border trade and that there would be other potential impacts of a positive nature<sup>215</sup>. The research also shows that it is likely that the

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<sup>206</sup> Ibid., p. 410.

<sup>207</sup> Ibid., p. 411.

<sup>208</sup> B. Hess, T. Pfeiffer and P. Schlosser, the Brussels I Regulation 44/2001. The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03) (Munich, Verlag C.H. Beck 2008), it can be accessed at: [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_i\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_i_en.pdf).

<sup>209</sup> Centre for Strategy & Evaluation Services (CSES), Data Collection and Impact Analysis-Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I"), Final Report, 17 December 2010, available at: [http://ec.europa.eu/justice/civil/files/study\\_cses\\_brussels\\_i\\_final\\_17\\_12\\_10\\_en.pdf](http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf).

<sup>210</sup> Heidelberg Report, op.cit., p. 226.

<sup>211</sup> Ibid., p. 221.

<sup>212</sup> Ibid., p. 226.

<sup>213</sup> Timmer, Laurens J., op.cit. p. 142.

<sup>214</sup> CSES Report, op.cit., p. 4.

<sup>215</sup> Ibid., p. 6.

abolition of exequatur will encourage the other participants of the cross-border trade to get involved by reducing costs and complications of litigation abroad and alter the perception that the cross-border enforcement of judgments is a potential difficulty facing a wronged party<sup>216</sup>. Therefore, the findings of the analysis were in line with the Commissions elaboration of the Proposal on the Brussels I Recast. However, the CSES Report was criticized as being inaccurate and lacking objectivity<sup>217</sup>. The aforementioned was concluded after it was established that the word “estimate” was used 142 times and that the CSES Report lacks supportive data<sup>218</sup>. Further critiques are addressed towards the estimate that the abolition could save nearly 48 million euros per year emphasizing the fact that numbers which were the basis for the final estimate were not based on empirical data obtained in the field. Instead, the average exequatur costs were based on multiple assumptions which are not sufficiently accurate<sup>219</sup>.

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<sup>216</sup> Loc.cit.

<sup>217</sup> Timmer, L. J., op.cit. p. 142.

<sup>218</sup> Ibid., p. 143.

<sup>219</sup> Loc.cit.



## 8. Concluding Remarks

The objective of the Thesis was to provide a systematic and elaborate display of the European Union system of recognition and enforcement substantiated with the recent CJEU case law and to highlight novelties adopted in the Brussels I Regulation Recast. The most important novelty adopted was the abolition of exequatur. The abolition represents a significant step towards a simpler and less costly procedure impacting positively on cross-border trade. Nevertheless, the abolition still leaves enough space for the interested party to invoke the refusal grounds expressly set out in Article 45. There was a great deal of political intrigue behind the abolition. Given the aforementioned it is important to, once again, emphasize that the abolition of exequatur was not only impelled by economic goals but also with political motives in securing a more homogeneous European system of recognition and enforcement and confirming the already achieved level of trust between Member States. It remains to be seen whether the financial implications of the abolition, presented in the Proposal on the Brussels I Recast and other related documents, will turn out to be true within the predicted framework. The following period will be crucial for the evaluation of the fruitfulness of the abolition and it will surely provide much needed data for further analysis.

## List of Abbreviations

ibid.	ibidem
loc.cit.	locus citatum
op.cit.	opus citatum
p.	page
art.	article
para.	paragraph
etc.	et cetera
no.	number
ed.	edition
OJ L	Official Journal of the European Union (Legislation)
et al.	et alia
v.	versus
CJEU	Court of Justice of the European Union
Co.	Company
EU	European Union
Vol.	Volume
HCCH	Hague Conference on Private International Law
sec.	second
CSES	Centre for Strategy & Evaluation Services
U.N.T.S.	United Nations Treaty Series
publ.	publishers
Dec.	December
ECHR	European Court of Human Rights
subpar.	Subparagraph

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