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

Jorg Sladič*

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* Docent Dr. Jorg Sladič, LL.M., D.E.S.S., univ.dipl.jur. is Assistant professor of International and European law, University of Maribor (Slovenia), Faculty of law.

A. Introduction

The term "European civil procedure" should be understood as comprising the standard term in legal writing. It refers to primary and secondary EU legislation concerning judicial enforcement of subjective rights in civil procedure in several EU Members States. This is characterised by uniform interpretation and exclusive competence for such an interpretation by the Court of Justice of the European Union.[1] The term "Regulations on European civil procedure" is a simplification used in this text to describe the following regulations and other legal acts adopted (also) by EU institutions such as the old repealed Regulation No 44/2001,[2] Regulations No 1346/2000,[3] 1206/2001,[4] 2201/2003,[5] 805/2004,[6] 1896/2006,[7] 1393/2007,[8] 861/2007,[9] 4/2009,[10] 650/2012,[11] 1215/2012.[12]

1 *Kropholler/von Heim*, Europäisches Zivilprozessrecht, 9th ed. 2011, pp. 11-18; *Adolphsen*, Europäisches Zivilverfahrensrecht, 2011, pp. 6-11.

2 Council Regulation (EC) No 44/2001 of 22/12/2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12 of 16/1/2001, p. 1.

3 Council Regulation (EC) No 1346/2000 of 29/5/2000 on insolvency proceedings, OJ L 160 of 30/6/2000, p. 1.

4 Council Regulation (EC) No 1206/2001 of 28/5/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174 of 27/6/2001, p. 1.

5 Council Regulation (EC) No 2201/2003 of 27/11/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23/12/2003, p. 1.

6 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21/4/2004 creating a European Enforcement Order for uncontested claims, OJ L 143 of 30/4/2004, p. 15.

7 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12/12/2006 creating a European order for payment procedure, OJ L 399 of 30/12/2006, p. 1.

8 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13/11/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324 of 10/12/2007, p. 79.

9 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11/7/2007 establishing a European Small Claims Procedure, OJ L 199 of 31/7/2007, p. 1.

10 Council Regulation (EC) No 4/2009 of 18/12/2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7 of 10/1/2009, p. 1.

11 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4/7/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201 of 27/7/2012, p. 107.

12 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12/12/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351 of 20/12/2012, p. 1.

Although it is not an EU regulation, the new Lugano Convention should be considered as part of EU civil procedure.[13] The same applies to Directive No 2003/8.[14] However, this enumeration is not the final stage of the European civil procedure *in statu nascendi*.[15] One might also refer to the forthcoming regulation on mutual recognition of protection measures in civil matters.[16]

The essence of this paper is the development in EU law concerning remedies after the abolition of the intermediate proceedings of *exequatur* in enforcement proceedings. In other words, does EU law offer the same level of remedies as in the *exequatur* phase? In order to understand the interplay between purely national and EU law created by the abolition of the *exequatur* in the field of remedies in civil procedure the first chapter will examine the nature of the *exequatur*. The abolition of the exequatur raises important questions of human rights. Therefore the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth: the "ECHR") and the principle of mutual recognition shall be examined.

B. Legal position of the exequatur in the EU

When dealing with cross-border enforcement of judicial decisions, the first issue is the precise legal distinction between a mere recognition (*the exequatur*) and enforcement.[17] It would appear that such a distinction is not as evident to a *common law* lawyer than it is to *civil law* lawyers.

It is asserted that "in most legal systems the distinction between recognition and enforcement is clear. Recognition refers to the *res judicata* effect of the foreign judgment which spreads to the country of reception, while enforcement pertains to an

13 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007/712/EC, OJ L 339 of 21/12/2007, p.3.

14 Council Directive 2003/8/EC of 27/1/2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26 of 31/1/2003, p. 41.

15 *Franzina*, Les acteurs de l'espace judiciaire européen en matière civile, in: Douchy-Oudot/Guinchard (eds.), La justice civile européenne en marche, 2012, p. 9 et seq.

16 Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, http://register.consilium.europa.eu/pdf/en/13/st06/st06838.en13.pdf (6/9/2013). At the material time of drafting of this paper the regulation – although adopted on 6/6/2013 – has not yet been published in the Official Journal. Cf.: http://register.consilium.europa.eu/pdf/en/13/pe00/pe00007.en13.pdf (6/9/2013).

17 *Kerameus*, Enforcement in the International Context, Recueil des Cours de l'Académie de droit international de la Haye, vol. 264 (1997), pp. 334-338, paras. 96-99.

act of material execution on the assets or of committal of persons".[18] It is stated that the *exequatur* "is placed just before the enforcement and it serves the enforcement, however the exequatur is not enforcement"[19] or "the exequatur solely assimilates a national and a foreign title."[20] According to CJEU case law the *exequatur* is described as the second stage of the procedure.[21] The next step is the proceedings of enforcement.

Classic private international law proceedings of cross border enforcement comprise three stages: the first stage is the litigation in the State of origin, the second intermediate phase is the *exequatur* in the enforcement State and the third phase is the enforcement proceedings in the State in which enforcement is sought.[22]

The *exequatur* used to be the standard legal instrument of a State in which the enforcement was sought allowing to perform a certain review of foreign enforceable (and final) judicial decisions. On the other hand, the *exequatur* was also necessary to give to a foreign compelling judicial decision that is *ipso jure* capable of enforcement in the State of origin the quality of an enforceable decision or enforcement title in the State in which enforcement is being sought.[23] As far as Regulation No 44/2001 is concerned, according to Polish Constitutional Court "[t]he aim of the legal institution of declaring the enforceability of foreign judgments – which together with recognition constitutes a basic form of ensuring the effectiveness of judgments issued by the courts of the EU Member States – is to make it possible to enforce those judgments outside the borders of the Member State of origin by making them enforceable in the territory of another Member State."[24]

A foreign *titulus executionis* is then considered as a national title by virtue of the principle *nulla executio sine titulo*.[25] This has been explained very clearly for example by

18 Ibid., para. 96; see also *Audit*, Droit international privé, 5th ed. 2008, para. 457; for the definition of three levels of exequatur see *De Cock*, Effets et exécution des jugements étrangers, Recueil des cours de l'Académie de droit international, vol. 10 (1925), pp. 437-440.

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

20 *De Leval*, Eléments de procédure civile, 2nd ed. 2005, p. 268.

21 CJEU, case C-619/10, *Trade Agency*, not yet reported in the ECR, para. 31.

22 *De Leval*, (fn. 20), p. 268. See also Polish Constitutional Court (*Trybunał Konstytucyjny*), SK 45/09 of 16/11/2011, www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf (6/9/2013), para. 3.2.

23 An enforceable national condemnatory judicial decision is *ipso jure a titulus executions*. See e.g. Court of Appeal of Liège (*Cour d'apppel de Liège, Belgium*), judgments no 2002/RG/11 of 20/6/2006, Justel number F-20020620-1, http://jure.juridat.just.fgov.be/?lang=fr (6/9/2013) according to which "*privé d'exequatur, un titre étranger ne peut recevoir exécution*" and French Court of Cassation, Cass. civ. 1ère of 3/1/1980, www.legifrance.gouv.fr/ (6/9/2013), "*l'objet principal de l'instance en exequatur est de permettre l'exécution forcée en France du jugement étranger*".

24 Polish Constitutional Court, (fn. 22), para. 3.1.

25 *De Leval*, (fn. 20), p. 269. *Meyer/Heuzé*, Droit international privé, 9th ed. 2007, para. 426, speak of "*force exécutoire*" of a foreign *titulus executionis*. It has to be said that lawyers in French speaking

the Austrian Supreme Court with a Statement of reasons according to which the consequence of the *ipso jure* recognition of foreign titles is the end of different treatment of national and foreign enforcement titles.[26]

In history the review in *exequatur* has ranged from a *révision au fond* to an extremely limited marginal review. On the other hand the *exequatur* was open to challenge by various legal remedies (opposition, appeal, etc.) in the State in which enforcement was sought. Perhaps the most interesting defence of the *exequatur* is to be found in constitutional law. *Acta jure imperii* adopted by foreign *fora* lack the democratic legitimisation that is to be found in national (judicial) authorities.[27] Newer developments have progressively reduced the importance of the *exequatur*, legal writers have started to speak of a recognition *ipso jure*.[28] National case law in EU Member States in application of EU regulations has also considerably reduced the importance of the *exequatur*.[29] Such facilitation has considerably limited the importance of the *exequatur* and finally opened the way to a gradual abolition of the *exequatur*. The issue of remedies in the Member State of origin and in the Member State in which the enforcement is sought is therefore gaining new and somehow different importance, as case law on European civil procedure is moving towards a position that substantive

countries make a distinction between *la force exécutoire* and *le titre exécutoire – de Leval*, (fn. 20), p. 257. As far as enforceability in the addressed State is concerned legal writers have always stated that " *jamais on ne reconnaîtra, on n'executéra un jugement étranger s'il ne possède pas la qualité d'être exécuté par les tribunaux civils et leurs huissiers dans son pays d'origine* " – *Sperl*, L'exécution des jugements étrangers, Recueil des Cours de l'Académie de droit international de la Haye, vol. 36 (1931), p. 431.

26 Supreme Court of Austria (*Oberster Gerichtshof*), 3Ob127/12s of 19/9/2012, www.ris.bka.gv.at (6/9/2013), para. 5: "Schon die ipso iure eintretende Anerkennung der Entscheidung aus dem Ursprungsstaat in Österreich (Art 33 Abs 1 EuGVVO) hat zur Folge, dass nicht mehr zwischen in- und ausländischem Exekutionstitel zu unterscheiden ist".

27 *Weber*, Europäisches Zivilprozessrecht und Demokratieprinzip, 2009, p. 167.

28 *Schack*, Internationales Zivilverfahrensrecht, 5th ed. 2010, para. 971; *Leifeld*, Das Anerkennungsprinzip im Kollisionsrechtssystem des internationalen Privatrechts, 2010, p. 140 et seq.; *Wautelet*, En guise d'introduction: sources et concepts de base, in: Wautelet, Relations familiales internationales, L'actualité vue par la pratique, Commission Université Palais, Vol. 118, 2010, p. 28 et seq.; *Audit*, (fn. 18), paras. 481-485; *Monteleone*, Manuale di diritto procesuale civile, Vol. II, 5th ed. 2009, p. 491, explains that foreign judgments are automatically accepted in Italian legal order as if they were Italian ones. However, one might add that Italian legal situation was modified as explained by *Consolo*, Il nuovo rito sommario (a cognizione piena) per il giudizio di accertamento dell'efficacia delle sentenze straniere in Italia dopo il D.LGS N. 150/2011, Rivista di diritto internazionale privato e processuale 68 (2012), p. 513 et seq. See for example in French case law Cass. Civ. 1ère of 6/6/1967, www.legifrance.gouv.fr/ (6/9/2013): "*mais attendu que la Cour d'appel énonce justement que l'ordonnance étrangère qui a conferé à veuve Schapiro des pouvoirs d'administration en matière successorale produit ses effets en France independamment de toute déclaration d'exequatur, du moment qu'elle ne doit pas donner lieu à des actes d'exécution forcée dans ce pays* "; in Belgian case law Court of Appeal in Labour Matters of Mons (*Cour du Travail de Mons*), 12072 of 2/6/1995, Justel Number F-19950602-7, http://jure.juridat.just.fgov.be (6/9/2013); and in Austrian case law Supreme Court of Austria (*Oberster Gerichtshof*), (fn. 26), para. 4.

29 See e.g. Court of Cassation of Poland (*Sąd Najwyższy*), II CSK 464/06 of 28/3/2007, http://curia.europa.eu/common/recdoc/convention/en/2007/39-2007.htm (6/9/2013).

and procedural defences (*exceptiones*) raised by the judgment debtor can no longer be submitted during the intermediary phase of the *exequatur*.[30] However, the judgment debtor must be allowed to raise his defences (*exceptiones*) in a different manner (be it during the trial phase in the Member State of origin or during the enforcement phase in the Member State of enforcement).[31]

The European integration is now creating a phenomenon of direct enforcement of enforceable judicial decisions rendered in an EU Member State of origin without any intermediate proceedings in an EU Member State in which enforcement is being sought.[32] In other words, judicial decisions rendered in the EU Member State of origin (adjudicatory jurisdiction) are being enforced in an EU Member State in which enforcement is sought (jurisdiction to enforce) without any intermediary (judicial) proceedings for constituting and creating enforceable effects of a foreign judicial decision of a Member State of origin under the *lex fori* of the Member State in which enforcement is sought.[33] A *titulus executionis* in the EU Member State of origin means that this title shall be enforced in the whole European judicial area as such and accepted in all EU Member States as such.[34] This, however, is an important evolution of international civil procedure.[35]

The effects of the abolition of the *exequatur* are best seen in the *Povse* case. "A certified judgment (i.e. a foreign enforceable title) cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child."[36]

In the EU some of the old doctrines in private international law on the importance and nature of the *exequatur* like the doctrine of territorial transfer of effects of a

30 See e.g. Appeals Committee of the Supreme Court of Norway (*Høyesteretts kjæremålsutvalg*), *Petter Samuelsen v. Nilsen Brokers Ltd AS* of 7/3/1996. The English summary, http://curia.europa.eu/common/recdoc/convention/en/ 1997/26-1997.htm (6/9/2013), reads: At this stage (the *exequatur*), the party against whom the enforcement is sought may make any submissions relating to the grounds for enforcement or enforceability. Submissions other than that relating to the grounds for enforcement or enforceability must be dealt with at the later stage in the proceedings.

31 *König*, Die Oppositionsklage (§ 35 EO) und Art. 22 Nr. 5 EuGVVO, Österreichische Juristen-Zeitung 60 (2006), p. 931 et seq.

32 *Rauscher*, Internationales Privatrecht, 4th ed. 2012, para. 2270 et seq.

33 *Schütze*, Die Doppelexequierung ausländischer Zivilurteile, in: Bernreuther/Freitag/Leible/Sippel/Wanitzek, FS Spellenberg, 2010, p. 517 et seq.; *Schack*, (fn. 28), para. 865 et seq.

34 *Rechberger/Simotta*, Zivilprozessrecht, 8th ed. 2010, para. 1220.

35 *Stein*, Der Europäische Vollstreckungstitel für unbestrittene Forderungen – Einstieg in den Ausstieg aus dem Exequaturverfahren bei Auslandsvollstreckung, EuZW 2004, p. 679.

36 CJEU, case C-211/10 PPU, *Povse*, ECR 2010, I-6673, para. 83.

foreign judgment or title import are (slowly) losing their importance.[37] Such a development did not come as *deus ex machina*, it was just a step in the gradual evolution of European civil procedure.[38] In 1999 the Tampere European Council had announced a gradual abolition of the *exequatur* by calling "upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State." It instituted political guidance for automatic recognition "throughout the Union without any intermediate proceedings or grounds for refusal of enforcement".[39] We might also cite the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.[40] It had already been observed, that „such considerations aim at perfect equal treatment of all enforcement titles and the unlimited territorial implementation in the EU (*ratione loci*) of all effects of a judicial decision in the European judicial area." [41] The Stockholm programme is extremely specific on this issue: "Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union."[42] As a result, an enforceable judgment given by the courts of a Member State of origin should be treated as if it is given in the Member State addressed. This doctrinal assumption has now been lately confirmed by the recital 26 in the statement of reasons (preamble) to the Regulation No 1215/2012 by the following words: "Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure".[43] The doctrinal impulse for "great and general" abolition of the *exequatur* was finally codified and proposed by German Professors *Hess*, *Pfeiffer*

37 See for the brief overview of the doctrinal debate in *Adolphsen*, (fn. 1), pp. 160-162. European law defined the *Theorie der Wirkungserstreckung* in terms: "A foreign judgment which has been recognised by virtue of Article 26 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given", CJEU, case 145/86, *Hoffmann*, ECR 1988, 645, para. 9.

38 See the exact narration of development in *Biagioni*, L'abolizione dei motivi ostativi al riconoscimento e all'esecuzione nella proposta di revisione del regolamento Bruxelles I, Rivista di diritto internazionale privato e processuale 67 (2011), p. 971 et seqq.

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

40 OJ C 12 of 15/1/2001, p. 1.

41 *Mansel*, Anerkennung als Grundprinzip des Europäischen Rechtsraums, RabelsZ 70 (2006), p. 663.

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

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

and *Schlosser* in their study by reference to sectorial Regulations No 805/2004, 1896/2006 and 861/2007.[44] This impulse has then been used by the Commission in preparation of the Regulation No 1215/2012, which shall in the future serve as the *lex generalis* also in future European civil procedure.[45] The new Regulation No 1215/2012 is the culmination of the abolition of *exequatur* and reviews performed in the EU Member State in which enforcement is sought of judicial decisions originating in an EU Member State.[46]

However, the end of old (albeit nowadays more doctrinal) problems linked to the *exequatur* does not preclude the creation of new ones. It is true that problems of judicial cooperation like the level of protection of fundamental rights in judicial cooperation in civil matters in various Members States are being discussed.[47] Therefore the next chapter will examine some open questions of compliance with human rights after the abolition of the *exequatur*.

C. Requirements of the ECHR

The starting point might be the respect of fundamental rights. Indeed, "if the enforcement State grants an exequatur, it will in most cases interfere with human rights of the judgment debtor. If, on the other hand, an exequatur is denied, that

44 *Hess/Pfeiffer/Schlosser*, Report on the Application of Regulation Brussels I in the Member States, Study JLS/C4/2005/03, 2007, paras. 903-905. This study also confirms the *communis opinio doctorum* that the most complete and influential legal doctrine in international civil procedure comes from Germany, see *Virgós Soriano/Garcimartín Alférez*, Derecho Procesal Civil Internacional Litigación Internacional, 2nd ed. 2007, p. 783.

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

46 *Müller*, Die Abschaffung des Exequaturverfahrens nach dem EuGVVO-Reformentwurf – Wegfall überflüssiger Gläubigerblockaden oder Abschied vom effektiven Rechtsschutz für den Schuldner, ZEuS 2012, p. 332.

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

decision might interfere with human rights of the judgment creditor."[48] Without examining the impressive and internationally extremely influential case law of the German *Bundesverfassungsgericht* one might conclude that according to the modern *communis opinio doctorum* in modern civil procedure fundamental rights must be respected also cases where such a procedure is regulated by EU regulations.[49] Some legal writers openly doubt whether the EU legislature complied with requirements of the ECHR in abolishing the exequatur.[50] Regulations on civil procedure have a genuine European character. Therefore it is suggested that the battleground for achieving compliance of the abolition of the exequatur with human and fundamental rights is not the national constitutions and their chapters on fundamental rights but rather the ECHR. This statement is supported by Art. 45(1)(a) of the Regulation No 1215/2012 referring to refusals to recognise a foreign judgment manifestly contrary to public policy (*ordre public*) in the Member State addressed. The attribute manifestly implies the research of common legal values in Europe.

Therefore, in order to understand the nature of opposition and similar remedies against direct enforcement of foreign enforceable judicial decisions without any intermediate procedures in European civil procedure, one must start with the ECHR. The most important provisions of the ECHR being Art. 6(1) and 13.[51] One of the recurring issues in EU Member States in indirect administration of EU law is the objection that EU law has superseded the ECHR. Therefore the first point will be the reiteration of the importance of the ECHR in application of EU law – comprising the EU civil procedure – in EU Member States.

I. The role of the ECHR in European civil procedure

The following paragraph is just a synthesis of standard European legal doctrine. From the point of view of an individual – i.e. the beneficiary of human rights – the fact that Members States of the EU have transferred some sovereign powers to the EU and are bound by EU law comprising also regulations and directives on European

48 *Schilling*, (fn. 47), p. 546. See from the point of view of the debtor also *Stamm*, Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts, 2007, p. 212.

49 See as far as the Regulation No 44/2001 is concerned Czech Constitutional Court (*Ústavní soud*), I. ÚS 709/05 of 25/4/2006, http://curia.europa.eu/common/recdoc/convention/en/2007/17-2007.htm (6/9/2013); and Polish Constitutional Court, (fn. 22), paras. 6.3., 6.4.-6.7. as far as Art. 41 of the Regulation No 44/2001 is concerned.

50 *López de Tejada*, La dispartion de l'exequatur dans l'espace judiciaire européen, 2013, paras. 293, 301, 301-3, 306-310.

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

civil procedure does not mean that the Member States are not bound by the requirements of the ECHR when implementing such regulations.[52] On the one hand the CJEU declared that "the principle of effective judicial protection is a general principle of [EU] law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union."[53] On the other hand, the ECHR is an international treaty and contracting parties to the treaty are bound by the *pacta sunt servanda* principle (Art. 26 of the 1969 Vienna Convention), even if they conclude other treaties comprising a transfer of parts of national sovereignty to an international organisation like the EU, otherwise there would be no *effet utile* of the ECHR.[54] This might be quite a heretical consideration for lawyers specialising in EU Law. However, international law is the basis of EU law and even though it is widely recognised in legal writing that the EU has some "constitutional" characteristics,[55] legal acts referred to by the CJEU as "constitutional charter of a Community based on the rule of law" are still legal acts of international law.[56]

However, when examining the above mentioned standard doctrine the importance of case law of the ECHR like *Michaud v France* shall not be underestimated, especially if examined in the context of the *Pellegrini* case law of the ECHR.[57] Legal writers state that the interdiction of examination of compatibility of a foreign judgement with (at least international) *ordre public* might not be compatible with fair trial requirements of Art. 6(1) ECHR[58] "That provision contains a number of safeguards which contribute to a fair administration of justice in national legal systems" and "from the point of view of the European Court of Human Rights, each court of a contracting State is entitled to deny enforcement to foreign judgements obtained in proceedings which do not comply with Art. 6(1)", "the enforcement of such type of judgements must

52 See to that effect, ECHR, no. 45036/98, *Bosphorus v. Ireland*, ECHR 2005-VI, para. 154; ECHR, no. 12323/11, *Michaud v. France*, paras. 102-104 and 112-116. See also questions opened by *Nunner-Krautgasser/Anzenberger*, General Principles in European Small Claims Procedure – How Far Can Simplifications Go?, LeXonomica 4 (2012), p. 141.

53 CJEU, case C-432/05, *Unibet*, ECR 2007, I-2271, para. 37; CJEU, case C-292/10, *G v Cornelius de Visser*, not yet published in the ECR, paras. 65, 66 and 68.

54 See to that effect, ECHR, no. 12323/11, *Michaud v. France*, para. 102. The relevant part of the text reads: "*Autrement dit, les Etats demeurent responsables au regard de la Convention des mesures qu'ils prennent en exécution d'obligations juridiques internationales, y compris lorsque ces obligations découlent de leur appartenance à une organisation internationale à laquelle ils ont transféré une partie de leur souveraineté.*"

55 *Franzina*, (fn. 15), p. 8.

56 *Pellet*, Les fondements juridiques internationaux du droit communautaire, Collected Courses of the Academy of European Law, vol. V, Book 2, p. 211 et seq.

57 ECHR, no. 30882/96, *Pellegrini v. Italy*.

58 *López de Tejada*, (fn. 50), para. 306.

be treated as involving a breach of the right to a fair trial."[59] The open question is whether in recognising and enforcing foreign decision courts in the contracting states are required to examine the compliance with Art. 6(1) ECHR of their own motion or solely upon request by the judgment debtor.[60] If the courts are bound to examine the compatibility of a foreign title with the ECHR *ex officio*, then abolition of the *exequatur* indeed would seem to be incompatible with the ECHR. On the other hand, if the courts are bound solely upon request of a judgment debtor to examine the compatibility of a foreign title with the ECHR, then there are no human rights issues involved in the abolition of the *exequatur*.[61] However, there is no straight answer. The principle of mutual recognition does set up a *praeusmptio juris tantum* and not a *praeusmptio juris et de jure* of equivalent protection of human rights in civil procedure in all aspects in all EU Member States.[62] Having regard to the CJEU's *Gambazzi* decision, the question will have to be answered on a case by case basis.[63] One might perhaps speak of a gradual and silent emergence of a very strong *praeusmptio juris tantum* in interpreting the *ordre public* clause in a very narrow way.[64]

II. Application of Art. 6(1) ECHR in exequatur

According to case law of the ECHR "as far as civil proceedings before domestic courts are concerned, the applicability of Article 6 extends to the execution phase of the proceedings, the reason being that the 'right to a court' embodied in Article 6 would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."[65] The deduction from that case law is – at least in principle – an existence of "a human right of the foreign-judgment creditor to an exequatur".[66] In private international law "the whole process of recognition [is], at the same time, a right and, still more, an obligation of the receiving State".[67]

59 *D'Alessandro*, The Impact of Article 6 of the European Convention of Human Rights on the Enforcement of Foreign Judgments rendered in a Non Contracting State, ZZPInt 15 (2010), pp. 171 and 173.

60 Ibid., p. 176.

61 Ibid.

62 *López de Tejada*, (fn. 50), para. 293.

63 CJEU, case C-394/07, *Gambazzi*, ECR 2009, I-2563.

64 BVerfG, 2 BvR 253/06 of 26/6/2009, para. 11, where the *Bundesverfassungsgericht* expressly dismissed the argumentation based on teleological reduction in interpreting Art. 28(3) of the Brussels Convention.

65 ECHR, no. 69917/01, *Saccoccia v. Austria*, paras. 60-62.

66 *Schilling*, (fn. 47), p. 547.

67 *Kerameus*, (fn. 17), para. 99.

However, the above mentioned opinion on existence of a fundamental right to *exequatur* can apply only if the judicial decision to be enforced is rendered in a State that is a party of the ECHR.[68] As all EU Member States are for the time being also contracting States of the ECHR, there seems to be no problem in that regard. On the other hand one cannot ignore that an *exequatur* against the judgment debtor might interfere with his protection of property guaranteed under Art. 1 of the 1st Protocol to the ECHR.[69] Such an interference might be undertaken only after a closed fair trial offering effective remedies against judicial decisions.

III. Abolition of the exequatur from the point of view of the ECHR

Legal writers have started to develop a doctrine of derived or indirect infringement of the right to a fair trial under Art. 6(1) ECHR. The *exequatur* and enforcement proceedings in the State in which enforcement is sought can therefore be considered a mere continuation of the trial in which a decision infringing Art. 6(1) has been given in the State of origin.[70] The phenomenon of cross-border enforcement does not suppress the infringement of essential procedural requirements posed by Art. 6(1) ECHR.[71] Indeed, the multilateral obligation of fair trial in every State which has ratified the ECHR also implies obligations of cooperation in the field of international civil procedure in such States.[72] German legal writers consider that by abolishing the requirement of the *exequatur* the positive obligation under Art. 13 ECHR to protect the judgment debtor against foreign titles in an unfair trial might be infringed in the State in which enforcement is sought, if there is no possibility of effective judicial remedy against the enforcement of such a decision.[73] This has been reflected by case law of constitutional courts in EU Member States. "An appellate court which refuses to examine a party's objection that recognition of the foreign judgment would be manifestly contrary to public policy in the Member State in which recognition is sought, on the ground that it does not have jurisdiction to review the foreign judgment, is interpreting Regulation No 44/2001 in such a way as to undermine the right to legal protection that is guaranteed by Article 36(1) of the

68 See to that effect ECHR, no. 30882/96, *Pellegrini v. Italy*, paras. 40 and 47; see also *Bureau/Muir-Watt*, Droit international privé, tome 1, partie générale, 2nd ed. 2010, pp. 289-291.

69 *Schilling*, Das Exequatur und die EMRK, IPRax 31 (2011), p. 31.

70 See ECHR, no. 30882/96, *Pellegrini v. Italy*, para. 47; *Bureau/Muir-Watt*, (fn. 68), p. 290 et seq.; *Biagioni*, (fn. 39), p. 980.

71 *Bureau/Muir-Watt*, (fn. 68), p. 290 et seq.

72 *Sengstschmid*, Handbuch Internationale Rechtshilfe in Zivilverfahren, 2010, p. 75 et seq.

73 *Schilling*, (fn. 47), p. 39 et seq.; for the doctrine on positive obligations of ensuring fundamental rights see *Khadzadeh-Leiler*, Die Grundrechte in der zivilrechtlichen Judikatur des Obersten Gerichtshofes, 2011, pp. 27-33.

Czech Charter of Fundamental Rights and Basic Freedoms which forms part of the Czech constitutional order."[74]

However, there is also a possibility of a direct or original infringement of Art. 6(1) ECHR. We might speak of a derived or indirect infringement only if the judgment debtor was not served the application commencing proceedings and was not able to lodge remedies against the decision *in merito* in the State of origin (the debtor was not able to arrange his defence). However, if the debtor was correctly informed of the pending proceedings, if summons were served on him, if a decision *in merito* was rendered, and if a period for lodging judicial remedies has already expired and if the judicial decision became enforceable only after such an expiry, the above mentioned legal opinion seems to be at odds with the doctrine of exhaustion of remedies.[75] As far as the question of (procedural and substantial) exhaustion of remedies is concerned,[76] a party who has not appealed against the enforcement order is precluded, "at the stage of the execution of the judgment, from relying on a valid ground which he could have pleaded in such an appeal against the enforcement order, and that that rule must be applied of their own motion by the courts of the State in which enforcement is sought."[77]

The question that should be asked is, where the violation of the ECHR has been committed? In the State of origin or the State in which the enforcement is sought? In the specific case of the abolition of the *exequatur* and direct enforcement of foreign judgments the answer seems to be that the infringement of Art. 6(1) ECHR could have been committed either in the State of origin or in the State in which the enforcement is sought. An infringement is possible in the State which has jurisdiction of adjudication and in the State which has the jurisdiction to enforce. Enforcement is an *actum jure imperii*, this means the performance of the powers of a public authority on the territory of the State in which enforcement is sought (jurisdiction to enforce implies the principle of territoriality).[78]

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74 Czech Constitutional Court (*Ústavní soud*), I. ÚS 709/05 of 25/4/2006, http://curia.europa.eu/common/recdoc/convention/en/2007/17-2007.htm (6/9/2013).

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

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

77 CJEU, case 145/86, *Hoffmann*, ECR 1988, 645, para. 34.

78 *Britz*, (fn. 47), p. 106. See also *Rijavec*, Civilno izvršilno pravo, 2003, p. 43; *Rechberger/Simotta*, (fn. 34), para. 39; *Virgós Soriano/Garcimartín Alférez*, (fn. 43), p. 683 et seq.

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

The most important provision of codified primary law (in the sense of *jus positum*) concerning the (direct and indirect) enforcement of judicial decisions rendered in the Member State of origin in the Members State in which enforcement is sought is undoubtedly the principle of mutual recognition under Art. 81 TFEU. That principle has to be read together with the principle of loyal cooperation laid down in Art. 4(3) TEU.

Article 81 TFEU introduces judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments with the aim of free movement of judicial decisions in EU Member States. In the area of freedom, security and justice, especially in the area of European judicial cooperation the principle of mutual recognition implies the end of traditional geographical limitation of exercise of sovereign powers to national territories of a given Member State.[79] Individuals are being subjected to foreign *acta jure imperii* in the form of judicial decisions adopted in other EU Member States.[80] According to national case law "the national court of the Member State in which enforcement is sought should, in accordance with that principle, manifest its trust in a foreign court, and in fact in a foreign legal order within the European Union and its administration of justice."[81]

However, such a principle must imply and also require an equivalent and efficient protection of human rights in every Member State.[82] This equivalence and efficiency might be referred to as the presumption of horizontal equal protection of fundamental rights.[83] *Fora* of the Member State in which enforcement is sought will always be confronted with defence and objections on infringement of fundamental rights in the Member State of origin.[84] Cases like *Gambazzi* and *Zarraga* may serve as an indication of that phenomenon.[85] The *Zarraga* judgment can have far more serious implications. The referring German court in the *Zarraga* case considered as

79 *Möstl*, Der unionsrechtliche Grundsatz der gegenseitigen Anerkennung – Einige Anmerkungen aus öffentlich-rechtlicher Perspektive, in: Bernreuther/Freitag/Leible/Sippel/Wanitzek, FS Spellenberg, 2010, p. 721.

80 Ibid.

81 Polish Constitutional Court, (fn. 22), para. 3.2.

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

83 *Britz*, (fn. 47), p. 108 et seq.

84 See e.g. Supreme Court of Austria (*Oberster Gerichtshof*), 3Ob253/06m of 22/2/2007.

85 CJEU, case C-491/10 PPU, *Aguirre*, ECR 2010, I-14247; CJEU, case C-394/07, *Gambazzi*, ECR 2009, I-2563.

a general rule, that there is no power of review under Art. 21 of the Regulation No 2201/2003. None the less the referring court clearly stated that it should be able to perform a review where there is a particularly serious infringement of a fundamental right.[86] This is an issue that the EU cannot accept. However, Member States must accept such a statement of reasons under their obligations of fair trial. As far as the EU is concerned "a foreign judgment is presumed to be in order. It must, in principle, be possible to enforce it in the State in which enforcement is being sought."[87]

It can be argued that the *effet utile* of the principle of mutual recognition implies *a majore ad minus* also enforcement between Member States of judgments and of decisions in extra judicial cases without the *exequatur*.[88] Article 81 TFEU is to be regarded as the legal basis for abolishing the *exequatur* and introducing the possibility of more or less direct enforcement in the addressed Member State of a judgment given in the Member State of origin. Especially as *de jure* – with the exception of a *clause contraire* in a treaty – there is no obligation of *exequatur* and enforcement in general public international law.[89] The principle of mutual recognition is nowadays the cornerstone of judicial co-operation in civil matters within the EU.[90] The importance of that principle *in concreto* is then shown in various recitals in the preambles of regulations on European civil procedure and in the references by the CJEU to such recitals.[91] According to the CJEU, "it is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts are required to respect, and as a corollary the waiver by Member States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions."[92]

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86 CJEU, case C-491/10 PPU, *Aguirre*, ECR 2010, I-14247, para. 34.

87 *Jenard*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27/9/1968, OJ C 59 of 5/3/1979, p. 47.

88 The interpretation of a treaty in international law and even of an act of EU law under the principle of *effet utile* is closely linked to the teleological method of interpretation, see *Stein/von Buttlar*, Völkerrecht, 12th ed. 2009, para. 84.

89 *Schilling*, (fn. 47), p. 546 with reference to *Michaels*, Recognition and Enforcement of Foreign Judgments, Max Planck Encyclopedia of Public International Law, 2009.

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

91 CJEU, case C-92/12 PPU, *Health Service Executive v S.C. and A.C.*, not yet reported in the ECR, para. 101; CJEU, case C-256/09, *Purrucker*, ECR 2010, I-7353, para. 70.

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

E. National procedural autonomy and its limits

Member States are in principle responsible for remedies and recourses under the principle of national procedural autonomy. However, if the EU legal acts do not allow remedies, the consequences might be quite interesting. In purely national cases remedies might be available, whereas in cross-border enforcements they might be foreclosed.

After the "*communitarisation*" of European civil procedure the best example of this statement is the modified importance of the 1984 case *Deutsche Genossenschaftsbank*. The principal objective of the regulations on civil procedure is to simplify procedures in the State of enforcement by abolishing the intermediate *exequatur* proceedings. "In order to attain that objective the [Brussels] Convention established an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals. It follows that article 36 of the [Brussels] Convention[93] excludes procedures whereby interested third parties may challenge an enforcement order under domestic law."[94] The continuation of that case law is to be found in the *Sonntag* case.[95] The transposition of this case law to the Regulation No 44/2001 was made in the *Draka NK Cables* ruling, since that ruling Art. 43(1) of the Regulation No 44/2001 "must be interpreted as meaning that a creditor of a debtor cannot lodge an appeal against a decision on a request for a declaration of enforceability if he has not formally appeared as a party in the proceedings in which another creditor of that debtor applied for that declaration of enforceability."[96] The continuation of the case law was established by the national courts in application of EU law. "A third party is precluded from intervening in the proceedings relating to the declaration of enforceability of a judgment".[97] However, if a certain matter is not covered *ratione materiae* by European regulations, then national *lex fori* is to be applied.[98]

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

94 CJEU, case 148/85, *Deutsche Genossenschaftsbank*, ECR 1985, 1981, para. 17.

95 CJEU, case C-172/91, *Sonntag*, ECR 1993, I-1963, para. 35.

96 CJEU, case C-167/08, *Draka NK Cables*, ECR 2009, I-3477, paras. 24, 27, 30 and 31.

97 Polish Court of Cassation (*Sąd Najwyższy*), I CSK 434/06 of 21/3/2007, http://curia.europa.eu/common/recdoc/convention/en/2007/38-2007.htm (6/9/2013), pp. 12-14.

98 Spanish Supreme Court (*Tribunal Supremo*), RJ 1998/10538 of 1/12/1998, http://curia.europa.eu/common/recdoc/convention/en/1999/43-1999.htm (6/9/2013).

F. Attempt of systematisation of remedies

The first finding in European civil procedure as far as enforcement is concerned is a lack of systematic development and of common systematics.[99] However, this does not mean that it is not possible to recognize and analyse basic "methods of cooperation" in the European judicial area in civil matters.[100] The common denominator of all regulations is the "firm distinction" between judicial decisions given in Members State of enforcement and judicial decisions rendered in the Member State of origin on the one hand and on the other with judicial decisions adopted in third States, i.e. Non-member States.[101] This finding might also be linked to the principle of general international law according to which only the addressed State having jurisdiction to enforce can set up and determine the remedies and recourses in enforcement proceedings.[102] As far as the *exequatur* is concerned, the texts are quite easy to understand. The *lex specialis* reads as: "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required" (Art. 36(1) of the Regulation No 1215/2012).[103] However, the abolition of the *exequatur* does not mean unification or even harmonisation of civil procedure, a fact that can be seen by several references to the *lex fori* of the Member State either of origin or of enforcement.[104]

Regulations on direct enforcement did not go as far as to introduce the "universal clause"[105] like in Art. 2 of the Regulation Rome I[106] and in Art. 3 of the Regulation Rome II,[107] even though Regulations like No 4/2009 and No 650/2012 also contain

99 *Rechberger/Simotta*, (fn. 34), para. 1226.

100 *Franzina*, (fn. 15), pp. 11-19.

101 *Biagioni*, (fn. 39), p. 974.

102 *Schack*, (fn. 28), para. 1093.

103 Similar text in Art. 16(1) of the Regulation No 1346/2000, in Art. 21(1) of the Regulation No 2201/2003 and in Art. 39(1) of the Regulation No 650/2012. Art. 5 of the Regulation No 805/2004 goes even further: "a judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition"; similar provisions can be found in Art. 19 of the Regulation No 1896/2006 and Art. 17 of the Regulation No 4/2009.

104 *Correa Delcasso*, La proposition de règlement instituant une procédure européenne d'injonction de payer, Revue internationale de droit comparé 57 (2005), p. 149.

105 That clause can also be found in Art. 4 of the Council Regulation (EU) No 1259/2010 of 20/12/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343 of 29/12/2010, p. 10.

106 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17/6/2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4/7/2008, p. 6.

107 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11/7/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199 of 31/7/2007, p. 40.

substantive parts. It would seem that the application of foreign substantive law is indeed not such an important issue as the automatic recognition of direct enforceability of foreign *acta jure imperii*.[108] One reason for the reticence of the automatic recognition of judicial decisions might be the respect of human rights. Some jurisdictions might not have a level of respect of fundamental rights which is comparable to Europe. Some might have different considerations in civil justice than in majority of EU Member States (e.g. punitive damages, incompatibility of US pre-trial discovery with the European data protection *de lege lata*[109]). The result might also be linked to the principle of general international law according to which only the addressed State having jurisdiction to enforce can set up and determine the remedies and recourses in enforcement proceedings.[110] As far as enforcement is concerned the Regulation No 4/2009 is a phenomenon *sui generis*. It is also linked to the Hague 2007 Protocol[111] (Art. 16). A similar statement might be adopted as far as the Regulation No 1346/2000 is concerned. Due to the specific nature of collective insolvency proceedings, there is only an automatic *exequatur* with no subsequent individual enforcement, as collective insolvency proceedings already imply a form of enforcement.

I. Remedies and recourses under the Brussels I Regulation

According to Art. 43(1) of the Regulation No. 44/2001 each party to the proceedings adversely affected by a declaration of enforceability can appeal against it.[112] If the appeals proceedings under Art. 43 of that regulation do not satisfy the adversely affected party, there is a possibility of a second appeal under Art. 44 referred to in

108 *Schack*, (fn. 28), para. 134, explains such a reticence by the opposition to the recognition of US judgments which comprise punitive damages and US exorbitant jurisdiction that would allow the US to export such judgments often motivated by considerations of economic policy.

109 For problems with the US institute of pre-trial discovery in a civil law jurisdictions see *Kleyr*, La production forcée de pièces par voie de référé dans un contexte international: la pre-trial discovery à la luxembourgeoise, Journal des Tribunaux Luxembourg Nr. 1/2011, p. 16 et seq.; *De Lummen*, Les entreprises françaises à l'épreuve du contentieux américain, quel arsenal juridique et judiciaire, Revue de droit des affaires internationales/International Business Law Review 2013, pp. 41, 42 and 44.

110 *Schack*, (fn. 28), para. 1093.

111 Protocol of 23/11/2007 on the Law Applicable to Maintenance Obligations; see also Council Decision 2009/941/EC of 30/11/2009 on the conclusion by the European Community of the Hague Protocol of 23/11/2007 on the Law Applicable to Maintenance Obligations, OJ L 331 of 16/12/2009, p. 17; *Bureau/Muir-Watt*, (fn. 68), para. 789.

112 The Pocar Report on the parallel Lugano convention states in para. 153 that "in practice, however, only the party against whom the enforcement is sought will have an interest in challenging a declaration of enforceability, and only the applicant will have an interest in challenging a rejection of the application" (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30/10/2007, *Pocar*, Explanatory report, OJ 2009 C 319, 23.12.2009, p. 1).

Annex IV. Usually this kind of appeal is the final appeal in cassation (*Rechtsbeschwerde*). Both recourses are adversarial and details are regulated by national procedural law.[113]

However, in order to understand the remedies available under the Regulation No 44/2001, their contents have to be examined. In other words, an examination of defences and objections that can be raised in appeals is needed. Such defences and objections should be submitted as pleas in law in the recourses against the *exequatur*.

1. Objections in remedies and recourses against the exequatur under Regulation No 44/2001

The first situation refers to substantive defences and objections that had existed before the judicial decision on the merits was delivered in the State of origin. German legal writers have correctly anticipated the *Prism Investments* judgment of the CJEU. The judgment-debtor is precluded from raising defences and objections (*exceptiones*) that had existed before the judicial decision on the merits was delivered in the State of origin.[114] Such defences and objections (*exceptiones*) can only be raised in appeals against the foreign decision.

It is submitted that such a decision does not represent a fundamentally new development. National case law either on the Brussels and Lugano Convention or on the Regulation No 44/2001 already developed a similar reasoning. One can find German case law that dates back to 1993 precluding the defence of (partial) performance by coerced enforcement in the State of origin in the *exequatur* stage.[115]

According to the Supreme Court of Norway, at the stage of the *exequatur* under the Lugano Convention the party against whom the enforcement is sought may make any submissions relating to the grounds for enforcement or enforceability. However, "submissions other than that relating to the grounds for enforcement or enforceability must be dealt with at the later stage in the proceedings".[116] Recourses at the stage of the *exequatur* in European civil procedure are therefore strictly limited to the

113 *Müller*, (fn. 46), p. 338; *Boularbah*, Requête unilatérale et inversion du contentieux, 2010, p. 585.

114 CJEU, case C-139/10, *Prism Investments*, not yet reported in the ECR, para. 43. *Hess*, Die Unzulässigkeit materiellrechtlicher Einwendungen in Beschwerdeverfahren nach Art. 43 ff. EuGVO, IPRax 28 (2008), pp. 25-30.

115 German Federal Court of Justice (*Bundesgerichtshof*), IX ZB 78/92 of 27/5/1993, http://curia.europa.eu/common/recdoc/convention/en/1994/13-1994.htm (6/9/2013), p. 8 et seq. It should be noted that the defence was not allowed due to the fact that only a provisionally enforceable decision was executed. Under German law at the time such a compulsory performance could not be construed as a performance of a definitive judgment having acquired a res judicata effect. The compulsory and coercive enforcement of a decision that can only be enforced provisionally is not definitive.

116 Appeals Committee of the Supreme Court of Norway (*Høyesteretts kjæremålsutvalg*), *Petter Samuelsen v. Nilsen Brokers* of 7/3/1996, http://curia.europa.eu/common/recdoc/convention/en/1997/26- 1997.htm (6/9/2013).

grounds of non-recognition. "The scope of jurisdiction of the court which issues a declaration of enforceability is limited to the examination of the conditions necessary for the enforcement in the Member State in which enforcement is sought."[117] The assessment of an allegation of fraud during the trial in the Member State of origin can therefore not be examined during the *exequatur*, as such an allegation forms part of the substance of the dispute.[118] It would appear that national case law under Regulation No 44/2001 starts considering that any plea in the phase of the *exequatur* must be raised by parties and examined at the very latest in the appellate proceedings, appellate courts however do not have power to examine a ground for refusal of its own motion.[119] Indeed, a "Court seized to hear the case challenging the enforcement order, ought not to take on the role of a party and investigate cases of refusal to enforce."[120] Any other plea must be either raised during the trial stage or – if admitted under national law – in the phase of enforcement.

2. Objections created ex post in remedies and recourses against the exequatur

The starting point shall the certificate i.e. a certified foreign enforceable judicial decision. The specific nature of EU civil procedure gives precedence to certified foreign judgments.[121] The certified judgment seems to have a substantive *res judicata* effect in the sense that it produces a cross border *ne bis in idem* effect.

New facts and new circumstances do create a *nova causa superveniens*. However, "such a change must be pleaded before the court which has jurisdiction in the Member

117 Polish Constitutional Court, (fn. 22), para. 3.2.

118 Court of Appeal of Versailles (*Cour d'appel de Versailles*), *Société Discophar Herbier de Provence c. Société Darley* of 29/6/2000, http://curia.europa.eu/common/recdoc/convention/en/2001/32-2001.htm (6/9/2013).

119 Czech Constitutional Court (*Ústavní soud*), I. ÚS 709/05 of 25/4/2006, http://curia.europa.eu/common/recdoc/convention/en/2007/17-2007.htm (6/9/2013); French Court of Cassation (*Cour de Cassation*), Cass. civ. 1ère, *Tonon c. Teufel* of 12/1/1994, http://curia.europa.eu/common/recdoc/convention/en/1994/21-1994.htm (6/9/2013); Italian Court of Cassation (*La Corte Suprema di Cassazione*), 06704/94 of 4/2/2002, http://curia.europa.eu/common/recdoc/convention/en/1996/11-1996.htm (6/9/2013).

120 French Court of Cassation (*Cour de Cassation*), Cass. civ. 1ère, *Delloye c. Lamberts* of 20/2/1996, http://curia. europa.eu/common/recdoc/convention/en/1997/20-1997.htm (6/9/2013).

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

State of origin, which should also hear any application to suspend enforcement of its judgment."[122]

Lodging of substantive defences and objections (*exceptiones*) created after the enforceability of a foreign judicial decision in the Member State of origin is not always compatible with direct enforcement of foreign titles, as it might destroy the *res judicata* effect of foreign titles. Legal situation in EU Member States as far as the legal position of substantive defences created after the enforceability of a foreign judicial decision is extremely unharmonised. Germany is one of the few countries which has adopted a special law on recognition and enforcement in the field of European civil procedure coexisting with national law on civil procedure.[123] § 12(1) of the German AVAG actually contains an authorisation for the debtor to assert and claim all defences (*exceptiones*) against a foreign decision i.e. comprising also the defences against the substantive claim even if such defences emerged only after the decision was given in the State of origin. However, national case law in Germany appears not to admit such defences without any restriction.[124] Only defences stating that the enforcement is not allowed, as the creditor's claim is extinguished or inhibited, are admitted, even though a valid foreign enforcement title exists.[125] Therefore the defence *ob supernascentiam liberorum*[126] when foreign enforceable titles on maintenance obligations are impugned is not admitted.[127]

The defence of specific performance in kind of the obligation *dare*, *facere or praestare* contained in the foreign enforcement title after the delivery of the title is an allowed defence. However, courts of the Member State in which enforcement is sought must examine such a defence *in merito* not in the *exequatur* but in the enforcement proceedings.[128] The *Prism Investment* case has precluded a defence of performance by set-off (*exceptio compensationis*) that could have been declared during the trial phase.[129] In a narrower sense the defence of set-off against a European enforcement order is certainly not allowed in enforcement proceedings if the debtor could

122 Ibid., para. 83: "A certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child."

123 Gesetz zur Ausführung zwischenstaatlicher Verträge und zur Durchführung von Verordnungen und Abkommen der Europäischen Gemeinschaft auf dem Gebiet der Anerkennung und Vollstreckung in Zivil- und Handelssachen (hereinafter: "the AVAG").

124 German Federal Court of Justice (*Bundesgerichtshof*), IX ZB 267/11 of 12/7/2012, as far as assigned claims originating in an enforceable Czech judgment in Germany after Czech accession to the EU are concerned.

125 German Federal Court of Justice (*Bundesgerichtshof*), XII ZB 174/04 of 14/3/2007, para. 20.

126 Later born children as cause of action for reduction or review of existing maintenance obligations.

127 German Federal Court of Justice, (fn. 125), para. 19.

128 See as far as the *exequatur* is concerned, ibid., para. 22.

129 CJEU, case C-139/10, *Prism Investments*, not yet reported in the ECR, para 43.

have declared the set-off before the issuing of the European enforcement order.[130] The debtor is therefore precluded from lodging such a defence in the last stage of civil procedure – namely in the enforcement stage.[131] According to German case law the defence of lack of *legitimatio activa* emerged due to the assignment (*cessio voluntaria*) of the debt contained in the foreign enforcement title is also not allowed in European civil procedure in the exequatur and in the enforcement stage.[132] As far as the defence of the assignment is concerned, the question of the defences opened to the *cessus* is still unanswered in the light of the *Draka NK Cables* ruling of the CJEU.[133] Even in application of regulations on European civil procedure questions concerning the *cessus* were until now discussed under terms such as the identity of the judgment debtor or the judgment creditor or such as the subjective *res judicata* effects (*res judicata jus facit inter partes*).[134]

If substantive defences and objections (*exceptiones*) created after the enforceability of a foreign judicial decision are either uncontested or declared by a definitive ruling, such defences and objections (*exceptiones*) can be raised in the exequatur.[135] For example, national courts must according to German case law examine of their own motion without any limits in the *exequatur* proceedings if the foreign decision has been set aside in the EU Member State of origin. A judicial decision set aside in the Member State of origin cannot be recognised and enforced because foreign decisions cannot have a stronger effect in the Member State in which enforcement is sought than in their Member State of origin.[136] Curiously enough the German *Bundesgerichtshof* explained this principle by reference to Austrian legislation (§ 84b *Exekutionsordnung*). This however means that limitations of enforceability attached to the enforcement title under the law of the Member State of origin must be observed in the Member State in which enforcement is sought.[137]

The acknowledgement in the phase of the exequatur of pleas and defences of substantive law that could not be examined in the Members State of origin due to its late emergence does not infringe the interdiction of the *révision au fond* and is not regulated by the Regulation No 44/2001.[138]

130 Supreme Court of Austria (*Oberster Gerichtshof*), 3Ob231/10g of 14/12/2010.

131 See *Oberhammer*, Oppositionsklage und Europäisches Zivilprozessrecht, in: König/Mayr (eds.), Europäisches Zivilverfahrensrecht in Österreich III, 10 Jahre Brüssel I-Verordnung, 2012, pp. 88, 91 et seq.

132 German Federal Court of Justice, (fn. 125).

133 CJEU, case C-167/08, *Draka NK Cables*, ECR 2009, I-3477.

134 Supreme Court of Austria (*Oberster Gerichtshof*), 3Ob129/98m of 24/6/1998, JBl. 120 (1998), vol. 11, p. 730.

135 German Federal Court of Justice, (fn. 124), para. 9.

136 German Federal Court of Justice, (fn. 125), para. 15.

137 *Angst/Jakusch/Pimmer*, Exekutionsordnung, 15th ed. 2009, p. 252.

138 German Federal Court of Justice, (fn. 125), para. 26.

3. Defences, objections and favour of recognition

It can be stated that substantive defences and objections (*exceptiones*) as far as the trial claim is concerned cannot be raised by the debtor in the enforcement proceedings. As far as the exequatur is concerned, it has been correctly stated that the opposing approach would not be compatible with the interdiction of the *révision au fond* (Art. 45(2) of the Regulation No 44/2001).[139]

Even though not mentioned in Art. 45, 34 and 35 of the Regulation No 44/2001 the debtor can raise defences and objections (*exceptiones*) concerning the enforcement proceedings regarding the declaration of enforceability (Art. 38). An allowed objection would be that the impugned decision is not enforceable under the procedural law of the EU Member State of origin.[140] Such an examination by the court of the State in which enforcement is sought comes very close to the interdiction of the *révision au fond*.

However, it has to be said, that there is a presumption in favour of recognition, as Art. 45, 34 and 35 of the Regulation No 44/2001 do not deal with conditions for recognition, but with grounds for refusal of recognition.[141] Such a presumption in favour of recognition cannot preclude a defence according to which the debtor against whom enforcement is sought is not the judgment debtor (the exception of the verification of the identity of the debtor).[142]

II. Remedies under the new Regulation No 1215/2012

1. The remedies in "reversed" exequatur proceedings

The new Regulation No 1215/2012 is said to have abolished the *exequatur* requirement. Special proceedings of *exequatur* under Art. 38 et seq. of the Regulation No 44/2001 have been repealed.

However, the abolition of the *exequatur* is not a new issue in the EU. Regulations No 805/2004, No 1896/2006 and No 861/2007 have set up a "system of direct enforcement with special initial trial procedures".[143] "All three regulations are characterised by the abolition of the *exequatur* and the transfer of review of challenged decisions in the Member State of origin."[144] As far as the three regulations are concerned, it can be said that "the review of grounds for refusal of recognition is

139 *Müller*, (fn. 46), p. 340.

140 *Kropholler/von Heim*, (fn. 1), p. 644.

141 The Pocar Report on the parallel Lugano convention, (fn. 112), para. 155.

142 Supreme Court of Austria (*Oberster Gerichtshof*), 3Ob129/98m of 24/6/1998, JBl. 120 (1998), vol. 11, p. 730.

143 *Rauscher*, (fn. 32), p. 578.

144 *Kropholler/von Heim*, (fn. 1), p. 796.

performed in the Member State of origin".[145] The three regulations did also "introduce the autonomous European enforcement titles that are independent from national procedural law".[146] The big difference between the Regulation No 1215/2012 and the three Regulations (No 805/2004, No 1896/2006 and No 861/2007) is the absence of genuine EU remedies like requests for rectification and withdrawal. Such simplified structure of remedies might be explained by the relatively lower importance of matters covered by the Regulations No 805/2004, No 1896/2006 and No 861/2007.

The so called general abolition of the *exequatur* in the Regulation No 1215/2012 implied *eo ipso* that the system of remedies and recourses had to be modified in order to guarantee effective judicial remedies to the judgment-debtor.[147] It can also be observed that contrary to the proposal for the Regulation No 1215/2012 the intended split of recourses and remedies in those in the Member State of origin and those in the Member State in which enforcement is sought is reduced to Art. 38, point a, and Art. 50 of the Regulation No 1215/2012.[148]

Enforcement and the corresponding refusal of recognition and enforcement are dealt with in Sections II and III of Chapter III of the Regulation No 1215/2012. The enforcement procedure *stricto sensu* is governed by the *lex fori* (Art. 41(1) and Art. 47(2) of the Regulation No 1215/2012). This also implies the application of national *lex fori*.

Legal writers put the emphasis on the difference between the new and the old text. This difference is demonstrated by the fact that the creditor can request the immediate application of the *lex fori* on the enforcement without prior leave to enforce in the Member State in which enforcement is sought.[149]

The abolition of the *exequatur* also means that there is no intermediate procedure for adapting the foreign title to national *lex fori* of the Member State in which enforcement is being sought. If there is no intermediate procedure, no remedies can be lodged. This statement, however, is to be put into the context of Art. 45 and 46 of the Regulation No 1215/2012. Article 45 states the grounds for the refusal of recognition. The novelty of this article is the reversal of procedural initiative. Either the competent courts refuse the recognition only on application of the party having an interest in refusal of recognition (Art. 45), or they give a declaration that there are

145 *Rechberger/Simotta*, (fn. 34), para. 1223.

146 Ibid., para. 1226.

147 *Müller*, (fn. 46), p. 346.

148 Art. 45 of 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, COM (2010) 748 final.

149 *Nuyts*, Bruxelles Ibis: présentation des nouvelles règles sur la compétence et l'exécution des décisions en matière civile et commerciale, in: Nuyts, Actualités en droit international privé, 2013, p. 81.

no grounds for refusal (Art. 36(2)). This implies that grounds for refusal of recognition are not examined by the courts of the Member State in which enforcement is sought of their own motion. The only consequence of the abolition of the *exequatur* in the new Regulation No 1215/2012 is the abolition of an *ex officio* examination of grounds for refusal of recognition (before the commencement of the actual enforcement proceedings). Such an examination, however, can still be performed if a party having an interest in refusal of recognition raises correspondent application and pleas.

2. Remedies against adaptation of foreign enforceable titles

If a foreign judicial decision contains an operative part that might not be executed under the law of the addressed Member State, then Art. 54 of the Regulation No 1215/2012 is to be applied. The mechanism found is the implementation *ratione materiae* in the field of procedural law of the doctrine on the "*Anpassung*" or "*la transposition*", i.e. a modified application of foreign law in application of private international law by the *forum*.[150]

Under Art. 54(2) of the Regulation No 1215/2012 any party may challenge the adaptation of the measure or order before a court. In order to understand this provision recourse *mutatis mutandis* is to be undertaken to the Pocar Report on the parallel Lugano convention. In § 153 of that report it is stated that "in practice, however, only the party against whom the enforcement is sought will have an interest in challenging a declaration of enforceability, and only the applicant will have an interest in challenging a rejection of the application."[151] This means that the judgment creditor will have an interest to challenge the adaptation if the national court performed an adaptation that does not acknowledge the foreign title.

Taking the *Szyrocka* case[152] into consideration (and omitting the specifics of that case like the application of Regulation No 1896/2006) at least a problem of fixing the interest rate in the field of monetary obligations will arise. The capital is usually fixed either expressly in the operative part of a judicial decision or at least in the statement of reasons, default or even other interests are a very different story that will cause problems to national enforcement judges. *Exequatur* also served to translate operative parts of foreign judgments into the *lex fori*, i.e. forms acceptable to enforcement agencies and judges.[153] If even simple monetary obligations can cause

150 *Kropholler*, Internationales Privatrecht, 6th ed. 2006, p. 234; *Bureau/Muir-Watt*, (fn. 68), para. 474.

151 The Pocar Report on the parallel Lugano convention, (fn. 112).

152 CJEU, case C-215/11, *Szyrocka*, not yet reported in the ECR.

153 *Schack*, (fn. 28), para. 1031 et seq. as far as the enforceability of foreign compelling titles containing a pecuniary condemnation with an interest rate is concerned. See also *Kleiner*, Les intérêts de somme d'argent en droit international privé (ou imbroglio entre la procédure et le fond), Rev. crit. DIP 98 (2009), pp. 639-683.

such issues, then cross border enforcement of compelling judicial decisions ordering a specific performance of obligations of *dare*, *facere* and *praestare* will undoubtedly cause a rather impressive development of case law before the CJEU under Art. 267 TFEU due to recourses against decisions on adaptation of foreign titles.[154] It might be expected that due to case law of that court the *lacunae* in Regulation No 1215/2012 will be filled and that the end result will be an even more unified European civil procedure than expected.

3. Predominance of the lex fori in the Regulation No 1215/2012

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

G. Functional equivalence between the exequatur and recourses in the enforcement stage

Perhaps one should start by considering the Swiss experience. Indeed, legal writers from Switzerland consider that due to national enforcement law "the exequatur […] is not required as a protection against foreign titles because the judgment debtor can raise all his objections against enforcement in recourses provided for under national enforcement law."[155] This doctrinal position has been accepted by international case law. "In exequatur proceedings the domestic courts are not called upon to decide anew on the merits of the foreign court's decision. All they have to do is to examine whether the conditions for granting execution have been met." [156] In certain Member States the enforcement agencies verify *ex officio* whether the conditions for granting execution have been met. This appears to be quite an important legal requirement. If national enforcement judges verify the condition of enforcement *ex officio*, then there is no need for the *exequatur*.

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

155 *Oberhammer*, The Abolition of the exequatur, IPRax 30 (2010), p. 198.

156 ECHR, no. 69917/01, *Saccoccia v. Austria*, para. 63.

Both the *exequatur* procedure and the enforcement procedure are governed by the *lex fori*. If the foreign decision to be enforced contains a condemnatory part, i.e. a condemnation to an obligation of *dare*, *facere*, *praestare*, then both procedures have the same aim, namely the satisfaction of the judgment-creditor. If there is a prohibition of the *révision au fond*[157] and only a limited scope of the *exequatur* like in Regulations No 44/2001 and No 2201/2003, then there is no reason why the *exequatur* should be maintained if the grounds for refusal of recognition can be raised during enforcement proceedings. It should also be recognised that the only effective protection of the judgment creditor was usually the *exequatur* performed incidenter during national enforcement proceedings.

When analysing the exequatur under the EU regulations on civil procedure the obvious conclusion is that functions of the exequatur since the Brussels Regulation No 44/2001 are:[158]

1. protection of the procedural public policy and too much lesser a degree of substantive public policy (*ordre public*) in the Member State of enforcement;[159]
2. protection of the rights of defence (i.e. right to be heard) in cases of default judgment entered without fault by the defendant;
3. if the judgment is irreconcilable with a judgment given between the same parties in the Member State of the enforcement;
4. protection of the substantive *res judicata* effect (*ne bis in idem*);
5. protection of certain provisions on exclusive jurisdiction.

One can easily declare that the *exequatur* had a scope of application that is similar to the scope of application of remedies and recourses in enforcement proceedings. Pleas concerning the enforceability of foreign titles are allowed in enforcement proceedings. Such a protection can be effectively granted also in enforcement proceedings, namely when deciding on recourses against enforcement orders. The prohibition of the *révision au fond* reduces the scope of control of the *exequatur* to merely a formal review that cannot annul the enforceability of a foreign enforcement title, in other words the substantive legality of an enforcement title cannot be verified. From this point of view it must also be stated that remedies (like an opposition) in enforcement proceedings usually allow only a review of formal

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

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

159 See e.g. *Hess/Pfeiffer/Bever*, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, European Parliament, document PE 453.189, pp. 152-154.

legality and not of the substantive legality of the enforcement title.[160] The enforcement judge is not entitled to review the concrete substantive legality and is bound by the enforcement title, any other solution would mean that the principle *ne bis in idem* is not complied with.[161]

Certain recourses in enforcement proceedings are referred to in English by terms such as application to oppose enforcement. They are referred to in Germany as *Vollstreckungsgegenklage* under § 767 of the German ZPO[162] and in Austria as *Oppositionsklage* under § 35 EO.[163] Even though they are not unified in Europe, all these applications allow the debtor to prevent or to achieve annulment of the enforceability of an enforcement title due to objections (*exceptiones*) of substantive law.

However, one has also to consider the EU wide dimension also comprising the autonomous and uniform interpretation of such applications to oppose enforcement in cases of *tituli executionis* originating from other EU Member States.[164] The consequence of that EU dimension as seen by some legal writers is the interdiction of application of defences (*exceptiones*) of substantive law in applications to oppose enforcements.[165]

All previously mentioned applications allow for a certain review of a foreign enforcement title in enforcement proceedings. In other words, as far as foreign enforceable titles are concerned, such recourses might have the same role as the *exequatur* and are to be qualified as "proceedings concerned with the enforcement of judgments". There seems to be a *forum exclusive* for such actions in the courts of the Member State in which the judgment has been or is to be enforced.[166]

The Europeanised question of *vis attractiva executionis* certainly creates numerous unsolved legal problems.[167] Does this also mean that foreign titles might be reviewed in the framework of such recourses with the aim of depriving the judgment given in the Member State of origin of the nature of *titulus executionis*?[168] This interpretation of Regulations No 44/2001 and No 1215/2012 is not confirmed by legal writers.[169]

160 *Monteleone*, (fn. 28), p. 265.

161 *Rijavec*, (fn. 78), p. 63.

162 *Brox/Walker*, Zwangsvollstreckungsrecht, 7th ed. 2003, para. 1312 et seq.

163 *Angst/Jakusch/Pimmer*, (fn. 137), p. 97 et seq.

164 See e.g. Supreme Court of Austria (Oberster Gerichtshof), 3Ob231/10g of 14/12/2010 and order of 24/3/2010 in case 3Ob12/10a, www.ris.bka.gv.at/Jus/ (6/9/2013).

165 See *Oberhammer*, (fn. 131), p. 88.

166 Art. 22, point 5 of the Regulation No 44/2001 and Art. 24, point 5 of the Regulation No 1215/2012; CJEU, case 220/84, *AS-Autoteile Service*, ECR 1985, 2267, para. 12.

167 See *Oberhammer*, (fn. 131), p. 85 et seq.

168 See *Rijavec*, (fn. 78), p. 214.

169 *König*, (fn. 31), p. 933.

The first argument which counters the power of an unlimited review would already be the interdiction of the *révision au fond*, that is also applied to the enforcement proceedings. The second argument is that the acknowledgement of a *clausula rebus sic stantibus*, which is implied in some applications to oppose enforcement against existing foreign titles, would jeopardise the exclusive jurisdiction under Regulations No 44/2001 and No 1215/2012.[170] Due to national procedural autonomy it cannot be disputed that the defences which may be raised and the conditions under which they may be raised are governed by national law.[171] However, such a ruling applies only to the situation where a defendant raises such a claim, as a pure defence and not to claims by defendants which seek the pronouncement of a separate judgment or decree.[172] Such a defence must be intrinsically connected with "proceedings concerned with the enforcement of judgments" i.e. proceedings which may arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments".[173] Therefore a judgment debtor opposing the enforcement of a foreign title is solely not allowed to lodge all oppositions in the Member State of enforcement, he is redirected to the Member State of origin.[174] The reason is simply that a question of procedural law like jurisdiction does not comprise questions of substantive law linked with the extinguishing of the claim.[175] One might therefore speak of the principle *qui elegit judicem, non elegit jus*. Therefore it can be stated that the enforcement judge can perform the same review as the judge granting an *exequatur*, if he is not reviewing the substance of the foreign enforcement title. If recourses and remedies against enforcement measures can have the same effect as the refusal of the *exequatur*, then the intermediary proceedings may be merged with enforcement proceedings.

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170 Supreme Court of Austria (*Oberster Gerichtshof*), 3Ob12/10a of 24/3/2010, p. 14 et seq. with reference to application (in Austria) for reduction of a maintenance obligation fixed by an enforcement title originating from another Member State (Poland) due to worsened economic conditions of the father who is domiciled in Austria. The aim of such applications according to the Austrian Supreme court is the revocation of the previous foreign enforcement title and replacement by a new national one. It has been correctly stated that such applications for reduction of a maintenance obligation are not always linked to proceedings concerned with the enforcement of judgments, see *Oberhammer*, (fn. 131), p. 94.

171 CJEU, case C-341/93, *Danværn Production*, ECR 1995, I-2053, para. 18.

172 Ibid.

173 CJEU, case C-261/90, *Reichert II*, ECR 1992, I-2149, para. 27.

174 See *Oberhammer*, (fn. 131), p. 90.

175 See CJEU, case 220/84, *AS-Autoteile Service*, ECR 1985, 2267, paras. 12-17.

H. Conclusion

The abolition of *exequatur* and direct enforcement of foreign judicial decisions are *per se* not incompatible with the ECHR. The first condition for such a compatibility is an effective remedy which offer in principle an examination before the court in both the State of origin of the judicial decision and in the State in which enforcement is sought (debtor's point of view). The second condition is that the enforcement proceedings are effective (creditor's point of view). This conclusion is also confirmed by the fact that all EU Members States are also contracting parties to the ECHR and have to respect requirements of the ECHR. At procedural level such a finding implies that the trial phase in the Member State of origin and the enforcement phase in the State in which enforcement is sought both comply with requirements of the ECHR.[176]

The European legislature has started building a framework for European civil procedure virtually in every field of private law. The current trend in the legislation is the abolition of the *exequatur* and direct enforceability of foreign titles. However, even the EU law cannot break the classic division between trial in the Member State of origin and enforcement in the Member State of enforcement. Therefore, enforcement is always ruled by the *lex fori* of the Member State of enforcement. Also the debtor has to be protected. Therefore, objections that are usually raised during the *exequatur* are nowadays moved towards the enforcement stage. Issues linked with the discrepancies between foreign and domestic titles are solved either by adaptation of foreign titles to *lex fori* of the enforcement Member State or by certificates.

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

176 *Kropholler/von Heim*, (fn. 1), p. 797 et seq.