

ENFORCEMENT AND THE ABOLITION OF EXEQUATUR UNDER THE 2012 BRUSSELS I REGULATION

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I. Introduction

The true value of a commercial claim lies in whether it can be enforced. A court judgment has less value for the judgment-creditor if it can be enforced only with difficulty and delays, and it has no value if it cannot be enforced at all. Against this background, the facilitation of cross-border enforcement of commercial claims and judgments significantly impacts companies conducting their business globally.

Within the EU, certain improvements for judgment-creditors will come with the revised Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“2012 Brussels I Regulation”).¹ For judgments handed down in legal proceedings instituted on or after 10 January 2015,² the new regulation abolishes the requirement of *exequatur*. This is an intermediate court procedure that aims to declare a foreign judgment enforceable before the actual enforcement and in 93% of cases is a formality.³ The abolition of *exequatur* had been on the EU’s agenda since the European Council of Tampere in 1999⁴ and has been implemented in a number of EU regulations issued since 2004.⁵ As a result, *exequatur* proceedings are no longer required today for claims up to EUR 2,000, uncontested claims and claims for family maintenance. However, *exequatur* is still required under the current Council Regulation (EC) No 44/2001 on jurisdiction

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

² Article 66 of the 2012 Brussels I Regulation.

³ European Commission, Impact Assessment – Accompanying document to 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, Commission Staff Working Paper, 14 December 2010, SEC(2010) 1547 final (“2010 Commission Impact Assessment”), p. 12.

⁴ See Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, available at <http://www.europarl.europa.eu/summits/tam_en.htm>, note 34; Council Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, *OJ C* 12, 15 January 2001, p. 5, Proposals A. 2. a) i) and A. 2. b); The Stockholm Programme – An open and secure Europe serving and protecting citizens, *OJ C* 115, 4 May 2010, p. 1, Section 3.1.2.

⁵ See Art. 5 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (“2004 European Enforcement Order Regulation”); Art. 19 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (“2006 Payment Order Regulation”); Art. 20(1) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (“2007 Small Claims Regulation”); Art. 17(2) Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (“2009 Maintenance Regulation”) for decisions given in a Member State bound by the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (“2007 Hague Protocol”).

and the recognition and enforcement of judgments in civil and commercial matters (“2001 Brussels I Regulation”).

The abolition of the exequatur procedure was the European Commission’s main objective in revising the 2001 Brussels I Regulation.⁶ After a consultation process based on a 2009 Green Paper,⁷ the Commission presented on 14 December 2010 its proposal for revision (“2010 Brussels I Proposal”).⁸ The Commission proposed partially⁹ abolishing exequatur, while maintaining safeguards in the form of extraordinary remedies that allowed for a limited review of the foreign judgment.¹⁰ Regarding these safeguards, the Commission proposed limiting the grounds for review by abolishing the review of substantive public policy and of certain provisions on jurisdiction.¹¹ Another important novelty of the 2010 Brussels I Proposal was that it introduced a special review of default judgments in the state of origin,¹² which was to replace the review in the enforcement state. The 2010 Brussels I Proposal also contained other important practical changes.

After two years of negotiating a compromise, the European Parliament and the Council amended the proposal of the Commission and adopted the 2012 Brussels I Regulation. This regulation goes further than the proposal of the Commission because it abolishes exequatur entirely: “A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.”¹³ However, it falls far short of the proposal of the Commission and stays closer to the 2001 Brussels I Regulation regarding the review of the foreign judgment and other changes proposed by the Commission.

This paper outlines the basic mechanism of enforcing a foreign judgment under the 2001 and the 2012 Brussels Regulation (Section II. below) and the reasons for exequatur and its abolition, together with some empirical data (Section III. below). It then addresses in more detail the practicalities of enforcing a judgment under the 2001 and the 2012 Brussels Regulation and how much will actually

⁶ Report from the European 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, 21 April 2009, COM(2009) 174 final (“2009 Brussels I Commission Report”), p. 4.

⁷ 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, 21 April 2009, COM(2009) 175 final.

⁸ 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, 14 December 2010, COM(2010) 748 final (“2010 Brussels I Proposal”).

⁹ “Partially” because the Commission suggested maintaining exequatur in collective redress and defamation cases, Article 37(3) 2010 Brussels I Proposal (note 8).

¹⁰ Articles 38(2), 43, 45, 46 of the 2010 Brussels I Proposal (note 8).

¹¹ See Articles 43, 45, 46 of the 2010 Brussels I Proposal (note 8).

¹² Article 45 of the 2010 Brussels I Proposal (note 8).

¹³ Article 39 of the 2012 Brussels I Regulation.

change for the judgment-creditors and judgment-debtors under the revised Regulation (Section IV. below).

This paper does not deal with the free movement of authentic instruments or court settlements.¹⁴ It also does not address in detail the recognition and enforcement of foreign provisional measures.¹⁵ Regarding the latter, it is important to note that the European Parliament and Council did not follow the Commission's proposal to allow the enforcement of provisional measures that were ordered *ex parte* and not served on the debtor prior to enforcement.¹⁶

II. Mechanisms of Enforcing a Foreign Judgment under the 2001 and the 2012 Brussels I Regulation

The 2001 and 2012 Brussels I Regulations distinguish between recognition and enforcement of a foreign judgment. The mechanisms of recognizing a judgment have remained unchanged under the 2012 Brussels I Regulation: For judgments that the creditor does not seek to enforce, no application for recognition is necessary, even though such an application is possible.¹⁷ Foreign court judgments that dismiss a claim or grant declaratory relief, for example, are therefore recognized automatically.

For judgments that the creditor seeks to enforce, the 2001 Brussels I Regulation requires a declaration of enforceability (*exequatur*) before enforcement measures can proceed.¹⁸ The court or authority grants *exequatur ex parte*, *i.e.*, without prior notice to the debtor, and without reviewing the grounds for refusing recognition and enforcement.¹⁹ The judgment-debtor can then appeal against the *exequatur* and have the grounds for refusing recognition and enforcement examined.²⁰ The judgment-creditor can proceed to enforcement measures only if and when the judgment-debtor does not appeal or the appeal is dismissed.²¹ In the meantime, the judgment-creditor is limited to protective measures.²²

¹⁴ Articles 57-58 of the 2001 Brussels I Regulation and Articles 58-60 of the 2012 Brussels I Regulation.

¹⁵ See ECJ, 21 May 1980, *Denilauler v. SNC Couchet Frères*, case 125/79 for the 2001 Brussels I Regulation, Articles 2(a), 42(2), 43(3) and Recitals 25 and 33 of the 2012 Brussels I Regulation, and Articles 2(a), 42(2), 44(3) of the 2010 Brussels I Proposal (note 8).

¹⁶ See Articles 2(a), 42(2)(b)(ii), 44(3) of the 2010 Brussels I Proposal (note 8) and Articles 2(a) and 42(2)(c) and Recital 33 of the 2012 Brussels I Regulation.

¹⁷ Article 33 of the 2001 Brussels I Regulation and Article 36 of the 2012 Brussels I Regulation.

¹⁸ Article 38(1) of the 2001 Brussels I Regulation.

¹⁹ See Sections IV.B.1., IV.C. and IV.F. below.

²⁰ See Section IV.F. below.

²¹ See Section IV.E. below.

²² See Section IV.D. below.

Under the 2012 Brussels I Regulation, the judgment-creditor can directly apply for enforcement as if the judgment had been given in the enforcement state. However, no enforcement measures will be taken before the judgment-debtor is informed of the request for enforcement.²³ The judgment-debtor may apply to a court for the refusal of enforcement,²⁴ in which case the competent court has discretion to limit the enforcement pending a final decision on the application. In any case, the judgment-creditor is entitled to protective measures.²⁵

III. Reasons for Exequatur and its Abolition under the 2012 Brussels I Regulation

A. Main Purposes of Exequatur

Exequatur has three main purposes:

- (1) to authorize the enforcement authorities to act,
- (2) to instruct the enforcement authorities how to act, and
- (3) to review the foreign judgment.

The first purpose of exequatur is to authorize the enforcement authorities to act (“title import”). This function is not particularly important in the present European framework²⁶ and does not justify keeping exequatur proceedings. Where the national enforcement law provides that a court must authorize all enforcement acts (such as in Germany), such requirement can be maintained provided that it applies equally to domestic and foreign judgments.²⁷

The second purpose of exequatur is to clarify how the enforcement authorities should act. This purpose is relevant primarily in two situations. First, foreign judgment might contain insufficient information that needs to be supplemented (“title supplementation”). Some common examples are judgments ordering the defendant to pay money plus interest at the statutory rate that is unknown to the foreign enforcement authorities,²⁸ or judgments ordering the defendant to make

²³ See Section IV.C. below.

²⁴ See Section IV.F. below.

²⁵ See Section IV.D. below.

²⁶ See in detail P. OBERHAMMER, *The Abolition of Exequatur*, *IPRax* 2010, p. 197-199. See also Recital 26 of the 2012 Brussels I Regulation.

²⁷ P. OBERHAMMER (note 26), at 199. According to Article 41(1) of the 2012 Brussels I Regulation, the enforcement procedure remains national law.

²⁸ See P. SCHLOSSER, *The Abolition of Exequatur Proceedings – Including Public Policy Review?*, *IPRax* 2010, p. 104, who states in favor of keeping exequatur that “[s]omebody must tell [the enforcement officials], for example, what the term «legal interest» exactly means”.

payments in installments without specifying the number and time of installments.²⁹ Problems in such situations can be solved by requiring the court of origin to provide more information in the Certificate under the Brussels I Regulation.³⁰ Consequently, the 2012 Brussels I Regulation includes an extended Certificate with detailed information.³¹ This extended Certificate gives the enforcement authorities sufficient support and information, whereas a declaration of enforceability does not add anything.³²

The second situation occurs when the foreign judgment contains an order or a measure unknown to the enforcement state; this order or measure needs to be transformed into a title that can be enforced with the available enforcement measures (“title transformation”). Some examples are the concept of usufruct,³³ or interim measures in the form of world-wide freezing orders or search orders that do not exist in all Member States.

With regard to this second situation, the 2012 Brussels I Regulation introduced an explicit obligation for the competent authority of the enforcement state to adapt, “to the extent possible, [...] the measure or order to one known under its own law which has equivalent effects attached to it and pursues similar aims and interests.”³⁴ Enforcement authorities may have difficulty adapting the foreign judgment,³⁵ which could indicate the benefit of maintaining exequatur. However, for cases of difficulties and disagreements, the 2012 Brussels I Regulation provides that any party may challenge the adaptation before a court.³⁶ This provides sufficient protection to both parties. Even if the enforcement authorities may have difficulty adapting foreign measures in certain cases, this does not command exequatur for all cases. In any case, even without exequatur, title transformation is not problematic in countries such as Germany, where courts must authorize all enforcement acts for all judgments (domestic and foreign). In this framework, courts can at the same time adapt the judgment where necessary.

²⁹ See B. HESS, in B. HESS/ Th. PFEIFFER/ P. SCHLOSSER, *The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03)*, München 2008, p. 129 para. 449 who states that courts currently handle these issues differently.

³⁰ Also B. HESS, in *Heidelberg Report* (note 29), at 129-130 paras 451-452.

³¹ See the detailed information contained in Annex I of the 2012 Brussels I Regulation, compared to Annex V of the 2001 Brussels I Regulation. See also Section IV.B.2. below.

³² P. OBERHAMMER (note 26), at 198.

³³ F. CADET, Main features of the revised Brussels I Regulation, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2013, p. 222.

³⁴ Article 54(1) and Recital 28 of the 2012 Brussels I Regulation.

³⁵ See the concern in the *Stellungnahme des Bundesministeriums der Justiz (Deutschland) zum Grünbuch Überprüfung der Verordnung (EG) Nr. 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen*, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/ms_governments/germany_de.pdf>, p. 3.

³⁶ Article 54(2) of the 2012 Brussels I Regulation.

The third purpose of exequatur is to review, at least to a certain extent, the foreign judgment (“title inspection”). This review serves the protection of the debtor. However, exequatur itself is not needed for the foreign judgment to be reviewed. In fact, the court of first instance declaring exequatur does not examine the grounds for review under the 2001 Brussels I Regulation either; such grounds are examined only upon the debtor’s appeal against the exequatur decision. In other words, the existing exequatur proceedings fulfill the purpose of title inspection only upon appeal. Therefore, one can keep the remedy and do away with the first instance procedure³⁷ without any loss, and this is what the 2012 Brussels I Regulation has done.³⁸

In summary, none of the purposes of exequatur justify maintaining the procedure. These purposes are achieved through other means.

B. Reasons for Abolishing Exequatur

The themes in the abolition of exequatur are mutual trust and free movement of judgments within the EU.³⁹ All Member States and a large majority of stakeholders supported the objective of free movement of judgments during the consultation process, and there was also general support for abolishing exequatur as a means to achieve this objective, provided that certain safeguards for the judgment-debtor existed.⁴⁰ While support exists on the principle of free movement of judgments, divergent views exist on its importance. Some are of the opinion that “it would [...] be a contradiction in itself if in an internal market and in a single area of law judgments could not circulate as freely as within one single state.”⁴¹ However, the situation in the USA and Canada (both of which are integrated markets with distinct jurisdictions) leads others to conclude that the idea of exequatur and of some form of review of non-domestic judgments is not alien to such markets.⁴²

Leaving such questions of principle aside, the best reasons for abolishing exequatur were practical and based on a cost-benefit analysis.⁴³ The idea behind

³⁷ P. OBERHAMMER (note 26), at 199.

³⁸ See Article 46 of the 2012 Brussels I Regulation, which provides for review of the foreign judgment upon application of the judgment-debtor.

³⁹ See, e.g., Recitals 6, 26 and 27 of the 2012 Brussels I Regulation.

⁴⁰ 2010 Brussels I Proposal (note 8), at 5-6; 2010 Commission Impact Assessment (note 3), at 48.

⁴¹ U. MAGNUS/P. MANKOWSKI, Joint Response to the Green Paper on the Review of the Brussels I Regulation, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/prof_magnus_and_prof_mankowski_university_of_hamburg_en.pdf>, p. 2; see also 2010 Brussels I Proposal (note 8), at 3.

⁴² P. SCHLOSSER (note 28), at 102-103.

⁴³ See, e.g., the cost-benefit analysis in 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 dated 17 December

abolishing exequatur was to eliminate the 95-99%⁴⁴ of all applications (and associated delays and costs) for which the first-instance exequatur decision is not being appealed,⁴⁵ while at the same time maintaining the necessary protection of the judgment-debtor.⁴⁶ According to a survey of the Centre for Strategy & Evaluation Services (CSES), two-thirds of businesses and consumer organizations said that they would be “a lot more inclined” (39.4%) or “slightly more inclined” (26.7%) to engage in (more) cross-border commercial activity if, in the event of a dispute, a judgment obtained in one Member State was enforceable in another Member State without additional procedures.⁴⁷ Thus, abolishing exequatur can strengthen cross-border trade and promote more extensive use of the internal market.

The most fundamental requirement for abolishing exequatur is the existence of mutual trust between the Member States. When making its proposals for revision, the Commission took the view that “the level of trust among Member States has reached a degree of maturity,” which in general would permit abolishing exequatur.⁴⁸ By contrast, the Commission did not assume the required level of trust in collective redress and defamation cases. This was due to the lack of harmonized rules, large differences in the resolution of these questions and the underlying conflict between the various fundamental rights at stake.⁴⁹ Therefore, the Commission suggested maintaining exequatur in these two areas.⁵⁰ In the end, however, the European Parliament and Council did not adopt this exception to the general abolition of exequatur, for reasons that include legal certainty.⁵¹

C. Duration, Success Rate and Costs of Exequatur under the 2001 Brussels I Regulation

Two studies have collected empirical data on exequatur under the 2001 Brussels I Regulation. Based on these studies, two reports were published estimating the actual duration, cost and success rate of exequatur⁵² and were considered for the

2010, available at <http://ec.europa.eu/justice/civil/files/study_cses_brussels_i_final_17_12_10_en.pdf> (cited as “2010 CSES Impact Analysis”), p. 58-67.

⁴⁴ 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 127 para. 447.

⁴⁵ See Recital 26 of the 2012 Brussels I Regulation.

⁴⁶ See Recital 29 of the 2012 Brussels I Regulation.

⁴⁷ 2010 CSES Impact Analysis (note 43), at 63; 2010 Commission Impact Assessment (note 3), Annex VI, Figure 2, at 59-60.

⁴⁸ 2010 Brussels I Proposal (note 8), at 7.

⁴⁹ 2010 Brussels I Proposal (note 8), at 7-8 and Recital 23.

⁵⁰ Article 37(3) of the 2010 Brussels I Proposal (note 8).

⁵¹ See Committee of Legal Affairs, Report on 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, 15 October 2012, 2010/0383 (COD) (“2012 Committee of Legal Affairs Report”), Explanatory Statement, paragraph 1.

⁵² 2010 CSES Impact Analysis (note 43) and *Heidelberg Report* (note 29).

Commission's 2010 Impact Assessment.⁵³ The estimations must be treated carefully, however. Nineteen of the twenty seven Member States, including Germany and the United Kingdom, do not collect data on the number of exequatur applications at the national level.⁵⁴ In seven Member States, not even the courts keep a record of the number of exequatur cases.⁵⁵

The length of first instance of exequatur proceedings under the 2001 Brussels I Regulation differs significantly among the Member States. Factors influencing the duration include the level of sophistication of the courts concerned and their existing workload. Sometimes these factors also differ considerably within a Member State. According to the statistics, first instance exequatur proceedings can last between one to two hours (Hungary) or three to six months (Estonia), provided the submitted documentation is complete.⁵⁶ Between one-third and two-thirds of the Member States render the exequatur decision within less than 30 days following the submission of the application.⁵⁷

Ninety to one hundred percent of the applications are successful in the first instance.⁵⁸ Only one to five percent of the exequatur decisions are appealed.⁵⁹ The appeal proceedings can last between one to two months (United Kingdom) or as long as three years (Malta: first hearing after two years, decision three to twelve months later).⁶⁰ Between one-third and two-thirds of the Member States render the appeal decision in less than six months.⁶¹

CSES estimates that in 2009 just over 9,900 exequatur applications were made across the Member States and that an average of 93% were successful. In all Member States except Bulgaria (56%), more than three-quarters of the applications were successful, and in two-thirds of the Member States the success rate was 85% or higher.⁶² CSES estimates that most applications were submitted in Germany (1,638 cases with a success rate of 88%), the United Kingdom (1,202 with an average success rate of 93%), France (1,176 with a success rate of 99%) and Italy

⁵³ 2010 Commission Impact Assessment (note 3), at 6, 7.

⁵⁴ 2010 CSES Impact Analysis (note 43), at 37-38, 145-146.

⁵⁵ 2010 CSES Impact Analysis (note 43), at 37-38, 145-146.

⁵⁶ 2010 Commission Impact Assessment (note 3), Annex V, at 56-57; B. HESS, in *Heidelberg Report* (note 29), at 130-131 para. 454; 2010 CSES Impact Analysis (note 43), at 35-36; 2009 Brussels I Commission Report (note 6), at 4.

⁵⁷ 2010 CSES Impact Analysis (note 43), at 35-36; 2010 Commission Impact Assessment (note 3), Annex V, at 56-57.

⁵⁸ 2009 Brussels I Commission Report (note 6), at 4.

⁵⁹ 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 127 para. 447.

⁶⁰ 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 150 para. 506; 2010 Commission Impact Assessment (note 3), Annex V, at 57-58.

⁶¹ 2010 CSES Impact Analysis (note 43), at 35; 2010 Commission Impact Assessment (note 3), Annex V, at 57-58.

⁶² 2010 CSES Impact Analysis (note 43), at 37-38; 2010 Commission Impact Assessment (note 3), Annex IVA, Table 1, at 52.

(1,156 with an average success rate of 93%).⁶³ CSES concludes that the number of exequatur cases remains modest but that it is generally increasing.⁶⁴

CSES estimates that the average costs of exequatur proceedings in a simple case in 2009 were EUR 2,208. This consists of court fees (EUR 53), legal fees (5h = EUR 1,205), and other fees (*e.g.* cost of serving documents, translations = EUR 850).⁶⁵ For complex cases, the average costs are EUR 12,791.⁶⁶ Based on the average costs, the number of cases and the overall success rate, CSES estimates the total costs of exequatur proceedings in the EU in 2009 to be approximately EUR 48 million.⁶⁷ CSES concludes that the estimated direct cost-saving for small and medium-sized enterprises amounts to EUR 6.16 million if exequatur is abolished (not including indirect savings such as management time).⁶⁸

IV. Practical Aspects of Enforcing a Foreign Judgment under the 2001 and the 2012 Brussels I Regulations

While much attention has been paid to the principle of abolishing exequatur, it is not always obvious what practical difference it will make for the judgment-creditor and debtor. To some extent, the practical differences between enforcement under the 2001 Brussels I Regulations and enforcement under the 2012 Brussels I Regulation will depend on the national law of the enforcement state. This law governs the exequatur procedure under the 2001 Brussels I Regulation and the enforcement procedure under the 2012 Brussels I Regulation.⁶⁹ However, the 2001 and 2012 Brussels I Regulations set the legal framework and contain a number of procedural rules and requirements. The following sections address some important practical aspects governed by the 2001 and 2012 Brussels I Regulations and the practical changes caused by the revision.

⁶³ 2010 CSES Impact Analysis (note 43), at 37; 2010 Commission Impact Assessment (note 3), Annex IVA, Table 1, at 52.

⁶⁴ 2010 CSES Impact Analysis (note 43), at 40-41. In the different Member States, the estimated costs ranged from EUR 1,048 (Spain) to EUR 3,955 (United Kingdom).

⁶⁵ 2010 CSES Impact Analysis (note 43), at 43-44, 146-148.

⁶⁶ 2010 CSES Impact Analysis (note 43), at 45; 2010 Commission Impact Assessment (note 3), at 13.

⁶⁷ 2010 CSES Impact Analysis (note 43), at 45; 2010 Commission Impact Assessment (note 3), at 13 and Annex IVA, Table 3, at 54.

⁶⁸ 2010 CSES Impact Analysis (note 43), at 66.

⁶⁹ Article 40(1) of the 2001 Brussels I Regulation and Article 41(1) of the 2012 Brussels I Regulation.

A. The Judgment-Creditor's Exequatur or Enforcement Application

1. Content of the Application

Under the 2001 Brussels I Regulation, the judgment-creditor must request exequatur before proceeding to the actual enforcement. The application must set out the requirements that the competent court or authority examines *ex officio*.⁷⁰ In practice, it is recommended that the enforcement-creditor requests that protective measures be taken, either immediately or when granting exequatur.⁷¹

Under the 2012 Brussels I Regulation, the judgment-creditor can directly request enforcement measures without any declaration of enforceability. The application must set out the requirements that the competent court or authority examines *ex officio*.⁷² In practice, the judgment-creditor should request that protective measures be taken immediately and *ex parte*, before the Certificate and the judgment (if not previously served) are served on the judgment-debtor.⁷³

2. Documents and Translations to Be Submitted with the Application

The extent to which a judgment-creditor must collect and translate documents in order to apply for exequatur or cross-border enforcement considerably impacts the duration and costs of preparing the application. The 2012 Brussels I Regulation introduces some changes that aim to protect the judgment-debtor.

Under the 2001 and 2012 Brussels I Regulations, the judgment-creditor must submit two documents to the court in support of his exequatur or enforcement application:

- (1) a copy of the judgment satisfying the conditions necessary to establish its authenticity; and
- (2) a certificate issued by the court of origin using the standard form annexed to the Brussels I Regulation (the "Brussels I Certificate").⁷⁴

The Brussels I Certificate contains considerably more information under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation.⁷⁵ While the 2001 Brussels I Regulation allows the exequatur court to dispense with the production of the Certificate,⁷⁶ this possibility no longer exists under the 2012 Brussels I

⁷⁰ See Section IV.B.1. below.

⁷¹ See Section IV.D. below.

⁷² See Section IV.B.1. below.

⁷³ See Section IV.D. below.

⁷⁴ Articles 53-54 and Annex V of the 2001 Brussels I Regulation and Article 42(1) and Annex I of the 2012 Brussels I Regulation.

⁷⁵ See Section IV.B.2. below.

⁷⁶ Article 55(1) of the 2001 Brussels I Regulation. The court may accept an equivalent document or dispense with the production of the Certificate or an equivalent altogether if it considers that it has sufficient information before it.

Regulation. To the contrary, the 2012 Brussels I Certificate must be served on the judgment-debtor prior to the first enforcement measure.⁷⁷

The 2012 Brussels I Regulation increases the protection for the judgment-debtor regarding translations. Under the 2001 Brussels I Regulation, the judgment-creditor must submit a translation of both the judgment and the Certificate only if required by the court or authority of the enforcement state.⁷⁸ While no translation is required as a rule, the *Heidelberg Report* criticizes the fact that most Member State courts regularly request a translation of the judgment.⁷⁹ The 2001 Brussels I Regulation contains no right of the judgment-debtor to request a translation of the judgment.

Under the 2012 Brussels I Regulation, the enforcement authority may request a transliteration or translation of the Certificate, but it may require a translation of the judgment only if it is unable to proceed without such a translation.⁸⁰ However, the 2012 Brussels I Regulation entitles a judgment-debtor domiciled in a Member State other than the state of origin to request a translation of the judgment if it is written in a language that he does not understand and that is not an official language at the place of his domicile.⁸¹ Until the judgment-debtor receives the requested translation, only protective measures may be taken, not enforcement measures.⁸² This amendment constitutes an important protection of the judgment-debtor at the expense of the judgment-creditor.

3. Requirement of a Service Address in the Member State of Enforcement

The 2001 Brussels I Regulation requires the judgment-creditor either to provide a service address within the area of jurisdiction of the exequatur court or to appoint a representative *ad litem*.⁸³ This *de facto* requirement of a local lawyer for exequatur proceedings has met with objections,⁸⁴ as most national laws do not require legal representation in this type of proceedings.⁸⁵ The 2012 Brussels I Regulation abolishes the requirement of a postal address or authorized representative in the

⁷⁷ Article 43(1) of the 2001 Brussels I Regulation.

⁷⁸ Article 55(2) of the 2001 Brussels I Regulation.

⁷⁹ B. HESS, in *Heidelberg Report* (note 29), at 131 para. 455, based on the information obtained from lawyers.

⁸⁰ Article 42(3)-(4) of the 2012 Brussels I Regulation.

⁸¹ Article 43(2) of the 2012 Brussels I Regulation. Exceptions apply if the judgment-debtor has already received a translation (Article 43(2) of the 2012 Brussels I Regulation, see in this regard Section 4.5.1.1 of the Certificate) or if the creditor seeks the enforcement or the issuing of protective measures (Article 43(3) of the 2012 Brussels I Regulation).

⁸² Article 43(2) of the 2012 Brussels I Regulation.

⁸³ Article 40(2) of the 2001 Brussels I Regulation.

⁸⁴ B. HESS, in *Heidelberg Report* (note 29), at 132 para. 457.

⁸⁵ According to the 2010 CSES Impact Analysis (note 43), at 35-36, only Belgium requires legal representation in the exequatur proceedings and five Member States require legal representation in the appeal proceedings (Belgium, Greece, Hungary, Italy and Portugal).

enforcement state.⁸⁶ It thereby helps to reduce costs. The Member States are free, however, to require an authorized representative if this requirement applies irrespective of the nationality or the domicile of the parties,⁸⁷ *i.e.*, if this requirement applies also in enforcement proceedings for domestic court decisions.⁸⁸

B. Examination by the Seized Court or Authority

I. Scope of Examination by the Seized Court or Authority

The 2012 Brussels I Regulation contains no substantive changes to the scope of what the competent court or authority examines *ex officio*. Upon the judgment-creditor's exequatur application (2001 Brussels I Regulation) or enforcement application (2012 Brussels I Regulation), the court or authority seized with the application examines the following requirements *ex officio*:

- (a) Local and subject-matter competence of the court or authority;
- (b) Submission of an authentic copy of the judgment and of the Brussels I Certificate;
- (c) Judgment falling under the Brussels I Regulation, in particular: (i) decision is a judgment in the sense of the Brussels I Regulation,⁸⁹ (ii) judgment is rendered in a Member State, and (iii) judgment is rendered in a civil or commercial matter (certified in the Brussels I Certificate⁹⁰);
- (d) Enforceability of the judgment in the state of origin (as certified in the Brussels I Certificate⁹¹);
- (e) Other requirements under national law that apply to all judgments regardless of their origin, to the extent that they are not incompatible with the grounds of refusing enforcement under the 2012 Brussels I Regulation.⁹²

Under the 2012 Brussels I Regulation, any enforcement authority should be able to examine these requirements without much difficulty. Most requirements are either clearly visible on the (new) Brussels I Certificate, seem easy to examine, or must be examined also in case of domestic judgments. For this reason, some Member States provide under the 2001 Brussels I Regulation for a simple registration of the

⁸⁶ Article 41(3) of the 2012 Brussels I Regulation.

⁸⁷ Article 41(3) of the 2012 Brussels I Regulation.

⁸⁸ H. GAUDEMET-TALLON/ C. KESSEDJIAN, *La refonte du règlement Bruxelles I, Revue trimestrielle de droit européen* 2013, p. 452 para. 58.

⁸⁹ See Article 32 of the 2001 Brussels I Regulation and Article 2(a) of the 2012 Brussels I Regulation.

⁹⁰ See the heading of the Certificate under the 2012 Brussels I Regulation.

⁹¹ See the statement at the bottom of the Certificate under the 2001 Brussels I Regulation and Section 4.4 of the Certificate under the 2012 Brussels I Regulation.

⁹² See Article 41(1)-(2) 2012 Brussels I Regulation.

foreign judgment and assign the competence for exequatur to a master or registrar.⁹³

If the requirements listed above are fulfilled, the competent court or authority will do the following:

- Under the 2001 Brussels I Regulation, the competent court declares the foreign judgment enforceable.⁹⁴ The grounds for refusing recognition and enforcement are examined only if and when the judgment-debtor files an appeal against the exequatur.⁹⁵ If so requested, the competent court will proceed to protective measures,⁹⁶ and finally to enforcement measures once an appeal against exequatur is no longer possible or has been dismissed.⁹⁷
- Under the 2012 Brussels I Regulation, the competent court or authority will, as the case may be, proceed to protective measures (if requested) and/or serve the Certificate and the judgment (if not previously served) on the judgment-debtor prior to the first enforcement measure.⁹⁸ The grounds for refusing enforcement are examined only if and when the judgment-debtor files an application for refusing enforcement.⁹⁹

2. *Content and Adaptation of the Foreign Judgment*

The content of the foreign judgment determines what protective and/or enforcement measures the seized court or authority will take. The 2012 Brussels I Certificate provides detailed information about the content of the judgment, unlike the 2001 Brussels I Certificate.¹⁰⁰ The 2012 Brussels I Regulation thereby makes it easier for the enforcement court or authority to take the appropriate protective and/or enforcement measures, while putting an additional burden on the court of origin.

In case of monetary claims, the 2012 Brussels I Certificate sets out the following information:¹⁰¹

- (a) A short description of the subject-matter of the case;¹⁰²

⁹³ According to B. HESS, in *Heidelberg Report* (note 29), at 128 para. 448, this is the case in England and Wales, Ireland, Scotland, Cyprus and France.

⁹⁴ See Article 41 of the 2001 Brussels I Regulation.

⁹⁵ See Article 45 of the 2001 Brussels I Regulation.

⁹⁶ See Article 47(2) of the 2001 Brussels I Regulation and Section IV.D. below.

⁹⁷ See Article 47(3) of the 2001 Brussels I Regulation and Section IV.E. below.

⁹⁸ See Articles 40 and 43(1) and Recital 32 of the 2012 Brussels I Regulation. Section 4.5 of the 2012 Brussels I Certificate indicates whether the judgment has already been served on the judgment-debtor.

⁹⁹ Article 46 of the 2012 Brussels I Regulation.

¹⁰⁰ See Annex I of the 2012 Brussels I Regulation and Annex V of the 2001 Brussels I Regulation.

¹⁰¹ Annex I of the 2012 Brussels I Regulation, Section 4.6.1.

- (b) The debtor and creditor of the payment and, in case of several debtors, whether the whole amount may be collected from any one of them;
- (c) The currency of the payment;
- (d) The principal amount to be paid, and whether it must be paid in one sum, in installments (together with information about the amount and due date of each installment) or regularly (together with information about the frequency of payments);
- (e) The contractual and/or statutory interest to be paid, including the amount, interest rate or statutory basis, the start and end date/event, and whether and how interest is to be capitalized.

For judgments other than monetary judgments, the 2012 Brussels I Certificate sets out a short description of the subject-matter of the case and of the court's ruling.¹⁰³ In case of provisional measures, the 2012 Brussels I Certificate also sets out whether the measure was ordered by a court having jurisdiction for the substance of the matter.¹⁰⁴

For judgments or orders other than monetary judgments, it may become necessary to adapt the foreign decision if the order or measure is not known to the law of the enforcement state.¹⁰⁵ The competence and procedure for adapting the foreign decision is subject to national law.¹⁰⁶

C. Time of Service of the Application on the Judgment-Debtor

An essential feature of exequatur under the 2001 Brussels I Regulation is the surprise effect because the judgment-debtor obtains knowledge of the creditor's exequatur application only when receiving the decision on exequatur.¹⁰⁷ This shall prevent the judgment-debtor from thwarting the future enforcement before the judgment-creditor can effectively obtain protective measures (see Section D.).

Under the 2012 Brussels I Regulation, the Certificate and the foreign judgment (if not previously served) shall be served on the judgment-debtor in reasonable time before the first enforcement measure.¹⁰⁸ It will be for the courts (including the ECJ) to determine what constitutes a reasonable time period. Subject to this requirement, the 2012 Brussels I Regulation leaves it to the national law to

¹⁰² This task can be particularly burdensome if the judgment-creditor requests the Certificate a long time after the judgment has been rendered, as there are no time limits for requesting a Certificate, see J.-P. BERAUDO, *Regards sur le nouveau règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, *Clunet* 2013, p. 758.

¹⁰³ Annex I of the 2012 Brussels I Regulation, Section 4.6.3.

¹⁰⁴ Annex I of the 2012 Brussels I Regulation, Section 4.6.2.

¹⁰⁵ See Article 54 of the 2012 Brussels I Regulation and Section III.A. above.

¹⁰⁶ Recital 28 2nd sentence of the 2012 Brussels I Regulation.

¹⁰⁷ Articles 41, 42(2) of the 2001 Brussels I Regulation.

¹⁰⁸ Article 43(1) and Recital 32 of the 2012 Brussels I Regulation.

determine when the enforcement application is served on the judgment-debtor.¹⁰⁹ In any case, protective measures are available as soon as the judgment is enforceable in the state of origin, and without the need for serving the 2012 Brussels I Certificate and the foreign judgment prior to obtaining such measures (see the following Section D.).

D. Time of Obtaining Protective Measures

Provisional (protective) measures serve to balance the interests of the judgment-creditor and those of the judgment-debtor. The judgment-creditor has an interest in securing the effective enforcement of the judgment by, for example, freezing assets necessary for the enforcement. The judgment-debtor, on the other hand, has an interest in not being definitely deprived of his assets in case he has grounds to refuse enforcement of the judgment.

The time when protective measures are effectively available is important. Under the 2001 Brussels I Regulation, the competent authorities must grant a request for protective measures when exequatur is granted in first instance.¹¹⁰ Prior to this time, and even without any exequatur proceedings, the judgment-creditor is entitled to apply for protective measures under the national law of the Member States.¹¹¹ However, the Heidelberg Report observes that this provision of the 2001 Brussels I Regulation is not often applied, and that its interpretation and implementation in the national laws of the Member States is an area of unsettled law.¹¹²

Under the 2012 Brussels I Regulation, the situation is more defined. As soon as the judgment is enforceable in the state of origin, the competent authorities in the other Member States must proceed, if and when requested, to any protective measures that exist under their national law.¹¹³ This excludes any national requirements such as urgency or plausibility that the enforcement is in danger. The 2012 Brussels I Regulation thus effectively reinforces the position of the judgment-creditor. The protective measure will be ordered without serving the 2012 Brussels I Certificate on the judgment-debtor.¹¹⁴ This means that the protective measure must be ordered *ex parte* (i.e., without any prior notification to the judgment-debtor) even if national law were to generally provide for notice of the application to the debtor. The surprise effect under the 2001 Brussels I Regulation, which explicitly provides for notice to the judgment-debtor only when exequatur is granted,¹¹⁵ should be maintained also under the 2012 Brussels I Regulation. It is not

¹⁰⁹ See Article 41(1) of the 2012 Brussels I Regulation, according to which the enforcement procedure is governed by the law of the Member State where enforcement is sought, subject to the provisions of Articles 39 *et seq.* of the 2012 Brussels I Regulation.

¹¹⁰ Article 47(2) and (3) of the 2001 Brussels I Regulation.

¹¹¹ Article 47(1) of the 2001 Brussels I Regulation.

¹¹² B. HESS, in *Heidelberg Report* (note 29), at 153-154 paras 522-523.

¹¹³ Article 40 of the 2012 Brussels I Regulation.

¹¹⁴ Article 43(3) of the 2012 Brussels I Regulation.

¹¹⁵ Article 42(1) of the 2001 Brussels I Regulation

required that the judgment-creditor submit an application for enforcement prior to or together with her application for protective measures.

E. Time of Obtaining Enforcement Measures

Under the 2001 Brussels I Regulation, the judgment-creditor can obtain effective enforcement only after the period for appealing the exequatur decision has lapsed or, in case of an appeal, after the appeal has been dismissed.¹¹⁶ The judgment-creditor can thus obtain enforcement at the earliest one month after service of the exequatur decision if the debtor is domiciled in the enforcement state, and two months after service of the exequatur decision if the debtor is domiciled elsewhere.¹¹⁷ The 2001 Brussels I Regulation thus grants the judgment-debtor an automatic “grace period.”

Under the 2012 Brussels I Regulation, there is no such automatic “grace period.” The judgment-debtor must – and can – take active steps to delay enforcement. Prior to the first enforcement measure, the 2012 Brussels I Certificate and the judgment (if not previously served) must be served on the judgment-debtor.¹¹⁸ A judgment-debtor domiciled in a Member State other than the state of origin may then request a translation of the judgment if it is not written in or accompanied by a translation into a language that she understands or that is an official language of the place where she is domiciled.¹¹⁹ If the judgment-debtor requests such a translation, no enforcement measures may be taken other than protective measures until she has received the translation.¹²⁰

Enforcement measures are not automatically excluded if the judgment-debtor applies for refusal of enforcement.¹²¹ However, upon request of the judgment-debtor, the competent court has discretion to limit enforcement to protective measures, make enforcement conditional on the provision of a security, or suspend enforcement either wholly or in part.¹²² When exercising its discretion, the competent court will consider the seriousness of the judgment-debtor’s objections to the enforcement. The enforcement court or authority has no such discretion if the enforceability of the judgment is suspended in the Member State of origin: In that case, the enforcement court or authority must suspend the enforcement proceedings upon request of the judgment-debtor.¹²³

¹¹⁶ Article 47(3) of the 2001 Brussels I Regulation.

¹¹⁷ See Article 43(5) of the 2001 Brussels I Regulation.

¹¹⁸ Article 43(1) of the 2012 Brussels I Regulation.

¹¹⁹ Article 43(2) first subparagraph of the 2012 Brussels I Regulation. Section 4.5 of the 2012 Brussels I Certificate indicates whether and in what language the judgment has already been served on the judgment-debtor.

¹²⁰ Article 43(2) second subparagraph of the 2012 Brussels I Regulation.

¹²¹ See Section IV.F. below.

¹²² Article 44(1) and Recital 31 of the 2012 Brussels I Regulation.

¹²³ Article 44(2) of the 2012 Brussels I Regulation.

F. Review of the Foreign Judgment upon Application by the Judgment-Debtor

One of the main purposes of exequatur was originally the inspection of the foreign judgment, *i.e.*, the examination of certain grounds for review. This review is part of weighing the respective interests of the judgment-creditor and the judgment-debtor. While a speedy, inexpensive and effective Europe-wide enforcement of the judgment serves the judgment-creditor's interest, the judgment-debtor has a legitimate interest in maintaining safeguards against violation of his fundamental rights.

Compared to the 1968 Brussels Convention, the 2001 Brussels I Regulation shifted the balance towards the judgment-creditor's interest by postponing the examination of the grounds for review until the appeal proceedings against the exequatur decision. The abolition of exequatur under the 2012 Brussels I Regulation maintains this balance, and it does not shift it any further towards the judgment-creditor's interest. Only few changes were made to the grounds for reviewing the foreign judgment (Section 1 below) and to the review procedure (Section 2 below) compared to the 2001 Brussels I Regulation. This is despite the fact that the 2010 Brussels I Proposal of the Commission contained significant changes.¹²⁴

I. Grounds for Review

The 2001 Brussels I Regulation provides for the following grounds for review: violation of procedural and substantive public policy, insufficient service of the documents initiating the proceedings in case of default judgments, incompatibility with other judgments and violation of certain provisions on jurisdiction.¹²⁵ According to the Commission, judgment-debtors most often invoke the lack of due service in case of default judgments, although they rarely succeed.¹²⁶ Procedural public policy is also frequently invoked, but rarely accepted, and a defense based on substantive public policy is extremely rare.¹²⁷ The other grounds for refusing recognition and enforcement are rarely invoked (and equally rarely accepted).¹²⁸

The grounds for review were much debated during the revision of the 2001 Brussels I Regulation. The views of the stakeholders differed on whether and to what extent the grounds for review should be maintained.¹²⁹ Most stakeholders proposed neither an increase nor a reduction of the number of grounds for review.¹³⁰ OBERHAMMER expressed this view by citing the adage "if it ain't broke,

¹²⁴ See D. SCHRAMM, Abolition of Exequatur, in A. BONOMI/ Ch. SCHMID (eds), *La revision du Règlement 44/2001 (Bruxelles I)*, Genève/ Zurich/ Bâle 2011, p. 71-89.

¹²⁵ Articles 34-35 of the 2001 Brussels I Regulation.

¹²⁶ 2009 Brussels I Commission Report (note 6), at 4.

¹²⁷ 2009 Brussels I Commission Report (note 6), at 4.

¹²⁸ 2009 Brussels I Commission Report (note 6), at 4.

¹²⁹ 2010 Brussels I Proposal (note 8), at 6.

¹³⁰ B. HESS, in *Heidelberg Report* (note 29), at 138 para. 473.

don't fix it."¹³¹ Nevertheless, the 2010 Brussels I Proposal suggested abolishing the limited jurisdictional review and the examination of substantive public policy, and it made changes to other grounds for review. The European Parliament and Council did not follow these suggestions. Most grounds for review under the 2012 Brussels I Regulation have remained unchanged compared to the 2001 Brussels I Regulation, as briefly outlined in the following.

In addition to the grounds for review under the Brussels I Regulation, the judgment-debtor can invoke grounds for refusing enforcement available under national law, to the extent that they are not incompatible with the grounds for review under the Brussels I Regulation.¹³² One typical example is the objection that the claim has been satisfied after the judgment was rendered.¹³³ The judgment-debtor can – and according to certain legal commentators, must¹³⁴ – invoke such additional national grounds for refusing enforcement with the grounds referred to in Article 45 of the 2012 Brussels I Regulation.¹³⁵

a) *Violation of Procedural Public Policy*

The 2001 Brussels I Regulation provides that a foreign judgment shall not be recognized if such recognition is manifestly contrary to the public policy of the enforcement state.¹³⁶ This ground for review has remained unchanged under the 2012 Brussels I Regulation. It is commonplace that the notion of public policy encompasses procedural public policy as well as substantive public policy. Procedural public policy includes in particular the defendant's right to be heard. In practice, procedural public policy is frequently invoked in cases of corruption, procedural fraud or other severe breaches of procedural fairness in the course of the proceedings.¹³⁷

¹³¹ P. OBERHAMMER (note 26), at 201.

¹³² Article 41(2) and Recital 30 of the 2012 Brussels I Regulation.

¹³³ See in more detail J. VON HEIN, Die Neufassung der Europäischen Gerichtsstands- und Vollstreckungsverordnung (EuGVVO), *RIW* 2013, p. 110.

¹³⁴ See J. VON HEIN (note 133), at 110.

¹³⁵ See Recital 30 of the 2012 Brussels I Regulation. According to M. POHL, Die Neufassung der EuGVVO – im Spannungsfeld zwischen Vertrauen und Kontrolle, *IPRax* 2013, p. 114, it is open to the national legislators whether national grounds for refusing enforcement such as the payment of the debt can be considered in the same proceedings as the grounds for refusal under the 2012 Brussels I Regulation.

¹³⁶ Article 34(1) of the 2001 Brussels I Regulation and Article 45(1)(a) of the 2012 Brussels I Regulation. The requirement of a „manifest“ violation of public policy was explicitly introduced in the 2001 Brussels I Regulation, but it already applied under the 1968 Brussels Convention; see ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, para. 37.

¹³⁷ P. OBERHAMMER (note 26), at 202. See also B. HESS, in *Heidelberg Report* (note 29), at 141-143 paras 481-486, who lists the reported case law relating to procedural fraud.

While the 2010 Brussels I Proposal of the Commission suggested introducing a uniform European standard for procedural public policy,¹³⁸ these changes were not adopted in the 2012 Brussels I Regulation. Thus, the courts of the enforcement state will still be entitled to apply their own national concept of public policy. However, they can do so only within specified European limits,¹³⁹ which are inspired by Article 6(1) of the European Convention on Human Rights (“ECHR”).¹⁴⁰ This means that the courts are entitled to refuse enforcement only if the violated principle of national public policy has sufficient weight under European standards, in particular under the standards of the ECHR. The European Court of Justice (“ECJ”) has accepted the refusal of enforcement in cases where the court of origin refused to hear the defendant’s representative when the defendant did not appear personally,¹⁴¹ and where the court of origin excluded the defendant from further participating in the proceedings and thereby manifestly and disproportionately infringed his right to be heard.¹⁴² However, if a procedural right

¹³⁸ See D. SCHRAMM (note 124), at 74-77.

¹³⁹ See ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, paras 22-23: “while the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.”

¹⁴⁰ See ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98, paras 24-27. Article 6(1) ECHR reads: „In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

¹⁴¹ See ECJ, 28 March 2000, *Krombach v. Bamberski*, C-7/98: The German doctor Krombach was charged in France with manslaughter of a French girl. The girl’s father raised a civil claim in the criminal proceedings. The French court refused to hear Krombach’s representative as Krombach did not appear personally. In his absence, Krombach was sentenced to 15 years of imprisonment and found liable for damages. Krombach then (successfully) opposed enforcement in Germany of the damages portion of the judgment on the basis of a violation of procedural public policy, in particular the violation of his right of defense, which is part of the right to a fair trial.

¹⁴² ECJ, 2 April 2009, *Marco Gambazzi v. Danieli*, C-394/07: An English court held the defendant Gambazzi to be in contempt of court for violating a disclosure order issued earlier in the proceedings and excluded him from further participating in the proceedings. Gambazzi objected to the recognition of the English judgment in Italy, and the ECJ found that the Italian court was entitled to refuse recognition and enforcement of the English decision “if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant’s right to be heard.” In this context, it is interesting that Gambazzi had applied to the ECtHR in the early 2000s and that his

granted by Article 6(1) ECHR does not belong to the national procedural public policy of the enforcement state, the enforcement state is not obliged to refuse recognition and enforcement on this ground.¹⁴³ Thus, the ECJ examines under the 2001 and the 2012 Brussels I Regulation only whether a national court *may* refuse enforcement on a particular procedural ground, not whether the national court *must* refuse enforcement.

b) Violation of Substantive Public Policy

Under the 2001 Brussels I Regulation, recognition of a foreign judgment can be refused if such recognition is manifestly contrary to the substantive public policy of the enforcement state.¹⁴⁴ This ground for review has remained unchanged in the 2012 Brussels I Regulation, despite the fact that the 2010 Brussels I Proposal of the Commission suggested abolishing the review of substantive public policy, as other EU regulations issued since 2004 did.¹⁴⁵

Judgment-debtors have only very rarely invoked substantive public policy successfully.¹⁴⁶ For example, the German Federal Supreme Court (“BGH”) applied substantive public policy in its famous *Sonntag*-decision,¹⁴⁷ which has often been criticized. The Heidelberg Report sees two main factors leading to the rare application of substantive public policy:¹⁴⁸ First, there are no fundamental differences between the legal systems of the Member States in civil and commercial matters that could trigger the application of substantive public policy. And second, the

application was held to be manifestly ill-founded; see G. CUNIBERTI/ I. RUEDA, Abolition of Exequatur – Addressing the Commission’s Concerns, University of Luxembourg Law Working Paper No. 2010-03, available at <<http://ssrn.com/abstract=1691001>>, p. 9, also published in *RebelsZ* 2011, p. 286 *et seq.* Also the Swiss Federal Supreme Court refused recognition and enforcement of the English decision, on the ground that Gambazzi would have subjected himself to criminal sanctions in Switzerland by complying with the disclosure order; ATF, 9 November 2004, 4P.82/2004, reason 3.3.

¹⁴³ See the formulation of the ECJ in Footnote 139 above.

¹⁴⁴ Article 34(1) 2001 Brussels I Regulation; also Article 27(1) 1968 Brussels Convention.

¹⁴⁵ See the 2004 European Enforcement Order Regulation, the 2006 Payment Order Regulation, the 2007 Small Claims Regulation and the 2009 Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol.

¹⁴⁶ 2009 Brussels I Commission Report (note 6), at 4; B. HESS, in *Heidelberg Report* (note 29), at 144 para. 491.

¹⁴⁷ BGH, 16 September 1993, BGHZ 123, 268: Sonntag was a school teacher at a German school. During a school trip to Italy, a schoolboy died in an accident. An Italian criminal court ordered the teacher to pay damages to the boy’s parents. The BGH refused enforcement of the decision. This was because, under German law, the social security system replaces the personal liability of a teacher at a public school for injuries suffered by the students, and therefore only the state employing the teacher can be sued for compensation.

¹⁴⁸ B. HESS, in *Heidelberg Report* (note 29), at 144 para. 491.

substance of the foreign judgment may not be reviewed.¹⁴⁹ It is therefore difficult to argue that the content of a judgment violates substantive public policy. In fact, according to the ECJ decision in *Renault v. Maxicar*, the court of enforcement may not refuse recognition and enforcement of a foreign judgment even if it considers that Community law was misapplied.¹⁵⁰ However, the European Parliament and Council finally sided with those concerned about giving up a tool that could still be needed in some rare and extreme situations and that could act as an “emergency brake for cases in which something went terribly wrong.”¹⁵¹

c) *Lack of Due Service in Case of Default Judgments*

In case of default judgments, parties most often resist enforcement based on defects in the service of the document instituting the proceedings.¹⁵² This ground for review was subject to change during the transition from the 1968 Brussels Convention to the 2001 Brussels I Regulation. Under the 1968 Brussels Convention, the debtor of a default judgment could refuse enforcement if the document instituting the proceedings “was not duly served [...] in sufficient time to enable [the defendant] to arrange for his defence.”¹⁵³ The 2001 Brussels I Regulation abandoned the notion of “duly served” and provided the judgment-debtor with a ground for refusing enforcement if service was not made “in sufficient time and in such a way as to enable him to arrange for his defence.”¹⁵⁴ This language has remained unchanged in the 2012 Brussels I Regulation.¹⁵⁵ The wording makes clear that compliance with the applicable provisions on proper service is not examined. The only issue examined is whether the service effectively enabled the defendant to take note of the action and prepare his defense.¹⁵⁶ The date of service is indicated on the 2001 and the 2012 Brussels I Certificate.¹⁵⁷

¹⁴⁹ Articles 36, 45(2) of the 2001 Brussels I Regulation and Article 52 of the 2012 Brussels I Regulation.

¹⁵⁰ ECJ, 11 May 2000, *Renault v. Maxicar and Formento*, C-38/98, para. 33.

¹⁵¹ P. OBERHAMMER (note 26), at 201; see also, e.g., B. HESS, in *Heidelberg Report* (note 29), at 144 para. 491; 2012 Committee of Legal Affairs Report (note 51), Explanatory Statement, paragraph 1. See also the assessment by D. TRÜTEN, *Die neue Brüssel I-Verordnung und die Schweiz*, *Zeitschrift für Europarecht (EuZ)* 2013, p. 62-63; M. POHL (note 135), at 113.

¹⁵² 2009 Brussels I Commission Report (note 6), at 4.

¹⁵³ Article 27(2) of the 1968 Brussels Convention.

¹⁵⁴ Article 34(2) of the 2001 Brussels I Regulation.

¹⁵⁵ Article 45(1)(b) of the 2012 Brussels I Regulation.

¹⁵⁶ See the analysis of B. HESS, in *Heidelberg Report* (note 29), at 138 para. 474 with reference to court decisions, and the reference to the French report to the Heidelberg questionnaire, at 139 para. 476.

¹⁵⁷ Annex V, Section 4.4 of the 2001 Brussels I Regulation and Annex I, Section 4.3.2 of the 2012 Brussels I Regulation.

The 2012 Brussels I Regulation also maintains the limitation introduced by the 2001 Brussels I Regulation (but not applied in Switzerland)¹⁵⁸ that the judgment-debtor cannot invoke the ground for refusal if “he failed to commence proceedings to challenge the judgment when it was possible for him to do so.”¹⁵⁹ This exception requires that the judgment-debtor be acquainted with the contents of the judgment because it was served on him in sufficient time to enable him to prepare his defense.¹⁶⁰

The 2010 Brussels I Proposal of the Commission suggested adding a new ground for refusing enforcement of a default judgment if the defaulting defendant “was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part,”¹⁶¹ in line with other EU regulations issued since 2004.¹⁶² However, the European Parliament and Council did not adopt this suggestion and left the ground for review unchanged.

d) Incompatibility with Other Judgments

Under the 2001 Brussels I Regulation, recognition of a foreign judgment can be refused if the foreign judgment is irreconcilable with either (a) a judgment rendered in the enforcement state in a dispute between the same parties or (b) an earlier recognizable judgment rendered in another state in a dispute between the same parties and involving the same cause of action.¹⁶³ This ground for review has remained unchanged,¹⁶⁴ despite criticism in legal commentaries and the fact that consistent changes were made in most other EU regulations issued since 2004 that abolished exequatur.¹⁶⁵

The criticism relates mainly to two issues. The first issue is the priority of a domestic judgment over the foreign judgment even if the foreign judgment was rendered earlier.¹⁶⁶ This priority was abolished in the aforementioned EU regula-

¹⁵⁸ Switzerland has made the reservation that it will not apply this exception under the revised Lugano Convention (Article III(1) of Protocol No. 1).

¹⁵⁹ Article 34(2) of the 2001 Brussels I Regulation and Article 45(1)(b) of the 2012 Brussels I Regulation.

¹⁶⁰ ECJ, 14 December 2006, *ASML v. SEMIS*, C-283/05.

¹⁶¹ Article 45(1)(b) of the 2010 Brussels I Proposal (note 8). See D. SCHRAMM (note 124), at 73.

¹⁶² See Art. 19(1)(b) European Enforcement Order Regulation, Art. 20(1)(b) Order for Payment Regulation, Art. 18(1)(b) Small Claims Regulation and Art. 19(1)(b) Maintenance Regulation for decisions given in a Member State bound by the 2007 Hague Protocol.

¹⁶³ Article 34(3) and (4) of the 2001 Brussels I Regulation; also Article 27(3) and (5) 1968 Brussels Convention.

¹⁶⁴ Article 45(1)(c) and (d) of the 2012 Brussels I Regulation.

¹⁶⁵ See Art. 21(1) European Enforcement Order Regulation, Art. 22(1) Order for Payment Regulation and Art. 22(1) Small Claims Regulation.

¹⁶⁶ P. OBERHAMMER (note 26), at 202, who considers this to be “an expression of obsolete nationalism”; B. HESS, in *Heidelberg Report* (note 29), at 146-147 paras 496-497.

tions.¹⁶⁷ The second criticism relates to the priority of an earlier judgment regardless of whether it was obtained in violation of the *lis pendens* rule of the Regulation.¹⁶⁸ At least three different solutions were proposed to fix this problem, which could lead to different results.¹⁶⁹ However, the European Parliament and Council decided not to make any changes.

e) *Limited Jurisdictional Review*

Under the 2001 and 2012 Brussels I Regulations, the court of the enforcement state may not, in principle, review the jurisdiction of the court of origin.¹⁷⁰ The sole exception relates to the review of some clearly defined provisions on jurisdiction.¹⁷¹ However, judgment-debtors have rarely invoked this ground for review.¹⁷² Its practical relevance is limited because the findings of fact of the court of origin are binding on the reviewing court.¹⁷³

The 2012 Brussels I Regulation includes two changes to the limited jurisdictional review. First, the jurisdictional review applies not only to the rules on exclusive jurisdiction and to the jurisdictional provisions for insurance and consumer contracts,¹⁷⁴ but now also to the jurisdictional provisions for individual employment contracts.¹⁷⁵ Second, the 2012 Brussels I Regulation better implements the purpose of protecting the typically weaker party in insurance, consumer and employment contract matters. While the wording of the 2001 Brussels I Regulation allows also the typically stronger party to resist recognition and enforcement,¹⁷⁶ the

¹⁶⁷ See Art. 21(1) European Enforcement Order Regulation, Art. 22(1) Order for Payment Regulation and Art. 22(1) Small Claims Regulation.

¹⁶⁸ Article 27 of the 2001 Brussels I Regulation and Article 29 of the 2012 Brussels I Regulation.

¹⁶⁹ See D. SCHRAMM (note 124), at 79-80.

¹⁷⁰ Article 35(3) of the 2001 Brussels I Regulation and Article 45(3) of the 2012 Brussels I Regulation; also Article 28(3) 1968 Brussels Convention.

¹⁷¹ Article 35 of the 2001 Brussels I Regulation and Article 45(1)(e) of the 2012 Brussels I Regulation; also Article 28 1968 Brussels Convention.

¹⁷² 2009 Brussels I Commission Report (note 6), at 4.

¹⁷³ Article 35(2) of the 2001 Brussels I Regulation and Article 45(2) of the 2012 Brussels I Regulation; also Article 28(2) 1968 Brussels Convention.

¹⁷⁴ Article 35(1) of the 2001 Brussels I Regulation and Article 45(1)(e) of the 2012 Brussels I Regulation; also Article 28(1) 1968 Brussels Convention.

¹⁷⁵ Article 45(1)(e)(i) of the 2012 Brussels I Regulation; critical J.-P. BERAUDO (note 102), at 759-760.

¹⁷⁶ A number of legal commentators take the view that a proper interpretation of the 2001 Brussels I Regulation prevents the insurer or contract partner of the consumer from invoking Article 35 of the 2001 Brussels I Regulation, despite the broad wording of this provision. See, e.g., R. GEIMER, in R. GEIMER/ R. SCHÜTZE (eds), *Europäisches Zivilverfahrensrecht*, 3rd ed., München 2010, Art. 34 paras 20, 47-48; J. KROPHOLLER/ J. VON HEIN, *Europäisches Zivilprozessrecht*, 9th ed., Frankfurt am Main 2011, Art. 35 EuGVO para. 8; all with further references.

2012 Brussels I Regulation clarifies that the jurisdictional review only applies if the defendant was one of the following persons: the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee.¹⁷⁷

In its 2010 Brussels I Proposal, the Commission proposed to abolish the limited jurisdictional review. Indeed, this review appears inconsistent with the general principle of mutual trust and the fact that all Member States are bound by uniform rules.¹⁷⁸ The ECJ stated repeatedly that it “is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them.”¹⁷⁹ However, the European Parliament and Council decided to maintain – and even extend – the limited jurisdictional review, in line with those who stressed the importance and to some extent the public character of the jurisdictional rules at stake.¹⁸⁰

2. Review Procedure

Under the 2001 Brussels I Regulation, the grounds for review are examined upon the judgment-debtor’s appeal against the exequatur decision.¹⁸¹ The 2001 Brussels I Regulation provides for two levels of appeal and thus for two instances that examine the grounds for review.¹⁸² Even though the 2001 Brussels I Regulation stipulates that the appellate court “shall give its decision without delay,”¹⁸³ the duration of the appeal proceedings varies significantly between the Member States.¹⁸⁴

Under the 2012 Brussels I Regulation, the courts examine the grounds for review upon the judgment-debtor’s application for refusal of enforcement.¹⁸⁵ As under the 2001 Brussels I Regulation, the court shall decide “without delay.”¹⁸⁶ Up to two levels of appeal are available against the first-instance decision on the application,¹⁸⁷ which may lead in some Member States to three instances that examine

¹⁷⁷ Article 45(1)(e)(i) of the 2012 Brussels I Regulation.

¹⁷⁸ See B. HESS, in *Heidelberg Report* (note 29), at 138 para. 473.

¹⁷⁹ *E.g.*, ECJ, 27 April 2004, *Turner v. Grovit et al.*, C-159/02, para. 25.

¹⁸⁰ A. MARKUS/ R. RODRIGUEZ, Grünbuch zur Verordnung (EG) Nr. 44/2001 des Rates über die Gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen – Stellungnahme, available at <http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/university_of_bern_de.pdf>, p. 5.

¹⁸¹ Articles 41, 45 of the 2001 Brussels I Regulation.

¹⁸² Articles 43-44 of the 2001 Brussels I Regulation.

¹⁸³ Article 45(1) 2001 Brussels I Regulation.

¹⁸⁴ See the statistics in Section III.C. above.

¹⁸⁵ Article 46 of the 2012 Brussels I Regulation.

¹⁸⁶ Article 48 of the 2012 Brussels I Regulation.

the grounds for review.¹⁸⁸ This change to the 2001 Brussels I Regulation creates the risk of longer delays to the actual enforcement, which the courts can somewhat moderate by allowing enforcement partially or against the provision of security.¹⁸⁹

The 2012 Brussels I Regulation provides that only the “person against whom enforcement is sought” has standing to apply for refusal of enforcement.¹⁹⁰ At first sight, this seems to prevent a judgment-debtor from filing such an application as a precautionary measure before the judgment-creditor seeks enforcement. However, the 2012 Brussels I Regulation provides a broader possibility for “any interested party” to apply for refusal of *recognition* of a judgment.¹⁹¹ A judgment-debtor who is domiciled or has assets within the jurisdiction of the addressed court has a legitimate interest in applying for refusal of recognition of the foreign judgment. This is because a successful application would prevent any protective measures against the judgment-debtor such as the freezing of assets. Judgment-debtors are thus free to apply for refusal of recognition and enforcement of a foreign judgment even before the judgment-creditor seeks enforcement.¹⁹² Upon an application for refusal of recognition, the same grounds for review are examined¹⁹³ and the same procedures apply¹⁹⁴ as upon an application for refusal of enforcement.

Regarding the review procedure, the 2012 Brussels I Regulation deviates significantly from the Commission’s 2010 Brussels I Proposal. Under the 2010 Brussels I Proposal, three different authorities were proposed competent to examine the different grounds for review: the competent (enforcement) authority was proposed competent to examine the incompatibility with other judgments; the competent court of the state of origin was proposed competent to examine the specific grounds for review against default judgments; and the competent court of the enforcement state was proposed competent to examine the compliance with the debtor’s right to a fair trial.¹⁹⁵ The competence of different authorities for different grounds for review would have presented challenges in explaining to the debtors their rights of appeal. However, this was not a unique feature of the 2010 Brussels I Proposal. Other EU regulations issued since 2004 that have abolished *exequatur* provide for similar solutions, as shown in the following section.

¹⁸⁷ Articles 49 and 50 of the 2012 Brussels I Regulation. While the Member States must provide for an appeal against the first instance decision (see Articles 49 and 75(b) of the 2012 Brussels I Regulation), the Member States are free to provide, or not, for a second level of appeal (see Articles 50 and 75(c) of the 2012 Brussels I Regulation).

¹⁸⁸ Very critical J.-P. BERAUDO (note 102), at 759.

¹⁸⁹ See Article 44 of the 2012 Brussels I Regulation.

¹⁹⁰ Article 46 of the 2012 Brussels I Regulation.

¹⁹¹ Article 45(1) of the 2012 Brussels I Regulation.

¹⁹² See also F. CADET (note 33), at 222; F. CADET, *Le nouveau règlement Bruxelles I ou l’itinéraire d’un enfant gâté*, *Clunet* 2013, p. 771.

¹⁹³ See Articles 45(1) and 46 of the 2012 Brussels I Regulation.

¹⁹⁴ See Article 45(4) of the 2012 Brussels I Regulation.

¹⁹⁵ See in more detail D. SCHRAMM (note 124), at 81-86.

Within the framework outlined above, the review procedure is subject to the law of the enforcement state.¹⁹⁶ National law will therefore determine what court is competent, what time limit the judgment-debtor must respect for filing the application and what procedure applies.¹⁹⁷

3. *Overview: Review of the Foreign Judgment under Different EU Instruments*

Any comparison of the review of the foreign judgment under the 2001 and 2012 Brussels I Regulation and the Commission’s 2010 Brussels I Proposal should not lose sight of the context of further EU Regulations that govern the recognition and enforcement of foreign civil judgments. The following chart offers an overview of the developments regarding the grounds for review; the time of review; and the competent authority under the 1968 Brussels Convention, the 2001 Brussels I Regulation, the 2004 European Enforcement Order Regulation, the 2006 Payment Order Regulation, the 2007 Small Claims Regulation, the 2009 Maintenance Regulation (for judgments rendered in a Member State bound by the 2007 Hague Protocol), the 2010 Brussels I Proposal and the 2012 Brussels I Regulation.¹⁹⁸

Instrument	Exequatur	Special review in state of origin	Review in state of enforcement
1968 Brussels Convention	Yes	No	<ul style="list-style-type: none"> - when deciding on exequatur - by court declaring exequatur + on appeal - all grounds for review - debtor is heard only in appeal proceedings
2001 Brussels I Regulation	Yes	No	<ul style="list-style-type: none"> - upon appeal against exequatur - by court of appeal - all grounds for review - debtor is heard only in appeal proceedings
2004 European Enforcement Order	No	[A judgment can only be certified as a European Enforcement Order if the law of the state of origin entitles	<ul style="list-style-type: none"> - upon application by debtor - by competent court - incompatibility with

¹⁹⁶ Article 47(2) of the 2012 Brussels I Regulation.

¹⁹⁷ H. GAUDEMET-TALLON/ C. KESSEDIAN (note 88), at 453 para. 62.

¹⁹⁸ The “review” addressed in the chart relates only to the “traditional” grounds for refusing recognition and enforcement as contained in Articles 27-28 of the 1968 Brussels Convention / Articles 34-35 of the 2001 Brussels I Regulation and Article 45 of the 2012 Brussels I Regulation. The chart does not address the examination of the requirements for enforcement.

Instrument	Exequatur	Special review in state of origin	Review in state of enforcement
Regulation ¹⁹⁹		the debtor to apply for a review of the judgment based on grounds similar to those of Article 45 of the 2010 Brussels I Proposal (Article 19).]	other judgments
2006 Payment Order Regulation	No	<ul style="list-style-type: none"> - upon application by debtor (acting promptly) - by competent court - specific grounds for review for default judgments or clearly wrong issuing of payment order 	<ul style="list-style-type: none"> - upon application by debtor - by competent court - incompatibility with other judgments, payment of amount awarded
2007 Small Claims Regulation	No	<ul style="list-style-type: none"> - upon application by debtor (acting promptly) - by competent court - specific grounds for review for default judgments 	<ul style="list-style-type: none"> - upon application by debtor - by competent court - incompatibility with other judgments
2009 Maintenance Regulation (Hague Protocol) ²⁰⁰	No	<ul style="list-style-type: none"> - upon application by debtor (acting promptly, in any event within 45 days from effective acquaintance with contents of the judgment and ability to react, at the latest from time of first enforcement measure with certain effects) - by competent court - specific grounds for review for default judgments 	<ul style="list-style-type: none"> - upon application by debtor - by competent authority - incompatibility with other judgments, extinction of the right to enforce the judgment by the effect of prescription or the limitation of action
2010 Brussels I Proposal of the Commission (NOT ADOPTED)	No	<ul style="list-style-type: none"> - upon application by debtor (acting promptly, in any event within 45 days from effective acquaintance with contents of the judgment and ability to react, at the latest from time of first enforcement measure with certain effects) 	<ul style="list-style-type: none"> - in enforcement proceedings - upon application by debtor - by competent authority - incompatibility with other judgments <hr/> <ul style="list-style-type: none"> - Upon application by

¹⁹⁹ It is important to note that the court of origin may only certify a judgment on an uncontested claim as a European Enforcement Order if certain requirements are met (Article 6), including *e.g.* compliance with the rules of the 2001 Brussels I Regulation on jurisdiction in insurance matters and on exclusive jurisdiction (Article 22 of the 2001 Brussels I Regulation).

²⁰⁰ For decisions given in a Member State bound by 2007 Hague Protocol. For all other decisions, exequatur is required and the procedure is the same as under the 2001 Brussels I Regulation.

Instrument	Exequatur	Special review in state of origin	Review in state of enforcement
		<ul style="list-style-type: none"> - <i>by competent court (but: request can also be filed with competent court of enforcement state, who will transfer request to state of origin)</i> - <i>specific grounds for review for default judgments</i> 	<ul style="list-style-type: none"> <i>debtor</i> - <i>by court at debtor's domicile or at the place of enforcement</i> - <i>fundamental principles underlying the right to fair trial</i>
2012 Brussels I Regulation	No	No	<ul style="list-style-type: none"> - upon application to refuse enforcement - by competent court - all grounds for review

G. Timeline for Enforcement under the 2001 and the 2012 Brussels I Regulations

When the judgment-creditor receives a judgment in his favor, time is often of the essence for her to enforce the judgment to prevent the dissipation of assets. The following timelines compare the time when the judgment-debtor receives notice of the enforcement and the time when protective measures and enforcement measures become available under the 2001 and 2012 Brussels I Regulations. Two scenarios are examined: In the first scenario the judgment-debtor does not take any steps to have the foreign judgment reviewed, whereas in the second scenario his does take such steps.

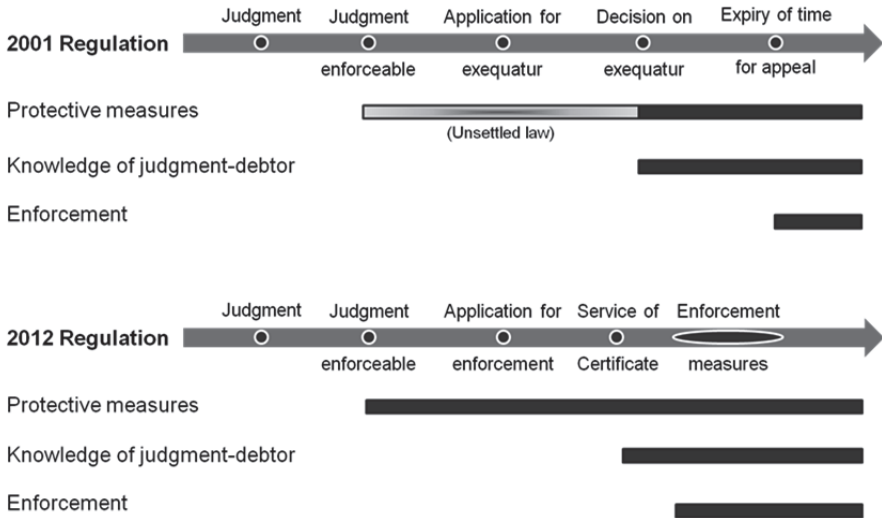
Importantly, while the timelines show the sequence of events, they are not true to scale. The duration of a time period depends in many cases on the practice of the court concerned and on other circumstances. For example, the Certificate under the 2012 Brussels I Regulation might potentially be served on the judgment-debtor before or after the court concerned would have rendered its exequatur decision under the 2001 Brussels I Regulation. This depends on the speed and efficiency of the court concerned and on where the judgment-debtor is being served, also considering that the judgment-debtor might have his domicile outside the EU.

1. Timeline for Enforcement without Review of the Foreign Judgment

If the judgment-debtor does not take any steps to have the foreign judgment reviewed, the judgment-creditor can potentially obtain enforcement measures in certain cases more quickly under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation. This is because the judgment-creditor does not need to obtain exequatur, and there is no automatic “grace period” before enforcement can commence.²⁰¹ However, this possible time advantage will depend on how quickly the Certificate is served on the judgment-debtor under the 2012 Brussels I

²⁰¹ See Section IV.E. above.

Regulation and how soon the enforcement authorities take enforcement measures after such service. In that regard, Recital 32 of the 2012 Brussels I Regulation speaks of a reasonable time period between service of the Certificate and the first enforcement measure. It will be for the courts (including the ECJ) to determine whether this reasonable time period will be shorter than the time period for appeal under the 2001 Brussels I Regulation. If it is equally long, the only time advantage under the 2012 Brussels I Regulation will lie in abolishing the exequatur proceedings. In any case, the 2012 Brussels I Regulation provides the judgment-creditor with a clearer legal basis for obtaining protective measures at an early stage.²⁰²



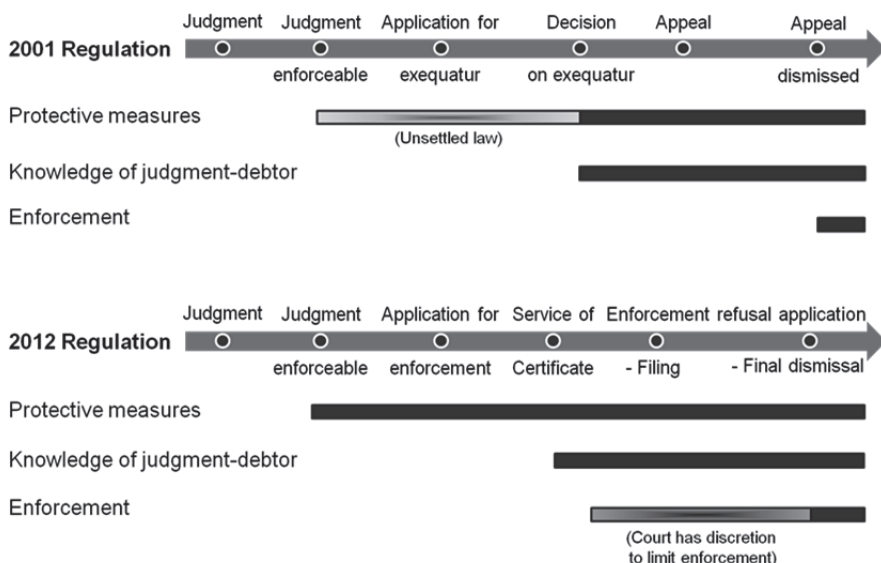
2. *Timeline for Enforcement with Review of the Foreign Judgment*

If the judgment-debtor takes the available steps to have the foreign judgment reviewed, I expect that the timing of enforcement measures will in many cases not be fundamentally different under the 2001 and the 2012 Brussels I Regulations. This will at least be the case in Member States that provide for only one level of appeal under the 2012 Brussels I Regulation. In those Member States that provide for two levels of appeal, enforcement measures might actually occur later under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation. However, in other cases an earlier enforcement is possible under the 2012 Brussels I Regulation than under the 2001 Brussels I Regulation. This might be the case, for example, if the judgment-debtor does not apply expeditiously for refusal of enforcement or if the competent court makes use of its discretion to allow limited enforcement or enforcement against provision of a security.²⁰³ In any case, as already noted, the judg-

²⁰² See Section IV.D. above.

²⁰³ See Section IV.E. above.

ment-creditor has a clearer legal basis under the 2012 Brussels I Regulation to obtain protective measures at an early stage.²⁰⁴



V. Conclusion

The 2012 Brussels I Regulation brings certain improvements for the judgment-creditor, but it also includes some improvements for the judgment-debtor. Overall, the amendments do not constitute a quantum leap regarding the balance between the interests of the judgment-creditor and those of the judgment-debtor.

The abolition of exequatur under the 2012 Brussels I Regulation is an important improvement for the judgment-creditor that will help saving costs. The judgment-debtor remains protected by the required service of the (more detailed) Brussels I Certificate and the foreign judgment in reasonable time before the first enforcement measure. Another important improvement for the judgment-creditor is the abolition of the automatic “grace period” prior to enforcement that existed under the 2001 Brussels I Regulation. However, the judgment-debtor can still delay enforcement, in particular by requesting a translation of the judgment (if the requirements for this request are fulfilled) and by applying for refusal of enforcement. In the latter case, however, the courts have more discretion than under the 2001 Brussels I Regulation to allow the enforcement to proceed, subject to a limitation of enforcement or to the provision of security.

²⁰⁴ See Section IV.D. above.

In practice, an important improvement for the judgment-creditor is the clear basis for obtaining *ex parte* interim measures once the foreign judgment is enforceable in the Member State of origin. By contrast, under the 2001 Brussels I Regulation, the creditor's right to protective measures is generally accepted only following the exequatur decision. This delay in obtaining protective measures is partially compensated by the fact that the judgment-debtor is notified of the enforcement request only once exequatur is granted, but the 2001 Brussels I Regulation still gives him more time to dissipate assets.

Improvements for the judgment-debtor include his entitlement to a translation of the judgment if he is domiciled in a Member State other than the state of origin, and if the judgment is written in a language that he does not understand and that is not an official language at the place of his domicile. Other improvements are the fact that Member States can provide for a total of three court instances to examine the grounds for review – which can lead to longer delays to the actual enforcement – and the availability of a limited jurisdictional review also in case of individual employment contracts.

Finally, the 2012 Brussels I Regulation contains improvements for the courts and authorities in the enforcement states, whose work will be significantly facilitated by the more detailed Certificate. However, the court of origin must carry the burden of this improvement.

While the 2012 Brussels I Regulation will enter into force on 10 January 2015, its provisions on enforcement will only apply to decisions that were rendered in legal proceedings instituted on or after 10 January 2015. It will therefore still take some time until the new provisions must pass the field test.